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JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

FLORIDA—Supreme Court.

GEORGE P. RANEY, CHIEF JUSTICE.

JUSTICES.

MILTON H. MABRY. R. FENWICK TAYLOR.

ALABAMA—Supreme Court.

GEORGE W. STONE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

DAVID CLOPTON.[1] THOS. W. COLEMAN
THOS. N. McCLELLAN. RICH. W. WALKER.
WM. S. THORINGTON.[2]

MISSISSIPPI—Supreme Court.

J. A. P. CAMPBELL, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

TIM E. COOPER. THOMAS H. WOODS.

LOUISIANA—Supreme Court.

EDWARD BERMUDEZ, CHIEF JUSTICE.[3]

ASSOCIATE JUSTICES.

CHARLES E. FENNER. SAMUEL D. McENERY.
LYNN B. WATKINS. JOSEPH A. BREAUX.

[1] Died Feb. 5, 1892. [2] Appointed April 11, 1892.
[3] Term expired.

COURT RULES—ALABAMA.

Rule 45. In compliance with the act of September 7, 1891, criminal cases reaching here during term, and before the docket has been closed, will be in order for hearing on the tenth day, exclusive of Sundays, after their arrival. As soon as the bill of exceptions and transcript of the record are received by the clerk, he shall give notice by mail to the counsel for the plaintiff in error, and to the solicitor general or county court solicitor concerned, and, in capital cases, to the attorney general, of the day of the hearing. Cases arriving after the docket of a term has been closed will be heard at the next term, in advance of all other business, and in the order of their filing in this court.

After to-day the court will meet at 11 o'clock A. M., take recess from half past 1 o'clock to 3 o'clock P. M., and adjourn for the day at 5 o'clock P. M.

Adopted January, 1892.

For rules as to exceptions to evidence, and as to taking oral examination of witnesses in chancery cases, see 9 South. Rep. iv.; for rules as to bills of exceptions, briefs, and arguments of counsel, and as to filing transcript and affirmance on certificate, see 8 South. Rep. v., vi.; for rule as to severance in criminal cases, see 6 South. Rep. iv.

CASES REPORTED.

THE

SOUTHERN REPORTER.

VOLUME 10.

(43 La. Ann. 943)

CASTANIE *et al.* v. BOULERIES *et al.* (No. 1,400.)

(*Supreme Court of Louisiana.* July Term, 1891. 43 La. Ann.)

PROOF OF MARRIAGE—EVIDENCE OF LEGITIMACY—RIGHTS OF REVENDICATION.

1. The proof allowed to be introduced in the absence of documentary evidence and direct oral testimony establishing a marriage must be clear and unmistakable to raise a presumption of marriage, as is settled by the jurisprudence on the subject, which is affirmed. Children born from the intercourse of persons living publicly as man and wife, and introduced by them as their offspring, must establish clearly their legitimate filiation in order to recover in a petitory action from one in actual possession as owner, and who claims and establishes a title to the real estate revendicated.

2. Natural children, even when duly acknowledged in the form prescribed by law, do not enjoy the rights and privileges of revendication, with which the law vests forced heirs whenever their *légitime* has been trenched upon.

3. In a petitory action the plaintiff must recover on the strength of his own title.

(*Syllabus by the Court.*)

Appeal from district court, parish of Iberia.

L. T. Dulany, for appellants.

(1) It is a general rule of law that plaintiff must make his case not only probable, but certain. Hennen's Dig. tit. "Evidence," XIII, A. No. 1.

(2) A case involving the question of legitimacy is no exception to the rule. 15 La. Ann. 410.

(3) The proof of legitimacy or legitimate filiation involves the proof of the marriage of the parents, and the identity of the child as the issue of that marriage. It differs essentially from the proof of the filiation of legitimate children, wherein the marriage of the parents is admitted or is established. Duranton, vol. 2, tit. 7, § 1; 20 La. Ann. 98; 15 La. Ann. 410.

(4) Under the laws of Louisiana marriage is a contract that must be established by legal evidence. In the absence of the best evidence, secondary and parol will be admitted, but the absence of the best evidence must be first accounted for. 15 La. Ann. 410.

(5) The court will take judicial notice of the fact that a record of marriages is kept in the public records of the parishes of this state, and also of the universal custom in all Catholic churches that the register of marriages and baptism is kept with great care. The failure of plaintiff to procure such evidence will make proof against him. 40 La. Ann. 81, 3 South. Rep. 489.

(6) When, in a case involving the question of marriage, no direct evidence of the marriage is adduced, or its absence accounted for, all the presumptions will be against the marriage. 15 La. Ann. 410.

(7) "Although our jurisprudence has recognized the rule that marriage will be presumed from long cohabitation and general reputation and conduct, it is still a fact that under our laws marriage is a contract, the best evidence of which is some act, as prescribed by the Civil Code, showing the consent or agreement of the parties to contract marriage." 35 La. Ann. 632.

(8) Long cohabitation and general reputation and conduct will not raise a presumption that the parties were married, unless the facts show that the relations between the parties were characterized in the beginning by a free consent to contract the obligation of marriage, and it must exclude the idea that the union began and the parties were drawn together merely through the promptings of sensuality. 35 La. Ann. 633.

(9) "Agreeing to live together as man and wife does not make marriage. The law does not sanction voluntary cohabitation, nor elevate concubinage, of whatever duration, to the dignity of marriage." Bish. Mar. & Div. 30 La. Ann. 1398.

(10) Facts from which to draw the presumption of marriage must be concise, consistent, and weighty, and these known facts should draw with them the unknown fact as an almost necessary consequence. 3 La. Ann. 103; 20 La. Ann. 98.

(11) If courts have somewhat relaxed the rigor of the law, to allow proof of marriage by long cohabitation and reputation, etc., it was only in the interest of persons who were the issue of marriages of which no direct proof could be adduced, and where the circumstantial evidence was conclusive in favor of the marriage, and excluded the idea of an illicit union. 35 La. Ann. 633.

(12) Testimony as to the visits and introduction of the woman as a wife should be considered with relation to the standing and respectability of the parties and visitors. 20 La. Ann. 495; 15 La. Ann. 410; 20 La. Ann. 97.

(13) Verbal declarations of the parties, though deceased, are legal evidence to show that their intercourse was illicit, and that they were not married. 15 La. Ann. 46, 410; 20 La. Ann. 97.

(14) Evidence offered and admitted for a special purpose, and especially restricted to that purpose by the party offering it, must be considered for that purpose alone.

(15) When the husband was a party to the act of purchase of property in the name of the wife, reciting that the purchase is made with her paraphernal funds, and that neither he nor his heirs will ever claim the property as belonging to the community, he cannot contradict the recitals of the deed. The question is one of estoppel. Creditors and forced heirs alone could do so, but the latter only to the extent of their *légitime* upon averments of fraud or error and injury. 35 La. Ann. 35; 41 La. Ann. 493, 6 South. Rep. 505.

Foster & Broussard, for appellees.

(1) Where the question of legitimacy is not raised by the pleadings, but merely the question of heirship, it is sufficient to prove descent.

(2) Where a man introduces a woman to his friends as his wife, calls her his wife, and he and she live together publicly as man and wife until her death, and their children, born while they are thus living together, are reared and cared for as their legal offspring, at the common domicile, and bear the name of their father, the law will presume that they have been lawfully married, and that their children are legitimate, until it is shown that no marriage between them ever took place, or that it was void on account of some nullity established by law. 30 La. Ann. 1388.

(3) Marriage may be proved by every species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party. 20 La. Ann. 97; 32 La. Ann. 308.

(4) The fact of marriage may be proved by circumstantial testimony, and by general reputation, cohabitation, and long residence together. 3 La. 33; 35 La. Ann. 630.

(5) It is not to be presumed that those who hold themselves out in society as man and wife, are rearing a family of children at their domestic board, to whom the father gives his name, over whom he exercises a parent's authority and administration, a parent's protection and support, are living in open disregard of public morals and common decency, and that their offspring are bastards. 6 La. 470; 30 La. Ann. 1397; 2 La. Ann. 945.

(6) It will be presumed that the community of *acquets* and gains exist between the husband and wife, until the contrary is shown. 30 La. Ann. 1106.

(7) Where, after the marriage and under the *régime* of the community, a business which had formerly belonged to and been conducted by the wife is conducted in the name of the husband, it becomes the business of the community. 36 La. Ann. 390.

(8) Lands purchased in the name of the wife, and partly with her paraphernal funds, under the administration of the husband, and partly with the funds of the community, fall into the community. 39 La. Ann. 377, 1 South. Rep. 913.

(9) The presumption of law is that property purchased during the marriage, whether in the name of both or either spouse, is community property. Rev. Civil Code, art. 2402. The wife may rebut this presumption, in doing which the burden of proof of three crucial facts is upon her, to-wit: *First*, paraphernality of the funds; *second*, administration thereof separately and apart from her husband; *third*, investment by her, (39 La. Ann. 632, 2 South. Rep. 98;) in the absence of which proof the property will be presumed to be community.

(10) Legal heirs, up to the amount of their *légitime*, are not estopped by the declaration in the act of sale from proving that property bought in the wife's name, declared to be bought with her funds, is community property. 30 La. Ann. 1036; 33 La. Ann. 609, 819; 35 La. Ann. 33, 570.

(11) Legal heirs are not estopped by the declaration in the act of sale from proving that property bought in the wife's name, declared to be bought with her funds in community property, when these funds are purely speculative, and evidence appears in the declaration itself affording full proof of the fact that the wife had no funds whatever with which to meet the obligation contracted in the act of sale.

(12) The court may, *ex proprio motu*, where it does not appear affirmatively that the amount involved exceeds $2,000, dismiss the appeal. 34 La. Ann. 406; 38 La. Ann. 395; 36 La. Ann. 419.

(13) The object of pleading is to place the opposite party on his guard, and to give him full notice of the grounds of defense. See Hennen's Dig. p. 1156, No. 1, and authorities.

(14) Some pleas are special, and, when so, they must be specially pleaded, and must be full and complete, so as not to surprise the opposite party. See 1 La. 283; 24 La. Ann. 288.

(15) The general allegation that plaintiffs are not heirs does not justify the rejection of evidence on grounds urged for the first time in a bill of exception, when said grounds are special pleas, and should have been specially pleaded.

(16) Courts will not decide that evidence was offered and admitted for a purpose brought to its knowledge only by a bill of exception, when the record is silent as to the purpose for which it was offered. The presumption under such circumstances is that it is offered for whatever it will prove, and full weight will be given to it as such. 30 La. Ann. 397.

(17) The court *a qua* was correct in overruling the objection and admitting the evidence.

BERMUDEZ, C. J. This is a petitory action against parties in possession. Originally it was brought by William Castanie and Mary Bouleries, against Ed. Laughlin and Therese Bouleries. Mary Bouleries having died, William Castanie, her brother, had himself appointed administrator of her estate, and in that capacity continued the prosecution of the suit.

The action was for the recovery of the

undivided half of four pieces of real estate,—two in the possession of Laughlin, and two in that of Therese Bouleries.

The plaintiffs claimed as the legitimate grandchildren of J. B. Bouleries,—the first named, through his mother, Delphine; the second, through her father, Levy,—representing themselves as their lawful issue.

The contention is, on one side, that J. B. Bouleries had married, very long ago, Adele Chacata; that from their union several children were born, all of whom died, save Delphine and Levy; that the former married B. C. Castanie, and William being the issue of that union; that the latter also married, and that Mary Bouleries was born from that marriage; that after the death of Adele Chacata, the grandmother, J. B. Bouleries married Therese Mailles, then widow of Bernard Delord; that during that marriage four pieces of real estate were acquired for the benefit of the community; that at the death of J. B. Bouleries half of said property vested in his widow and the remaining half in his legal heirs, namely, his grandchildren, William Castanie and Mary Bouleries; that two of said pieces of real estate were sold by the widow, as though her exclusive property, to Laughlin, who could only acquire her share; that the widow is in possession of the remaining half of the other two pieces, which belongs to the grandchildren by inheritance from their grandfather, J. B. Bouleries. It is further insisted that the widow is liable for rents and revenues from the beginning of the illegal possession to the time of surrender to the rightful owners. On the other hand, Laughlin claimed an absolute title to the entirety of the two lots sold to him by the widow, as the same was her personal and exclusive property. The widow contended—*First*, that the plaintiffs were not the legitimate grandchildren of J. B. Bouleries; and, *second*, even then, that the two lots were her paraphernal property, acquired with her individual funds, under her separate administration, and invested by her in the purchase. Eventually, under the averment that she had in good faith constructed buildings and placed improvements on the lots, the widow, reconvening, claimed the value thereof. A good deal of proof was admitted, (some over objections,) consisting of documentary evidence and oral testimony. There was judgment in favor of Laughlin, from which no appeal was taken, and which must remain undisturbed. Further, there was judgment in favor of plaintiffs, recognizing them as the legitimate grandchildren of J. B. Bouleries, declaring one of the two lots to be community property, and estopping them from claiming any title to the other lot. The judgment went no further. It proved satisfactory to neither side. The plaintiffs appealed, and ask a recognition of their rights to the second lot, and to rents and revenues; and the defendant Therese Bouleries, as appellee, prays for an amendment of the judgment, by reversing it in so far as it went in favor of the plaintiff, and eventually by allowing her the value of the buildings and improvements placed by her on the lots in good faith.

It is clear that, in order to recover from one claiming title to real estate, of which he is in possession, a plaintiff can only do so on the strength of his own title. In order to succeed in the present action, the plaintiffs ought to have established the marriage of J. B. Bouleries with Adele Chacata, either by the act of celebration, or, in its default, by witnesses, or by very strong circumstances establishing a presumption of marriage, and, besides, the marriages of their respective authors; in all of which they have altogether failed. The legal propositions relied upon by the plaintiffs, touching the circumstances from which the presumption of a marriage arises, and which are to a certain extent set forth in the authorities cited from the adjudicated cases in this state, and to which no special reference would subserve any useful purpose, cannot be and are not disputed by the defendant, who, on the contrary, readily concedes them. The difficulty consists in applying them to the facts established in this controversy, which, far from leaving on the mind an impression of such presumption, rather dispel all inclination to receive the same. It does not appear from the written evidence or from the oral testimony that either J. B. Bouleries or Adele Chacata ever represented themselves as having been married, ever alluded to any circumstance about their marriage, or that any one was ever heard to say that he had attended their marriage, or had heard any one mention anything about it as an actually occurred fact. No effort is shown to have been made to discover any written evidence of it, either in the records of a church or of any public office in the vicinity of the place where they resided, and at which, if celebrated, it occurred. The very brother of J. B. Bouleries, who was on intimate terms with him all his life, was heard as a witness, and he utters not a word about the fact of the marriage, which certainly, had it ever taken place, would have been in some way—at least by hearsay—to his knowledge. The manner in which he testifies shows that he does not really believe they ever were actually married. The other witnesses heard do not state any circumstance from which the presumption of the marriage may be inferred. The mere fact that the parties lived publicly as man and wife for a length of time, and treated their issue as though they were born in lawful wedlock, under the surrounding circumstances of this case is insufficient to raise the presumption claimed. The defendant, who was heard as a witness, testified that Bouleries told her that he had never married Adele Chacata, and that their children were illegitimate. Of course, this testimony, coming from the party interested in making such statement, as emanating from one whose mouth, sealed in death, cannot be heard counter to it, is very weak; but, feeble as it is, it is entitled to some weight. It cannot be presumed that the woman has perjured herself, particularly as her character for truth and veracity remains altogether unimpeached. It is not contended in the least—on the contrary, it is conceded—that the proof clearly establishes a natural

filiation of the plaintiffs way back to J. B. Bouleries and Adele Chacata; but, even if the proof had shown that the former had duly acknowledged, in the form prescribed by law, both Delphine and Levy as his children, and, besides, William and Mary as his grandchildren, this would not have conferred, upon the latter the right and privilege of revendication accorded by law to forced heirs, whenever their *légitime* has been trenched upon in some way or other.

The documentary evidence shows that the two lots were acquired by the defendant with the expressed statement that they were purchased out of her personal funds, and for her separate advantage and exclusive benefit, or language to that effect; the investment thus declared to have been made having been admitted by J. B. Bouleries, who has signed the deed. The plaintiffs, not having the rights of forced heirs, and not being creditors urging injury, etc., have no standing in court to contest the title of the defendant to the lots, who, we think, has even then satisfactorily proved them to be her separate estate, which has, therefore, never formed part of the community between Bouleries and her. It is therefore ordered and decreed that the judgment appealed from be reversed, so far as it recognizes title in plaintiffs to the half of one of the two lots involved; that, so far as it is rendered in favor of defendant Therese Bouleries, it be affirmed; and it is further adjudged that it be so amended as to reject the plaintiff's demand entirely, and to quiet defendants absolutely in the ownership and possession of said lots; the costs of appeal to be paid by the plaintiffs and appellants.

BREAUX, J., recuses himself, as having been of counsel.

ON REHEARING.

Alleging themselves to be the sole surviving descendants of J. B. Bouleries, their grandfather, the plaintiffs institute this action against his surviving widow of an alleged second marriage and one of her transferees for the recovery of their said ancestor's one-half interest in certain real estate, which was acquired during said second marriage. Plaintiffs' contention is that very many years ago their grandfather was married to Adele Chacata, and that of this marriage their parents, Delphine and Levy Bouleries, were the sole surviving issue. The answer of the defendants is a general denial, coupled with the special averment that the plaintiffs are not heirs of J. B. Bouleries, and that the property in dispute was and is not community, but belongs to his widow's separate paraphernal estate. Our opinion holds with the defendants' theory on both of these propositions. It declaims substantially that there is in the record no proof of such a marriage, or even that the said parties ever declared that they were or ever had been married. No one was ever heard to say that he had witnessed the celebration of a marriage between them. That the plaintiffs appear to have made no search in the records of any church or public office of the vicinity of where said parties lived for written or record proof of such a marriage. It then announces as a proposition of law that "the mere fact that the parties lived publicly" as man and wife for a length of time, and "treated their issue as though they were born in lawful wedlock," is insufficient, under the "circumstances surrounding this case, to raise the presumption claimed." It then states as an additional fact worthy of note that the proof abundantly discloses, and that it is conceded by defendants to be a fact, that there was a filiation between said parties for many years; but it announces as a legal proposition that, even if the plaintiffs' ancestor had duly acknowledged their father and mother as his natural children in the form prescribed by law, this acknowledgment would not have conferred upon the plaintiffs as their children the rights and privileges of revendication of property which the law accords forced heirs in case their *légitime* had been trenched upon. Our opinion then states as a fact (and this proposition is to be taken alternatively) that it appears from the defendant's titles that she purchased the property in her own paraphernal right, with the concurrence of her husband, J. B. Bouleries, who joined his wife thereon, and that plaintiffs have no standing in court, as forced heirs or creditors would, to attack them.

The objections urged in plaintiffs' and appellees' application to our opinion are: (1) That the defendants' answer does not fairly raise the question of the legitimacy of their parentage; that the maintenance of that proposition was and is a surprise to them, and that our judgment and decree should have been one of nons uit only. (2) That the defendants' deeds contain no recital disclosing the paraphernal character of the acquisition. (3) That the proof introduced *aliunde* was insufficient to establish that fact, which is essential to remaintain defendants' title. (*a*) As plaintiffs' title was alleged to be one by inheritance, and the answer denied their heirship, definite proof was absolutely required of plaintiffs' legitimate heirship to entitle them to recover from a stranger; and in thus instituting suit they incurred this risk, and the burden of making such proof. We cannot understand in what manner they were taken by surprise; but if the interpretation placed by the district judge upon defendants' answer caused them surprise, the proper course would have been for their counsel to have then stated the grounds of surprise, demanded a continuance, and reserved a bill of exceptions to the judge's declaration, if refused. On such a showing we could have given plaintiffs relief from any error the judge below might have committed. We are of opinion that the defendants are fully entitled to the judgment pronounced. (*b*) Our opinion does not hold that defendant Therese Bouleries is the owner in her individual paraphernal right of the property in controversy, but that plaintiffs have no standing in court, as legitimate grandchildren of J. B. Bouleries, to have the titles interpreted, and the property de-

clared community property. That, even if the proof had disclosed the fact that their grandfather had, duly and in proper form of law, acknowledged the issue of his filiation with Adele Chacata as his natural children, such acknowledgment could not have conferred upon such issue the rights and privileges of forced heirs of their grandfather; and hence their position would not have been improved. Now, it is worthy of note that this proposition is hypothetically stated, and not as one that is substantiated by proof. A reexamination of the record fails to satisfy our minds of the correctness of the allegations of the application. We are unable to find any proof of marriage or acknowledgment either. Really the application does not contend that there is any such evidence in the record. Reduced to a last analysis, the ingenious argument is that, as the judgment should have been one of nonsuit, therefore the legitimacy of the plaintiffs is an undetermined question, and therefore they still have the *status* of forced heirs, and the corresponding rights of forced heirs to revendicate the property. It does not avail the plaintiffs to invoke the ruling in Bennett v. Cignoni, 41 La. Ann. 1145, 8 South. Rep. 544, in which a nonsuit was rendered. The court did so because the plaintiffs there had failed to introduce evidence which was within his reach; but it is not pretended in the present instance that any such proof exists. It is claimed, on the contrary, that all the evidence of which the case was susceptible was introduced. The plaintiffs have no right to keep a perpetual sword hanging over defendant's head by the reserve of a right to eternal litigation. *Interest reipublicæ ut sit finis litium.* Having maintained the finality of the judgment, their argument is fully answered, and the correctness of the opinion established. Rehearing refused.

(43 La. Ann. 959)

BARNARD, Sheriff and Tax Collector, v. GALL *et al.* (No. 1,405.)

(*Supreme Court of Louisiana.* July Term, 1891. 43 La. Ann.)

CONSTITUTIONAL LAW—EXEMPTION FROM LICENSE TAX—CONSTRUCTION OF STATUTES—LEGISLATIVE INTENT.

1. The legislature has the right to exempt any business or occupation from license tax, and no license can be exacted not imposed by the terms of the law.

2. The general license act of 1890 was designed to formulate complete and exclusive regulations for license taxation for 1891 and succeeding years, and operated the supersession and repeal of the prior act of 1886, so far as relates to common subject-matter.

3. Courts may take judicial cognizance of the official journals of the houses of the general assembly, in order to aid them in ascertaining the true legislative purpose and intent, when the same is doubtful.

4. When the legislative intent is clear, the court should enforce it, and should not resort to artful construction in order to defeat it.

(*Syllabus by the Court.*)

Appeal from district court, parish of Iberia.

Edward Weeks, for appellant.

(1) Section 3 of Act No. 150 of session of 1890 imposes a license on all manufactories not expressly exempted by articles 206 and 207 of the state constitution. Saw-mills are manufactories, (35 La. Ann. 998; 38 La. Ann. 398; 41 La. Ann. 996, 6 South. Rep. 893; 42 La. Ann. 1119, 8 South. Rep. 399,) but are not exempted by the constitution. Hence they are liable to license under section 3 of Act 150 of 1890.

(2) Where an act expressly declares that it repeals only such portions of existing laws as conflict with it, this expression must govern; and such portions of existing laws as do not conflict with it continue in full force and effect. Suth. St. Const. §§ 147, 155, 288, 327; 39 La. Ann. 441, 1 South. Rep. 923; Saund. Tax'n, 246; 23 La. Ann. 140; 16 La. Ann. 379; 20 La. Ann. 140, and authorities.

(3) Courts will not take judicial cognizance of legislative journals. Lottery Mandamus Suit (State v. Mason,) 43 La. Ann. —, 9 South. Rep. 776; 23 La. Ann. 376; 42 La. Ann. 1006, 8 South. Rep. 530; 33 La. Ann. 963; 28 La. Ann. 415.

Walter J. Burke, for appellees.

In an act imposing a license tax for a particular year, "and for each subsequent year, upon each person, association of persons, or business firms, pursuing any trade, vocation, calling, or business, except those expressly exempt by articles 206 and 207 of the constitution," when the legislature has failed to name specifically any particular avocation, etc., among those to be subject to a license tax, the inference is that it was not intended to have been subjected to the license tax. State v. Dupre, 42 La. Ann. 561, 7 South. Rep. 727; Forman v. Board, 35 La. Ann. 825; New Orleans Cotton Exchange v. Board of Assessors, Id. 1154; Cooley, Tax'n, p. 102; Suth. St. Const. p. 457 et seq.

When necessary, the court may refer to the journal of the house of representatives, and of the senate, when seeking the intent of the law-maker. Suth. St. Const. § 300; Whart. Ev. § 296; Sedg. St. & Const. Law, (2d Ed.) 54; Gardner v. Wall, 6 Wall. 508; South Ottawa v. Perkins, 94 U. S. 260.

The power granted to the legislature to levy a license tax is discretionary, and not mandatory. The state may abstain from imposing a license tax on any occupation, etc. City of New Orleans v. Mule, 38 La. Ann. 826; City of New Orleans v. Bank, 32 La. Ann. 82; State v. Dupre, 42 La. Ann. 561, 7 South. Rep. 727.

If two statutes relate to the same subject-matter, though not in terms repugnant or inconsistent, if the latter one is plainly intended to prescribe the only rule that shall govern, it will repeal the earlier. Sedg. St. & Const. Law, pp. 104, 154; 12 La. Ann. 432; Suth. St. Const. 104; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. Rep. 312; Murdock v. Memphis, 20 Wall. 601.

When a statute is destined to embody all the law upon any subject-matter, the provisions of anterior laws on the same subject-matter, treating it in a different manner, are repealed by the following clause in the last act: "All laws or parts of laws in conflict with this act are hereby repealed," even though there be no apparent repugnancy in the provisions of both acts.

FENNER, J. The parties are agreed as to all the facts, and the sole question presented for our determination is one of law, to-wit, whether or not the existing law of the state subjects the business of conducting a saw-mill to license taxation. It is fully settled by prior decisions that the power granted to the legislature to levy license taxes is discretionary, and not mandatory, and that the legislature may exempt or abstain from taxing, by way of license, any particular business or occupation. City of New Orleans v. Mule, 38 La. Ann. 826; City of New Orleans v. Bank, 32 La. Ann. 82; State v. Dupre, 42 La. Ann. 561, 7 South. Rep. 727. The existing general license act was passed in 1890. The act in force prior thereto was the act of 1886. These two acts bear similar titles, cover the same general subject-matter, pursue the same order, and adopt the same subdivisions of the subjects of taxation. Indeed, it requires close study to discover the few differences between them. Under the head "Miscellaneous," the ninth section of each act provides for the licensing of a large number of businesses therein enumerated. After a very close scrutiny, we discover these sections of the two acts to be identical in every respect, with the single exception that the act of 1886 embraces the word "saw-mills" in its enumeration of the businesses taxed, whereas he act of 1890 omits it. Out of this difference arises the controversy. The tax collector, in support of his demand for license, contends that the omission of "saw-mills" from the enumeration in the act of 1890 is of no effect, because the act contains no general repealing clause, but only provides "that all laws or parts of laws in conflict with this act are hereby repealed." He contends that there is no conflict between the section of the act of 1886, which expressly taxes the business of saw-mills, and that of 1890, which simply omits to tax it; and therefore that this provision of the act of 1886 is unrepealed, and remains in force. We cannot approve this view. It seems to us perfectly clear that the act of 1890 was designed to formulate complete and exclusive regulations for the license taxes to be imposed for the year 1891 and subsequent years on all persons, associations of persons, or business firms and corporations, pursuing any trade, profession, vocation, calling, or business, as declared in its title. It is not a question of consistency or inconsistency of the two acts; it is a question of the supersession of the former by the later act. The rule is well settled, as declared by Mr. Sedgwick, that, even though the two statutes be not repugnant or inconsistent, yet if they related to the same subject-matter, and the later statute was clearly intended to prescribe the only rule that shall govern, it will repeal the former act. Sedg. St. & Const. Law, pp. 100, 104. Our view is expressed in the very words of the United States supreme court in an analogous case: "A careful comparison of these two sections can leave no doubt that it was the legislative intention, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will, in that regard, entirely, for the old law on that subject. We are of opinion that it was their intention to make a new law; and that law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other laws on the subject embraced within it." Murdock v. Memphis, 20 Wall. 601; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. Rep. 312.

We are also referred to the official journal of the house of representatives, showing that the act of 1890, as originally presented, contained the word "saw-mills," and that an express amendment to strike it out was offered and adopted. Strenuous objection is made to our considering this reference, on the ground that the journal was not offered in evidence on the trial. Authorities are quoted to the effect that private statutes will not receive judicial cognizance unless offered in evidence, but these authorities do not cover the present point. The official journals to be kept by the houses of the general assembly are prescribed and regulated by the constitution. They constitute official records, and import presumptive verity. High authorities maintain the right of courts to refer to them in order to ascertain the purpose and intent of the statute, when not clearly expressed. Cooley, Const. Lim. (4th Ed.) p. 164; Suth. St. Const. p. 300; Whart. Ev. pp. 269, 290; Sedg. St. & Const Law, 54; Gardner v. Collector, 6 Wall. 508. This court has frequently taken cognizance of such journals. Jones v. Sheriff, 35 La. Ann. 999; Planting, etc., Co. v. Green, 39 La. Ann. 461, 1 South. Rep. 873. This amendment establishes very clearly the legislative intent to exclude the business of saw-mills from license taxation. It is claimed, however, that saw-mills are covered by paragraph 1 of section 3 of the act of 1890, which imposes a license tax on "each business of manufacturing not expressly exempt by articles 206 and 207 of the constitution." This clause is copied from the prior act of 1886. It did not, in that act, embrace saw-mills, because they were expressly provided for in section 9. It would be a very strained and unreasonable construction to extend the meaning of the same clause in the act of 1890 so as to embrace saw-mills, when the legislature had just manifested its purpose to exempt saw-mills by striking them out of the enumeration in section 9. This would be to defeat, instead of enforcing, the manifest legislative intent. We think the court below did not err in rejecting the tax collector's demand. Judgment affirmed.

(43 La. Ann. 924)

Succession of JAN. (No. 1,398.)

(*Supreme Court of Louisiana.* July Term, 1891. 43 La. Ann.)

JUDGE—DISQUALIFICATION—INTEREST.

1. A judge is disqualified to pass on the homologation of an account when the assignee of a claim transferred by him attempts to enforce its payment by an opposition to the account.

2. Although the claim has been transferred without recourse, yet there is an implied war-

ranty as to the existence of the debt, and the judge is interested to this extent.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Martin.

In the mat er of the estate of A. M. F. Jan. Opposition of Robert Martin and others. Motion to recuse JAMES E. MOUTON, the district judge, denied. The administrator appeals. Reversed.

Felix Voorhies, for appellant.

A judge is disqualified to pass on the homologation of an executor's account, when the assignee of a claim transferred by him attempts to enforce this claim by an opposition to the account.

In such a case, a motion for his recusation should prevail. Succession of Rhea, 31 La. Ann. 324.

A judgment overruling the recusation of the regular judge of a court is not an interlocutory decree, but a final judgment, which may be appealed from. State v. Judge, 42 La. Ann. 317, 7 South. Rep. 586.

Edward Lima and *Louis J. Voorhies*, for appellees.

The judge of the lower court is recusable only when he is clearly interested in the alleged cause of interest.

Opponents and appellees submit the motion alleges interest. There is no error in the judgment of the court entered on the minutes, to-wit: "That Judge JAMES E. MOUTON was not recusable, because he was not interested in the oppositions to be tried." Act No. 40 of 1880, Code Prac. art. 338.

MCENERY, J. In this case a motion was made to recuse the district judge, JAMES E. MOUTON. The motion was referred to the Honorable O. C. MOUTON, judge of the twenty-fifth judicial district, who denied the motion. The judge, JAMES E. MOUTON, was a member of the law firm of Mouton & Martin before his elevation to the district bench. This firm obtained a judgment against a debtor for the decedent. Before he qualified, Judge MOUTON transferred all his fees for legal services due said firm to his former law partner, Robert Martin. This transfer was made without recourse, and he was not to return the cash amount which he received for them whether the fees were collectible or not. The administrator for the succession of Jan filed his account refusing to allow the fee for services rendered by Mouton & Martin in recovering the judgment for Jan against the debtor. For this reason Robert Martin opposed the account. Hence the motion for the recusation of the judge by the administrator of the succession of Jan.

When JAMES E. MOUTON transferred this account for fees, among others, there was an implied warranty as to its existence. The transfer without recourse went no further than to warrant against the insolvency of the debtor. To the existence of the debt there was an implied warranty. Civil Code, art. 2646. To this extent the district judge was interested. In Succession of Rhea, 31 La. Ann. 324, this court said: "The decree of a court should be not only impartial, but no pretext should, as a stepping-stone, be allowed to stand between its impartiality and even the most unreasonable suspicion; for, as well said, praise is without feet, and the wings of blame are swifter than the winds." We have no doubt that the district judge felt perfectly disinterested. There also can be no doubt that his pecuniary interest in the litigation was very remote; too remote to influence his judgment. But, nevertheless, there was an interest, however remote and distant, sufficient to incite the tongue of the disappointed to the most unreasonable suspicion. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, awarded, and reversed; and it is further ordered that this case be remanded, to be proceeded with according to the view herein expressed, and according to law; the succession to pay the costs of appeal.

(43 La. Ann. 942)

DEROUEN v. DAVIDSON *et al.* (No. 1,407.)

(*Supreme Court of Louisiana.* July Term, 1891. 43 La. Ann.)

SALE BY BOUNDARIES—LOCATION.

A sale of property described by boundaries, where one of them cannot be definitely fixed and ascertained, is not a sale *per aversionem*. Where one of the boundaries is described as by donor's lands, and no limit is fixed where the boundary is to commence, it is not a sale within fixed limits, and a sale *per aversionem*.

(*Syllabus by the Court.*)

Appeal from district court, parish of Iberia.

Action by Oscar Derouen, under-tutor, against W. L. Davidson and other. Preliminary injunction dissolved. Plaintiff appeals. Modified and affirmed.

Walter J. Burke, for appellant.

When two descriptions of property on their face differ, parol evidence is admissible to prove that they are descriptions of one identical tract.

One who recognizes another's title to a thing is not estopped forever after from claiming that thing by a title translative of property and of subsequent date to the recognition.

Rights of parties cannot be affected by the acts or admissions of third persons.

If any one sells or alienates a piece of land from one fixed boundary to another fixed boundary, the purchaser takes all the lands between such bounds, although it gives him a greater quantity of land than is called for in his title, and although the surplus exceed the twentieth part of the quantity mentioned in his title. Civil Code, art. 850; Landry v. Tullier, 9 La. Ann. 100; 9 Rob. (La.) 250; 2 Rob. (La.) 357; 12 Mart. (La.) 425.

Full effect must be given to evidence received without objection, although the pleadings do not put the point at issue. 16 La. Ann. 278; 15 La. Ann. 389, 804; 18 La. Ann. 328; 20 La. Ann. 241.

Parol evidence is admissible to prove error in an act, in the description or quantity of land sold, etc.

If one claim more than is due him, he should nevertheless have judgment for what is actually due him. Code Prac. art. 155.

Property of the wife transferred to her

by a *dation en paiement* cannot be seized to satisfy a judgment claim against the husband. 24 La. Ann. 138.

L. O. Hacker, for appellee.

(1) The fact that, in a sale *per aversionem*, the purchaser acquires all the land between the boundaries mentioned, though it exceeds by far the quantity mentioned in the act, is founded upon the presumption that such were the intentions of the parties at the time of the passage of the act, and it must so appear in the act itself.

(2) To constitute a sale *per aversionem*, there must be fixed boundaries, otherwise the object is not described; and therefore quantity must govern. A sale which recites, "bounded on the north by vendor and on the south by unknown," is not a sale *per aversionem* for want of fixed boundaries.

(3) A sale of 14 arpents of land, when the land is well known to the parties, and the exact quantity has been by them previously ascertained, cannot be extended to comprise 200 arpents, on the plea that it is a sale *per aversionem*.

MCENERY, J. The defendant is a judgment creditor of one Tiburce Norés. He issued a *fi. fa.* on his judgment, and seized and advertised for sale certain property, seized as the property of said Norés. Previous to the seizure he made a *dation en paiement* to his wife, who afterwards died leaving several minor children, the issue of her marriage with Norés. A description of a part of the immovable property comprising the *dation* is as follows: "One tract of land situated in Iberia parish, bounded north by donor; south by Stansbury; south by Gall & Hebert; east by Mitcheltree and unknown; and west by Hardy. Said tract contains 14 arpents, more or less, and all improvements." The validity of the *dation en paiement* is not questioned. The defendant Davidson seized under his judgment the land embraced within this description, which contains 200 acres. The minor children of the deceased Mrs. Norés, by their under-tutor, enjoined the execution of the judgment upon this property, alleging that it is the identical property given in payment to their mother by their father. If the sale was one *per aversionem*, there can be no doubt as to the correctness of their contention. They would be entitled to all the land contained within the designated boundaries, regardless of quantity. In a sale *per aversionem* the boundaries must be fixed and certain, so as to give evidence of the intention of the parties to convey the land within the designated and specified boundaries, without reference to the quantity. In the description of this property the limits are not so fixed as to show that it was the intention to convey a specified body of land. The donor owned the land to the north. There is no limit fixed to the northern boundary. As he, the donor, owned all the land from the south boundary to the extent of his ownership north, there is no means in the description of locating where the lands of the donor should mark the limits of the lands donated. In order to fix the northern boundary, it is necessary to compute the area by arpents to ascertain the northern limit of the land donated. It is evident, therefore, that only 14 arpents, the amount of land designated in the *dation en paiement*, were conveyed to the donee, the measurement commencing from the south boundary. Fourteen acres of this land rightfully belonged to the minors. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, so that the order dissolving the injunction shall apply only to 186 acres of land embraced within the description of the property in the sheriff's return on the execution. In other respects it is affirmed, the appellee to pay costs of the appeal.

(43 La. Ann. 926)

LAUDRY v. BROUSSARD. (No. 1,402.)

(*Supreme Court of Louisiana.* July Term, 1891. 43 La. Ann.)

ESTOPPEL.

Where there has been a destruction of titles to property, and a party wishing to purchase goes to the original owner of the property for information, and he disclaims title to the same, and joins in a deed relinquishing all claims to the same, he is estopped from setting up title to the property against the party whom he induced to purchase the same.

(*Syllabus by the Court.*)

Appeal from district court, parish of Vermillion.

Action by Leo Laudry against Semar Broussard. Judgment for defendant. Plaintiff appeals. Affirmed.

Lewis L. Bourges, for appellant.

(1) A plea of estoppel cannot be maintained where it appears that the party against whom the plea is directed was ignorant of the truth relating to the matter which formed the subject of the plea. 33 La. Ann. 1194; 38 La. Ann. 100, 813.

(2) A person, who under the belief that a certain state of facts exists, and without any intention to defraud another, makes certain statements to that other person, which induces him to do an act, is not estopped by those statements which he believed to be true at the time. 34 La. Ann. 816; 10 Lea, 406.

(3) Two things are necessary to create an estoppel *in pais:* (1) An intent to defraud, or an assertion known by the party who made it to be false at the time he makes it; and (2) an injury caused to the person who pleads the estoppel by the assertion so made. 12 Wis. 112, 125; 105 Ill. 318; 104 Ill. 49; 150 Mass. 324, 23 N. E. Rep. 101; 80 Ala. 145.

(4) A vendee, who has recourse against his vendor for the reimbursement of his outlay, cannot plead injury, and the vendee in this case can have such recourse.

White & Broussard, for appellee.

(1) When, in describing the property conveyed, a sheriff's deed refers specially to a patent, such patent, to all intents and purposes, becomes incorporated in the deed; and the description contained in it will, in case of doubt, control in determining what property is sold. 9 Rob. (La.) 30; 18 La. Ann. 290; Henen's Dig. 1337, Nos. 6, 13; 26 La. Ann. 254.

(2) A party who has led another to believe in the existence of a certain state of

facts, and to act upon the faith of such assurances, cannot afterwards deny his representations to the prejudice of the person who has thereby been misled or induced to alter his position. 30 La. Ann. 1040; 12 La. Ann. 473; 9 La. Ann. 528; 5 La. Ann. 368; 4 La. Ann. 293; 5 Rob. (La.) 523; also 1 La. Ann. 11; 6 La. Ann. 274, 349; 30 La. Ann. 50; 96 U. S. 659.

(3) The effect of an estoppel cannot be defeated by a plea of error, when the error assigned is inexcusable, and results from gross negligence, or a reckless disregard of the right of others. Sedg. & Waite, Tr. Tit. Land, §§ 845–847; 42 La. Ann. 242, 599.

(4) Where one of two parties must suffer a loss, it should be borne by the one who is in fault, rather than by the one whom he has misled or deceived. 34 La. Ann. 912.

(5) A title by prescription results when a party and his authors hold, in good faith, peaceable possession as owners, under a title translative of property, for a period of 10 years. Civil Code, arts. 3478–3487, inclusive, and Id. art. 3493.

McENERY, J. The plaintiff obtained from the United States government a patent to lots 1 and 2, section 28, and lots 1 and 2, section 34, in township 12 S., of range 4 E., in the district of lands subject to sale at Opelousas, La., containing 123.13 acres. This land the plaintiff mortgaged to one Judice. The mortgage was foreclosed many years ago, and the lots 1 and 2, section 34, were sold, according to the *procès-verbal*, with some town lots, also mortgaged, in the town of Abbeville. Although the lots 1 and 2, in section 28, do not appear in the *procès-verbal*, they were seized to satisfy the mortgage debt. The lots 1 and 2, section 34, were described as containing the amount of land patented to the plaintiff. Daniel O. Bryan became the purchaser of the property lots 1 and 2, section 34, described as containing 123.13 acres, the amount of land in the patent. He took possession of all the property which was mortgaged, including lots 1 and 2, section 28. Lots 1 and 2, section 34, were inventoried as containing the above amount of acres, and, at his succession sale, sold in the same manner. The property lots 1 and 2, described as containing 123.13 acres, went through various transfers, all the purchasers taking possession of and acting as owners of lots 1 and 2, section 28. The plaintiff during all these years lived in the neighborhood of the property, and was under the impression that lots 1 and 2, section 28, had been sold to satisfy the mortgage debt, and purchased by Bryan. He was present at the sale. He at no time, until the institution of this suit, set up any claim to the property, or asserted any rights to it. The court-house in the town of Abbeville was destroyed by fire, and valuable records destroyed. The titles to the property in controversy shared the same fate. In the transfer of property in the parish of Vermillion it was, of course, necessary to be careful in the transfer of property, and, as far as possible, to reinstate deeds. Semar Broussard, desiring to become the owner of the property in controversy, refused to purchase the same, without a renunciation of title to lots 1 and 2, section 28, by the plaintiff. Broussard, induced by the representations of the plaintiff, purchased from one Frasemond Babineaux, for the price of $994, lots 1 and 2, section 28, which had before this sale been omitted in the deeds in the several transfers; but described as to quantity. In this sale, made in May, 1887, the plaintiff joined in the act of sale, and declared on his part as follows: "And to these presents personally appeared and intervened Leo Laudry, of said parish, the original owner of said land, and from whom said land, with others, had been seized in the suit of Judice v. Leo Laudry, and purchased by the late Daniel O. Bryan at said sheriff's sale some twenty-two years ago; that since that time he laid no claim in and to the land herein conveyed; and ratifies said sheriff's deed for said land, and abandons and relinquishes all claims, rights, titles, and demands in and to the tract herein conveyed." This deed was read to the plaintiff, and a map of the land exhibited to him, and lots 1 and 2, of section 28, pointed out to him. After the execution of this deed he brought this petitory action to recover back said lots 1 and 2, section 28, on the grounds that the property had never been sold, and that the above declaration on his part was an error of fact, the existence of which he did not know when he appeared and signed said deed. There was judgment below rejecting his demand, and he has appealed.

The presence of the plaintiff at the first sale, over 22 years ago, his silence during the time of the various transfers of the property, and its occupancy by the purchasers as owners, his final abandonment of all claim or title to it, and his belief that the property had been sold to satisfy the mortgage debt, lead us to believe, although there is no evidence of this fact, in consequence of the destruction of the records and the sheriff's deed, that the property was actually offered for sale, and adjudicated to Bryan, and its omission by the description of the lots and section was an error on the part of the sheriff in the *procès-verbal*, as the quantity of the land stated therein corresponds with the amount in the patent to the plaintiff. Under this state of facts, we are of opinion that the plea of estoppel must prevail. The records having been destroyed, the plaintiff was the person to give the defendant, Broussard, correct information as to the title to the property. He acted on this information, and purchased the property in controversy. Broussard obtained the information in good faith, and practiced no fraud or artifice on the plaintiff to obtain it. It may be a hardship on the plaintiff to lose his property, but it is through his own fault and negligence, and he must bear it, as the defendant is innocent of any wrong, and purchased through the representations of the plaintiff. Where two innocent parties must suffer, he whose fault caused it must bear the infliction of the injury. Judgment affirmed.

(43 La. Ann. 981)

PAYNE *et al.* v. MORGAN'S L. & T. R. & S. S. CO. (No. 1,412.)

(*Supreme Court of Louisiana.* July Term, 1891. 43 La. Ann.)

EMINENT DOMAIN—OBJECTIONS TO TAKING—WAIVER.

1. Section 12 of the charter of M.'s L. & T. R. & S. S. Co. exempts it from suit outside of the city of New Orleans, except in cases of trespass.

2. Where a railroad enters upon the land of another in the course of its construction, and builds its road and road-bed, without opposition, upon the same, and the party makes no objection for several years, his act will be construed into a waiver. His claim against the road must be for compensation at the domicile of the company. He does not abandon his claim for compensation by the tacit waiver.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry.

Action by Jacob N. Payne and others against Morgan's Louisiana & Texas Railroad & Steam-Ship Company to recover land. Dismissed. Plaintiffs appeal. Affirmed.

Kenneth Baillio, for appellants.

(1) * * * A variety of wrongs, having the common element of a use of force, whether direct or indirect. 33 La. Ann. 955. "Trespass" is defined to be an unlawful act committed with violence, *vi et armis*, on the person, property, or relative rights of another. 36 La. Ann. 187.

(2) The legislature contemplated the active violation of some right, or the doing of some illegal thing, acts of commission, which give rise to an action for damages; and that the rule does not apply to omissions, neglect, or failure to do. Wrongs of this class are excluded by the use of the words "commit" and "committed," and which necessarily imply action. 30 La. Ann. 609; 31 La. Ann. 566; 39 La. Ann. 29, 6 South. Rep. 9.

(3) It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude. Civil Code, art. 660.

(4) He whose estate borders on running water may use it, as it runs, for the purpose of watering his estate, or for other purposes. He through whose estate water runs, whether it originates there or passes from lands above, may make use of it while it runs over his lands; but he cannot stop or give it another direction, and is bound to return it to its ordinary channel where it leaves his estate. Id. art. 661.

(5) The owner whose estate is inclosed, and who has no way to the public road, may claim the right of passage on the estate of his neighbors for the cultivation of his estate, but he is bound to indemnify them for the damage he may occasion. Id. art. 699.

(6) A passage must be furnished to the owner of the land surrounded by other lands, not only for himself and workmen, but for his animals, carts, instruments of agriculture, and everything which may be necessary for the use and working of his land. Id. art. 702.

(7) When the place for the passage is once fixed, he to whom this servitude has been granted cannot change it, but he who owes this servitude may change it from one to another, in order that it may be less convenient to him, provided that it afford the same facility to the owner of the servitude. Id. art. 703.

(9) *Quasi* contracts are the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties. Id. art. 2293.

Leovy & Blair, H. L. Garland, and *Laurent Dupre*, for appellee.

(1) Under section 12 of its charter, Morgan's Louisiana & Texas Railroad & Steam-Ship Company must be sued at its domicile, except in cases of trespass, when the company may be sued in the parish where the trespass has taken place.

(2) The effect of said twelfth section of the charter of said company is to repeal, as far as said Morgan Company is concerned, all provisions in the Code of Practice inconsistent therewith.

(3) When the entry of a railroad company upon the land of the owner thereof is peaceable, and acquiesced in by him, when neither force nor violence is used in effecting said entry, and when said land is taken without any resistance or remonstrance on the part of said owner, by that peaceable entry on said land, the construction of a road-bed thereon, and the possession and operation of same, the land so taken passes irrevocably from said owner to the railroad company, and all that is left the owner is a right of action against said railroad company for compensatory damages.

MCENERY, J. The plaintiffs sue the defendant for the recovery of land now occupied by it as a railroad embankment in excess of what is necessary for railroad purposes. They also sue for the value of the strip of land occupied by the railroad embankment. They aver that, by the construction of the railroad embankment, the natural drains and ditches on this property have been obstructed, and the flow of water retarded, damaging them to the amount of $2,000. Suitable crossings, cattle-guards, culverts, etc., are demanded to be constructed for the plaintiffs by the defendant company. The defendant company filed an exception to the jurisdiction of the court, as follows: "That under section 12 of its charter suits cannot be brought against it outside of the parish of Orleans, except in cases of trespass; that the present suit is not one for trespass, and hence this honorable court [district court] is without jurisdiction to try the same." The exception was sustained and the suit dismissed. From this judgment plaintiffs have appealed.

From the face of the papers it will be perceived that the *gravamen* of plaintiffs' petition is (1) that the defendant company has taken possession of and holds 22.72 acres of land belonging to them, and is using same as a railroad track, on which it is running its passenger and freight trains,—the one-half of which plaintiffs' demand shall be restored to them in kind,

and for the other half they claim a personal judgment for its value; (2) that the defendant company has, by its said embankment, entirely obstructed the drainage of the place, and they ask that said company be ordered to remove the said obstructions to drainage, and make the necessary openings in its track; (3) that said company has not constructed the necessary crossings and cattle-guards on its embankment, and it is asked that said company be required and ordered to make them at once.

It does not appear from the allegations in plaintiffs' petition that the defendant company committed a trespass upon that property by entering upon it unlawfully. The following averment in the petition negatives any idea of a trespass having been committed by the defendant company on the lands of the plaintiffs: Plaintiffs allege "that some time in the year 1882 Morgan's Louisiana & Texas Railroad & Steam-Ship Company, a corporation duly organized under the laws of this state, having its domicile in the city of New Orleans, and owning and operating railroads in other sections of the state, at that time entered upon, took possession of, and now has possession of same, certain tracts of land originally forming part of a plantation, situated on Bayou Bœuf, in St. Landry parish, about three miles above the town of Washington, known and called the 'Webb' or 'Cailigher' place, and built and constructed upon the said land so entered upon by them a railroad embankment or 'dump,' and placed on said embankment crossties and steel rails, over which said company has, ever since the year 1882, been running locomotives, and passenger and freight trains, whereon they have carried passengers and freight for hire, and have been operating same as a regular railroad ever since."

The obstruction of the drains and ditches, the failure to construct cattle-guards, and to make crossings, are merely incidental to the taking possession of plaintiffs' property, which was lawful and legal, at least was made so by plaintiffs, who permitted the railroad company to go on the property and construct its road thereon without remonstrance or complaint. The acquiescence of the plaintiffs in the construction of the road over their property, under the circumstances, which made it imperative upon them to resist or to remonstrate, will be construed into a waiver of any objections to the construction of the road-bed over their property. State v. Judge, 33 La. Ann. 955; St. Julien v. Railroad Co., 35 La. Ann. 924. The taking possession of the land of plaintiffs was not accomplished by violence, nor through the commission of a wrong, tort, or other illegal act. The plaintiffs made no resistance to the entry of the defendant, but acquiesced in it by long-continued non-action. St. Julien v. Railroad, etc., Co., 39 La. Ann. 1064, 3 South. Rep. 280. In the case of Caldwell v. Railroad Co., 40 La. Ann. 755, 5 South. Rep. 17, we said that "this court had distinctly announced the doctrine that, in case the owner of land permits its use and occupancy by a railroad company, and the construction upon it of a *quasi* public building, without resistance or complaint, he cannot thereafter require the demolition of the work, nor prevent its use by the company. * * * He cannot treat such entry as tortious, and sue the corporation as a trespasser at the place where the injury is alleged to have been sustained." The plaintiffs are entitled to bring their suit at the domicile of the company for compensation, damages, and land, including what is required for railroad purposes, etc., which right is reserved to them. Section 12 of the company's charter exempts it from suit out of New Orleans, except in cases of trespass. In this case no trespass was committed by the defendant company.

Judgment affirmed.

FENNER, J., recuses himself, on the ground of affinity to plaintiffs.

(43 La. Ann. 984)

McWILLIAMS v. MICHEL *et al.* (No. 1,417.)

(*Supreme Court of Louisiana.* July Term, 1891. 43 La. Ann.)

RIGHT TO APPEAL—TAX-SALES—VALIDITY OF ASSESSMENT.

1. When an appellant applies for and obtains an order of appeal to a court having no jurisdiction of the matter in dispute, the order is a nullity. He is not estopped from prosecuting his appeal in a court of competent jurisdiction.

2. An actual assessment of property and notice required by article 210 of the constitution are essential to a valid tax-sale of the property.

3. There is no actual assessment of property as contemplated by law when it is not assessed to the owner, and is confusedly assessed with other property.

4. Where the state sells public land, and issues a patent for it, the land-office at Baton Rouge is the proper place from which information should be obtained in order to assess it correctly. Rev. St. 2922. When the state sells public land, and the assessor places it on the assessment rolls, to a person not the owner, the state cannot take advantage of this defective assessment, and at tax-sale have the property adjudicated to her.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Martin.

Action by Jacob McWilliams against Justinien Michel and others to set aside a tax-deed and obtain an injunction. Preliminary injunction granted, but afterwards dissolved, and judgment for defendants. Plaintiff appeals. Reversed. Perpetual injunction granted. Rehearing denied.

R. N. Sims and *C. H. Mouton*, for appellant.

(1) Plaintiff's title to the lands in controversy is complete and perfect. They were patented and sold by the state to Thomas Mille in 1860. After his death, his heirs went into possession, and at the partition sale made by the sheriff of Iberville, in 1877, they were acquired by the plaintiff, who has since held and possessed them.

(2) The tax-sale of these lands in 1872 with the lands adjudicated to Wilbert at the same partition sale, in 1877, in the name of Eugene Garandi, was an absolute nullity. Garandi had disappeared many

years before, and had never owned a particle of interest in the property. The lands stood at the time in the registry office of the land department of the state in the name of Thomas Mille. The assessment in the name of Garandi was therefore a nullity, and could not form the basis of a valid tax-sale. Saund. Tax'n, 302; 26 La. Ann. 509, 30 La. Ann. 176; 32 La. Ann. 926; 34 La. Ann. 107; 35 La. Aun. 1086.

(3) The adjudication to Breaux and Duperier, in 1873, being a nullity, they acquired no title. They never claimed title, never acted as owners, and never desired or attempted to take or be placed in possession. The paper title evidencing the adjudication produced no effect, and could not form a basis for prescription. Breaux v. Negrotto, 43 La. Ann. —, 9 South. Rep. 502; 32 La. Ann. 237.

(4) The nullity of the adjudication to Breaux and Duperier, in 1873, involved the nullity of the assessment in their names in 1885, and, as a necessary consequence, the nullity of the adjudication to the state in their names in 1886. Besides, they were never notified to pay any taxes on the property, which notice was a condition precedent to a valid adjudication. Const. art. 210; Breaux v Negrotto, 43 La. Ann. —, 9 South. Rep. 502. The state never attempted to take possession under the adjudication of 1886, and, there being no adverse possession, prescription does not apply. Breaux v. Negrotto, 43 La. Ann. —, 9 South. Rep. 502; 32 La. Ann. 237.

(5) The lands assessed in the name of Breaux and Duperier, in 1885, had been separately assessed to their respective owners, plaintiff and the Wilberts, from 1881 to 1884, both inclusive. The assessment of both pieces of property confusedly to Breaux and Duperier constituted an additional nullity, which vitiated the adjudication based upon it. Act No 96 of 1882, § 18; Saund. Tax'n, 108; Welty, Assessm. § 112; 36 Me. 435; 63 Me. 382; 34 La. Aun. 196; Cooley, Tax'n, 295; Burroughs, Tax'n, 212-301; 51 Mo. 63; 6 Kan. 540; 32 La. Ann. 228; 42 La. Ann. 853, 8 South. Rep. 607.

(6) In Wilbert v. Michel, 42 La. Ann. 853, 8 South. Rep. 607, this court annulled and set aside the adjudication to the state in 1886, and that to the defendant in 1889. Those adjudications stand annulled for all purposes and as to all persons. They cannot be null in part and valid in part. The tax claimed was indivisible, and the adjudication in each instance was an indivisible act. Saund. Tax'n, 305; 34 La. Ann. 123; Burroughs, Tax'n, p. 301; 51 Mo. 63; 6 Kan. 540; Blackw. Tax-Titles, pp. 180, 181; 55 Miss. 26; 44 Mich. 561, 7 N. W. Rep. 160, 367; Cooley, Const. Lim. p. 368.

(7) On the question of registry of titles, the advantage is with the plaintiff. The state could not ignore the title of Mille, which was extant upon her records. It was the duty of the state officers to follow up that title, and after the death of Mr. Mille to assess the property in 1871 and 1872 in the name of his estate, or of his heirs or their assigns, if known. The state officers could not by a fictitious assessment create a title for the purposes of future assessments, legally binding on the heirs of Mille or their vendees. Rev. St. 2922. The state could not plead want of registry of the Mille title in the parish of St. Martin, and the defendant is in no better position than the state would be. See cases cited under No. 9; Act No. 96 of 1882, § 18.

(8) Plaintiff had a perfect legal right to obtain a certificate of redemption from the auditor on the 2d of May, 1890. The adjudication to the state in his name in 1883 had never been filed for record or recorded in the recorder's office of St. Martin, and had not up to that day been filed or recorded in the auditor's office. The act of redemption did not and does not concern the defendant. It shows, however, in connection with the testimony of the auditor, that plaintiff does not owe the state one cent of taxes on the property in controversy. Statutes which give the right of redemption are to be regarded favorably and construed with liberality. Act No. 96 of 1882; Cooley, Tax'n, p. 363; 33 Pa. St. 94-97; 10 Wall. 464; 16 Wis. 594; 1 Rob. (La.) 421. On the other hand, the formalities which the law prescribes in the interest of the tax-payer or purchaser subsequent to the sale must be strictly complied with. Cooley, Tax'n, p. 365; Burroughs, Tax'n, p. 312; 9 Mo. 878. It is error to suppose that a certificate of redemption by the state constitutes a sale. The only effect is to replace the property in the position it was before the tax adjudication. Saund. Tax'n, p. 205. The application to redeem must be made within a year from the recordation of the adjudication to the state. Id. p. 206.

(9) The state having acquired no title under the adjudication in 1886 by reason of the antecedent radical defects in the proceedings, it is perfectly well settled that she could convey no title to the defendant under the sale made in 1889, in pursuance of Act No. 80 of 1888. 32 La. Ann. 926; 37 La. Ann. 209; 34 La. Ann. 255; 35 La. Ann. 952; 36 La. Ann. 350; 35 La. Ann. 1109; 42 La. Ann. 835, 8 South. Rep. 593.

E. Simon, for appellees.

(1) One who obtains from the auditor a redemption act for lands adjudicated to the state at tax-sales, even when this obtention is after the time for redeeming has passed, is thereby estopped from contesting the assessment and the state's title.

(2) Assessors are not bound to look beyond the recorded titles to property. See Palmer v. Board, 42 La. Ann. 1122, 8 South. Rep. 487.

(3) The assessment, being in the name of the only owners known in the records, is sufficient and legal. See Gee v. Clark, 42 La. Ann. 918, 8 South. Rep. 627.

(4) Under such an assessment, when taxes have not been paid, the title derived from tax-sale is good and valid. See Wilberts v. Michel, 42 La. Ann. 853, 8 South. Rep. 607.

(5) In this case, the state holding under two adjudications, at different periods, the titles acquired under both to the benefit of the state's adjudicatee.

(6) The claimant must be strictly limited to the causes of nullity alleged in his petition and pleadings.

(7) Notice required by article 10 of the state constitution is applicable only to

tax-sales of property of delinquents, and not to a sale of property of the state made under Act No. 80 of 1888.

(8) An action to invalidate a tax-sale, made under a law of the state, is barred by the prescription of 3 years. See 9 La. Ann. 403, 1005; 7 South. Rep. 731.

(9) Parties sold out as delinquents cannot redeem their property, except within the year the deed was given.

(10) The purchaser of lands from one who has bought at tax-sales, in good faith, will be maintained in his purchase after 10 years of peaceable possession, and that possession gives an indefeasible title. See Gee v. Clark, 42 La. Ann. 918, 8 South. Rep. 627.

ON MOTION TO DISMISS.

McENERY, J. The defendants move to dismiss this appeal on the ground of want of jurisdiction *ratione materiæ*, and that the plaintiff had applied for and obtained, in open court, an order of appeal to the court of appeals for the third circuit. The amount in dispute is over $2,000. This is apparent from the admissions of defendants in their application to bond in the injunction proceedings. The order of appeal to the court of appeals was a nullity. The error of plaintiff in applying for and obtaining an order of appeal to that court cannot estop him from prosecuting his appeal, and lodging it in the court having jurisdiction of the matters involved. The motion to dismiss the appeal is denied.

ON THE MERITS.

The plaintiff, alleging that he is the lawful owner of sections or lots Nos. 10, 11, 12, 13, 14, 15, 17, township 8 S., range 8 E., in the S. E. land district, brought this suit to set aside a tax-deed of said property made to the defendants under the provisions of Act 80 of 1888, on the 1st of June, 1889, for an adjudication to the state on the 1st of May, 1886, for unpaid taxes of the year 1885, assessed to Breaux and Duperier. The defendants were put into possession of the property. The plaintiff obtained an injunction restraining the defendants from committing waste on the property. There was judgment for the defendants, maintaining their title to the property under the tax-deed, and dissolving the injunction, with $400 damages. The plaintiff has appealed. In 1871 and 1872 the property in controversy was assessed to Eugene Garandi. Garandi held certain floating land scrip or warrants. He assigned the same to Thomas Mille, who located it on the property in suit. Patent No. 9,197 was issued to him for this and other lots or sections in 1860. Garandi never carried the property, and was dead when the assessment was made to him. The land-office at Baton Rouge was the proper place for the assessor to get information of the description and ownership of the property which had been sold by the state to Mille. Rev. St. 2922. The state had notice of the title of the property in Thomas Mille. She cannot ignore this fact, and assess the property to a person not the owner, sell it, and acquire title to it. Under this assessment, the property was adjudicated to Breaux & Duperier. The assessment was null and void, and could not form the basis of a valid tax-sale. Thibodaux v. Keller, 29 La. Ann. 509; Fix v. Succession of Dierker, 30 La. Ann. 176; Guidry v. Broussard, 32 La. Ann. 926; Le Blanc v. Blodgett, 34 La. Ann. 107; Hickman v. Dawson, 35 La. Ann. 1086.

Judge Breaux in his testimony states that, happening to be in St. Martinsville, he had the property adjudicated to him and Duperier, in order to pay the taxes thereon, as their wives were interested in the property. No adjudication or forfeiture of the property was ever made to the state under this assessment. The property was never assessed under this tax-deed, before 1885, to Breaux and Duperier. The plaintiff claims title on this tax-deed of 1873 made to Breaux and Duperier. As he claims through the state, he must show title in the state. Judge Breaux disclaims title to the property. If there is any ownership of the land under this tax-sale, it must be in Breaux and Duperier. They have sold their interest in the property. In the partition proceedings of the succession of Mille, they joined with their wives in a sale of the property in controversy to the present plaintiff. From 1873 to 1881 the property was not assessed. From 1881 to 1884, inclusive, it was assessed to the plaintiff. In 1885, without the knowledge of Breaux and Duperier, it was assessed to them. The lands of Wilbert & Son, which were also purchased at the same time in the partition proceedings, in the succession of Mille, were assessed and sold, confusedly with plaintiff's property, for the unpaid taxes for the year 1885, assessed to Breaux and Duperier. It was under this assessment that the adjudication was made to the state in May, 1886, which resulted in the tax-sale, June 1, 1889, under Act 90 of 1888, and the adjudication and the tax-deed to the defendant Michel.

In the case of Wilbert v. Michel, 42 La. Ann. 856, 8 South. Rep. 607, we said: "The validity of the title acquired from the state depends on the validity of the adjudication forfeiture. If that was not valid, the state acquired no title, and can transfer none." In Re Douglas, 41 La. Ann. 776, 6 South. Rep. 675, in enumerating the essentials for a valid sale of property under tax proceedings, the assessment of the property was named as one of them; and in Breaux v. Negrotto, 43 La. Ann. —, 9 South. Rep. 502, that the notice required by article 210 of the constitution should also be served on the tax debtor. It does not appear in the record, and it is not alleged in the pleadings, that there was any change in the title to the property after its assessment to the plaintiff, Jacob McWilliams, in 1884, in which year he paid the taxes for the year previous. No reason is assigned for placing the property again on the rolls in the names of Breaux and Duperier, except in that there was a recorded tax-deed to them in 1873. This adjudication being null and void because of the defective assessment, as stated above, the continuation of the property

on the rolls in their names was also null and void. There was in fact no assessment of the property in 1885 upon which the adjudication to the state in May, 1886, was based. There was no notice served on the tax debtor, as required by article 210 of the constitution. The tax-deed made to the defendants, 1st June, 1889, shows that the notice was served on Breaux and Duperier. But, as a fact, it was not even served on them. The adjudication, therefore, to the state in 1886, and the proceedings in the sale of the property thereafter under Act 80 of 1888, were null and void. The state having acquired no title, she could transfer none.

For the tax of 1882, assessed to the plaintiff, the property was adjudicated to the state in 1883. She never took possession of the property, and seems to have abandoned all claim to it under this adjudication, as it was assessed to Breaux and Duperier afterwards, and again adjudicated to the state under this assessment. But the defendants cannot set up this adjudication as the basis of their title under the tax-deed to them June 1, 1889, as it was sold to them, under Act 80 of 1888, as having been adjudicated to the state for the unpaid taxes of 1885, assessed to Breaux and Duperier.

From this statement of the case it is very clear that the prescription of one, three, and ten years, pleaded by defendants, can have no application. Breaux v. Negrotto, 43 La. Ann. —, 9 South. Rep. 502. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered that there be judgment in favor of the plaintiff decreeing the adjudication of the property described in his petition to the state on 1st May, 1886, for the tax of 1885, assessed to Breaux and Duperier to be null and void and of no effect; and that the adjudication and tax-deed made to the defendant Justinien Michel of said property, on June 1, 1889, under Act 80 of 1888, be declared null and void; and it is further ordered that the plaintiff be declared the true and lawful owner of said property, that he be placed in peaceable possession of the same, and that the injunction herein be perpetuated; defendants to pay all costs.

BREAUX, J., recuses himself.

ON REHEARING.

The defendants' counsel failed to call our attention in his brief and argument to the fact which led to the error in the decree, and which is now urged as a reason for granting a rehearing. It will not be necessary to reopen the case to correct the error. There was no controversy in dispute as to the description of the property. The case was argued and submitted on the assumption that McWilliams, the plaintiff, had acquired title to lots 10, 11, 12, 13, 14, 15, and 17 from the succession of Mille. These lots were assessed to McWilliams from 1881 to 1884, inclusive. Defendants now call attention to the fact that lots 10, 16, and 17 were not adjudicated to the plaintiff in the sale of the property in said succession to effect a partition. An examination of the succession proceedings shows that they are correct. Plaintiff, however, does not claim lot 16. Lot 10 was not sold to the defendants at tax-sale, June 1, 1889. Lot 17 is the only part of the description of the property about which there can be any controversy between plaintiff and defendants. Lot 10 was assessed to the plaintiff by the state, and adjudicated to her in 1883. It was never sold to the defendants. He has therefore no interest in it. The decree in this case is therefore amended so as to strike out lot 17 from the description of the property in the decree. In all other respects it is to remain undisturbed. Rehearing refused.

(23 Fla. 793)

STATE *ex rel.* BOARD OF PUBLIC INSTRUCTION v. COUNTY COMMISSIONERS OF VOLUSIA COUNTY.

(*Supreme Court of Florida.* Oct. 31, 1891.)

SCHOOL TAX—LEVY BY COUNTY COMMISSIONERS—POWER TO LOWER RATE — MANDAMUS — WHEN DENIED.

1. The fourteenth paragraph of section 20 of the school law of June 8, 1889, (chapter 3872 of the Laws,) which provides that the county school boards shall prepare itemized estimates of the amount of money required for the maintenance of the necessary common schools, and state the amount in mills on the dollar of the taxable property; and the tax levy act of June 9, 1891, (chapter 4012,) providing that the county commissioners shall levy other county taxes, and a tax for county school purposes, such tax to be estimated by the school board and submitted to the commissioners for their approval or disapproval, who shall have the power to increase or lower, within specified limits, the estimate so made; and the thirty-fifth section of the general revenue law of June 10, 1891, (chapter 4010,) enacting that the commissioners shall determine the amount to be raised for all county purposes, except school purposes, and enter upon their minutes the rate to be levied for each fund, respectively, and shall ascertain the aggregate rate necessary to cover all such taxes, including such rate as may have been levied by the school board, —are *in pari materia*, and to be construed as one act; and the thirty-fifth section of the last-named act does not deprive the commissioners of power to lower the rate of taxation on taxable property estimated by the school board, where such reduction does not affect the amount of money fixed by such board as necessary for the schools, even if it prevents any change of such amount,—a point not presented by the record.

2. A writ of *mandamus* will be denied, where no violation of official duty is shown.

(*Syllabus by the Court.*)

Appeal from circuit court, Volusia county; JOHN D. BROOME, Judge

Petition for writ of *mandamus* by State ex rel. Board of Public Instruction of Volusia county against the county commissioners of Volusia county. Judgment for defendants. Relators appeal. Affirmed.

B. M. Miller and *E. K. Foster*, for appellants. *J. D. Broome, Jr.*, for appellees.

RANEY, C. J. The petition for the writ of *mandamus* states that the board of public instruction of Volusia county met on the last Monday in June, the 29th day of that month, of the present year, for the purpose of preparing an itemized state-

ment showing the amount of money requisite for the maintenance of the necessary common schools of the county for the ensuing scholastic year, and for the purpose of making a levy therefor: and then, at the request of the board of county commissioners, and for the purpose of conferring with the latter board at its next meeting to be held on the 7th day of July, adjourned to that day; on which day the former board met, and prepared an estimate and levy of the amount so required for the maintenance of the schools, and presented such estimate and levy to the commissioners, and requested them to levy and assess a tax of five mills upon the dollar of the taxable property of the county for the purpose aforesaid, and to report such estimate and levy to the assessor of taxes. The transcript of the record of the proceedings of the school board on the day last named, which transcript is made a part of the petition, shows the following action:

"On motion, the following estimate for the current year's expenses was made:

For salary of teachers	$17,800
For furniture, repairs, and new buildings	2,500
For school board and mileage	250
For superintendent	1,000
For school-books and freight	1,800
For miscellaneous expenses	250
Total	$23,650

And, in accordance with the law, the above estimate was presented to the board of county commissioners, with the request that they levy a tax of five mills on the dollar for school purposes."

The complaint of the school board is that the commissioners refused to make a levy of five mills, or to report to the assessor of taxes "the amount and rate of the estimate and levy" so made by the former board, but made a levy of three and three-quarter mills, which they instructed the assessor to enter upon the assessment, which instruction the assessor has obeyed. The prayer of the petition is, in effect, for a *mandamus* commanding the commissioners to do what it is complained they have not done.

The petition seems to have been treated as an alternative writ, which is the declaration in such cases, and was answered by the commissioners, who state that their action was taken on the 4th day of August of this year, and pursuant to the provisions of an act approved June 9, 1891, (chapter 4012, Laws,) given below. The school board's response to this is, practically, though not in form, a demurrer, and has been so treated by the circuit judge.

The fourteenth paragraph of section 20 of the school law, approved June 8, 1889, (chapter 3872, Laws,) provides that the board of public instruction in each county shall, on or before the last Monday in June of each year, prepare an itemized estimate, showing the amount of money required for the maintenance of the necessary common schools of their county for the next ensuing scholastic year, stating the amount in mills on the dollar of the taxable property of the county, which shall not be less than three nor more than five mills, and furnish a copy of the statement to the assessor of taxes of the county, and file a copy in the office of the board of public instruction, and the assessor shall assess the amount so stated, and the collector shall collect the amount assessed, and pay over the same monthly to the county treasurer, to be used for the sole benefit of the public schools.

"An act to provide for the levy of taxes for the years 1891 and 1892," approved June 9, 1891, (chapter 4012, Laws,) and by its terms taking effect upon such approval, ordains that the board of county commissioners of every county, at a meeting for correcting and reviewing the county assessment, shall immediately thereafter determine the amount of money to be raised by tax for county purposes, including current expenses, interest on the bonded debts, bridges, and county buildings; and to meet these expenses they are authorized to levy a tax, not exceeding five mills on the dollar, on real and personal property of the county, and that every such determination and levy so made shall be entered at large upon the record of the board; and it is also provided that the commissioners "shall levy a tax not to exceed five mills, nor less than three mills, on the dollar, on real and personal property of the county, for county school purposes; such tax to be estimated by the county school board, and submitted to the board of county commissioners for their approval or disapproval, and the county commissioners shall have the power to increase or lower the estimate so made within the above limits."

The thirty-fifth section of "An act for the assessment and collection of revenue," approved June 10, 1891, (chapter 4010, Laws,) which act did not go into effect "until sixty days from the final adjournment of the session of the legislature," (section 18, art. 3, Const.,) which adjournment took place on the 5th day of the same month, provides that the county commissioners shall determine the amount to be raised for all county purposes, except for school purposes, and shall enter upon their minutes the rate to be levied for each fund, respectively, and shall ascertain the aggregate rate necessary to cover all such taxes, including such rate as may have been levied by the county board of education for school purposes, and report the same to the assessor, who shall carry out the full amount of taxes for all county purposes under one heading in the assessment roll to be provided for that purpose; and the county commissioners shall notify the clerk and auditor of the county, also the treasurer thereof, of the amount to be apportioned to the different accounts out of the total taxes levied for all purposes.

Respondents rely, as indicated above, on the act of June 9th of the present year, (chapter 4012,) and relators contend that this statute was modified by the thirty-fifth section of the general revenue law, (chapter 4010,) approved June 10th, which they say was, in effect, on the 4th day of August, when the commissioners took the action complained of. Respondents further urge that, as the legislature did

not adjourn until the 5th day of June, the last-mentioned statute did not go into effect until August 5th, or the day after the levy by the commissioners.

To ascertain the real intention and meaning of the legislature of 1889, we must consider any legislation there may be of that year bearing on the same subject that the fourteenth paragraph of the twentieth section of the school law of that year relates to. In "An act to provide for the levy of taxes for the years 1889 and 1890," approved June 3, 1889, (chapter 3849,) the county commissioners are given powers, as to other taxes than those for school purposes, similar to those given by the tax levy act of 1891, (chapter 4012, supra;) and as to school taxes it was enacted that the county commissioners should "levy a tax not to exceed five mills, nor less than three mills, on the dollar on the real and personal property of the county for county school purposes, such tax to be estimated by the county school board, and submitted to the board of county commissioners for their approval or disapproval; and the county commissioners shall have power to increase or lower the estimate so made within the above limits."

The above provisions as to school taxes in the two acts of 1889 are *in pari materia*, and they are to be construed together, the same as if they were in one statute. See authorities infra. Considering them together, there is not only no irreconcilability between them, but no obscurity as to their meaning, or as to the purpose of the law-makers. The meaning and purpose were that the school board should, as directed by the school act, on or before the last Monday in June, prepare the itemized statement of the amount required for the maintenance of schools, stating also the amount in mills on the dollar of the taxable property; but this estimate was, by the tax levy act of the same year, rendered subject to the approval or disapproval of the commissioners, and to be increased or lowered by them. The duty devolved by the latter act upon the school board, of submitting the estimate to the county commissioners, was to be performed, as was the revising duty of the commissioners under the same act, before the school board could or should perform the other duties devolved upon it by the subsequent provisions of the given fourteenth paragraph of section 20 of the school law.

Such being the effect of the law and the purpose of the legislature, as shown by the legislation of 1889, the disposition of the case presented by this record is not difficult. Assuming that the thirty-fifth section of the general revenue law of 1891, (chapter 4010, supra,) was in force on the 4th day of August of this year, there is in it nothing inconsistent with the power of the county commissioners to reduce the rate of taxation on taxable property estimated and submitted, under the tax levy act of 1891, (chapter 4012, supra.) Even if it be that the effect of the thirty-fifth section in excepting school taxes from the direction of the commissioners to "determine the amount to be raised for all county purposes" is to limit the revisory powers which the commissioners would have if the school law of 1889 and the tax levy act of 1891 stood alone, by preventing any interference with the determination or discretion of the school board as to the amount of money requisite for the necessary common schools, it has not the effect to take from the commissioners the power to increase or lower the rate of taxation. This is clearly the effect of the latter act, notwithstanding anything in the "thirty-fifth section." The tax levy act makes it the duty of the school board to submit "the tax estimated by" it to the commissioners for their approval or disapproval, and the county commissioners have power to increase or lower the estimate so made, within specified limits. Whether, in view of the exception, by the thirty-fifth section, of school taxes from the duty of the county commissioners as to determining the amount to be raised for county purposes, the submission for approval or disapproval to be made by the school board of "the tax estimated" by them, and the power of the commissioners to increase or lower the estimate so made, include the "amount of money required for the maintenance of the common schools," we do not feel called upon to decide, but we are entirely satisfied that they do include the rate of taxation which the school board are required by the act of 1889 to state. When this thirty-fifth section says that the county commissioners shall determine the amount to be raised for all county purposes, it means it shall do so in accordance with the provisions of the tax levy act of 1891, or, in other words, shall perform the duty as to such taxes imposed by that act, and, in excepting school taxes from such duty of determining the amount to be raised for county purposes, its purpose was not more than to avoid any conflict with the provisions of the fourteenth paragraph of the twentieth section of the school law, as to the duties and powers of the school board in the matter of "preparing an itemized estimate showing the amount of money required for the maintenance of the necessary common schools for the next ensuing scholastic year;" and when it says that the commissioners shall ascertain the "aggregate rate necessary to cover all such taxes, including such rate as may have been levied by the county board of education for school purposes," the words, "including such rate as may have been levied by the county board of education for school purposes," are not used as granting power to the county school board, but as words of reference or of description of the tax, and they refer at least to the rate fixed for school purposes in accordance with law; that is, by the school board under the supervisory power of the county commissioners. In determining how the rate of taxation for county school purposes is to be fixed, we have no more right to ignore the provisions of the tax levy act of 1891, requiring that the county commissioners shall "levy" the tax, and that it shall be a tax previously estimated by the school board, and submitted to them by it for their approval or disapproval, with power in the commis-

sioners to increase or lower the tax or estimate so made and submitted, than we have to close our eyes to the provision of the school law as to the school board preparing the itemized estimate of the amount required with the statement of the amount in mills. If it be that the thirty-fifth section of the general revenue law was not in force, and for that or other reason is not applicable to taxes of the present year, then the effect of the tax levy act of this year upon the provision of the school law discussed above is the same, at least in so far as the rate of taxation is concerned, as was the tax levy act of 1889. Of course, if the thirty-fifth section is not applicable to these proceedings, there was no law making it the duty of the county commissioners to make the "report" to the assessor of taxes, provided by such section, or interfering with the provision of the fourteenth paragraph of the twentieth section of the school law, (as modified by the tax levy act of 1891,) as to the school board furnishing a copy of the statement to the assessor.

Assuming that the power of the county commissioners extends only to altering the rate of taxation, the petition does not show that they have acted either illegally or improperly in lowering the estimate, or even that the rate of taxation fixed by them will not produce an amount of money equal to the aggregate of the itemized statement. No *prima facie* case is made by the petition; no omission or violation of duty shown. High, Extr. Rem. §§ 449, 450. The "meeting" of the county commissioners "for correcting and reviewing the county assessment," mentiond in the tax levy act of 1889, as well as that of 1891, (chapters 3849 and 4012, supra,) is the meeting provided for by the general revenue law; and the day fixed for its commencement by such law, as it stood in either 1889 or 1891, was no earlier than the first Monday in July, (see chapters 3849, 3861, 4010, Laws,) even if it can be said that the last of these chapters could have had any effect at that time. Of course, any estimate of the rate of taxation made by the school board on the last Monday in June must, in view of the powers of the commissioners as to altering valuations of property at their subsequent meeting, necessarily be of doubtful accuracy, even assuming that the assessor was so well up with his assessments or books as to inform the school board of the aggregate of his valuation of the taxable property in the county.

The fact that the general revenue law was approved by the governor one day after the approval of the tax levy act does not make the former statute work a repeal of any part of the latter, or prevent their being construed as one act. The former passed the senate June 4th, and the house of representatives the next day, and the latter passed both houses on the latter day. They are, by their nature, *in pari materia*, and should be so construed. Florida, A. & G. C. R. Co. v. Pensacola & G. R. Co., 10 Fla. 145; State v. Brown, 19 Fla. 563, 593–595; State v. Palmes, 23 Fla. 620, 3 South. Rep. 171; Ex parte O'Donovan, 24 Fla. 281, 4 South. Rep. 789; Forbes v. Board, 27 Fla. —, 9 South. Rep. 446; Attorney General v. Railroad Co., 35 Wis. 425.

The judgment is affirmed.

(23 Fla. 755)

LONG *et ux.* v. HERRICK.

(*Supreme Court of Florida.* Oct. 16, 1891.)

DISMISSAL OF APPEAL — FAILURE TO FILE TRANSCRIPT.

Where the appellant fails to file in the supreme court, within the time required by law, a transcript of the proceedings of the lower court subsequent to a decree of the former court in the cause, there being a stipulation that the transcript on the former appeal shall be used for all purposes necessary to the second, and good cause for the laches is not shown, the appeal will be dismissed on motion of the appellee, and damages be allowed as for an appeal taken merely for delay.

(*Syllabus by the Court.*)

Appeal from circuit court, Volusia county; JOHN D. BROOME, Judge.

Action by Emma Herrick against H. J. Long and wife. Judgment for plaintiff. Defendants appeal. Motion to dismiss granted, and damages allowed.

A. M. Thrasher and *Fred T. Myers*, for the motion. *John W. Price*, opposed.

RANEY, C. J. The decree was rendered October 3, 1890, and the appeal therefrom to the January term, 1891, was entered on the 18th day of the same month, the *supersedeas* bond being approved and filed on the same day, but the citation was not served till the 29th day of December. No appeal transcript was filed at the January term. On May 8, 1891, the solicitors of appellants and appellee entered into an agreement in writing that certain copies of the papers and proceedings in the cause subsequent to the decree of this court, when the case was formerly here on appeal, (26 Fla. 356, 8 South. Rep. 50,) should be re-established as the record in the cause, and certified as such. On the same day they also agreed in writing that the transcript filed on the former should be used for all purposes necessary to the present appeal, stating that this agreement was made on account of the loss of the original record. On the 12th day of August, at the present term, the appellee moved to dismiss the appeal, and for damages as for a frivolous appeal, because no transcript of the record of the proceedings had been filed as required by law and the practice of the court, and because no petition of appeal had been filed, and also that the appeal is frivolous and taken for delay. Upon the presentation of the motion about the time of its entry we concluded to adjourn the consideration of it to a future day, and required notice to be given to the appellants. Notice was given that the application would be renewed on the 15th day of the present month, (October.) Counsel for appellants has filed a statement, which he seems to have intended to swear to, but did not, in which he asserts that shortly after taking the appeal he called on the clerk to make a copy of the proceedings, and was told by him that counsel for appellee had the papers, and also called subsequently several times for the same purpose, and

received the same answer, and that some weeks thereafter the deputy-clerk told him that counsel for the appellee disclaimed having the papers. He then states that some weeks thereafter counsel for appellee consented to the re-establishment of the papers, as indicated above, and that the clerk was requested to certify the same to this court. That soon after the appellants called to pay the costs of such copies, and have them sent up, and was then informed "that counsel for appellee had obtained them, and paid the bill for copying," and, as we understand his meaning, that they were sent to this court. There are also statements as to the docket fee and the petition of appeal, accompanying the above statement, which need not be noticed.

It is true that counsel for appellee has during the present term filed a transcript of the proceedings taken in the cause subsequent to its disposition on the former appeal, but he did not do so in behalf of the appellants, nor to have the cause heard as if appellants had done so, (Sup. Ct. Rule 17;) but, as is apparent from his conduct, to use it as a basis for this motion, (U. S. v. Fremont, 18 How. 30.) It was the duty of appellants, after the agreement of May 8th, to procure and have filed promptly, as they might have done, during that term of this court, a transcript of the re-established proceedings, but they and their counsel failed to do so even during the present term, and not only up to the time of the entry of the motion to dismiss, but, we may remark, also up to the present time. The agreements of May were made for benefit of appellants, and the one stipulating that the transcript of the former appeal might be used should not operate to the disadvantage of the appellee, nor is it to be imagined that she would have made it, except upon the implied understanding that the transcript of the subsequent proceedings would be promptly filed here. Her purpose was to facilitate the perfection of the appeal in order that the cause might be disposed of, but the appellants' conduct shows a marked indifference to this consummation. In view of their laches as to filing the transcript of the subsequent proceedings, they are entitled to no more consideration than if the agreement as to the old transcript had not been made. No "good cause" for the laches is shown. We not only think that the appeal should be dismissed, but also, following the practice in Richards v. Nail, 8 Fla. 369; Stafford v. Anders, 10 Fla. 211; Williams v. La Penotiere, 25 Fla. 473, 6 South. Rep. 167,—that damages should be allowed the appellee because the appeal has been taken merely for delay. The agreement as to the original transcript constitutes, in view of the appellants' conduct, no exception to the rule established by these cases. The amount of money whose payment has been arrested by this appeal and *supersedeas* was at the time at least $450. The sum of $30 will be allowed the appellee as damages, to be collected in the same manner as the amounts decreed the appellee in the lower court.

It will be ordered accordingly.

(22 Fla. 763)

HAWORTH *et al.* v. NORRIS *et al.*

(*Supreme Court of Florida.* Oct. 24, 1891.)

HUSBAND AND WIFE—COMPETENCY AS WITNESSES—COMPETENCY OF PARENT — ESCROW — PAROL EVIDENCE—QUIETING TITLE.

1. In civil actions, other than divorce cases, as the law stood in this state after the legislation of January 29, 1885, (chapter 3582 of the Laws,) and before the act of June 4, 1891, (chapter 4029 of the Laws,) a husband was, on account of the marital relation, not a competent witness either for or against his wife, but the wife was a competent witness for or against her husband in a case where he was a party and could himself testify; and the disqualification of the husband, as such, to testify for or against his wife did not of itself disqualify him from testifying as to his own interest where they were both parties, nor did such relation disqualify her from testifying as to her interest in the case.

2. Neither a father nor a mother is disqualified by the parental relation as a witness for or against a son.

3. Delivery to a third party is essential to an escrow.

4. Parol evidence is admissible to prove that a deed was never delivered to the grantee, or that it came into his possession accidentally or by mistake, or contrary to the intention of the parties, or by fraud, or otherwise illegally; but it is not admissible to show that an actual delivery to the grantee of a deed absolute upon its face was made under any agreement that a condition not expressed in the deed should be performed, and that the deed should not be operative until or unless such condition should be performed. The reason of such inadmissibility of parol evidence is that its effect would be to contradict a written instrument absolute upon its face by showing, contrary to its terms, that it was not absolute, but conditional.

5. A bill in equity to remove a cloud upon title to land cannot be sustained when the evidence shows that the land was at the time the bill was filed in the possession of the party complained of and claiming to hold under the deeds constituting the cloud. The remedy is at law.

(*Syllabus by the Court.*)

Appeal from circuit court, Duval county; JAMES M. BAKER, Judge.

Bill in equity by Eli Haworth and wife and Alphonso Haworth against Fannie M. Norris and another, to remove a cloud from title. Decree for defendants. Complainants appeal. Affirmed.

STATEMENT BY THE COURT. The bill in this cause was filed October 15, 1885. The complainants are Eli Haworth and his wife, and Alphonso Haworth, their son, and its material allegations are in substance as follows:

(1) That on October 20, 1877, Eli and his wife, at the solicitation of the defendant Emma Reed, then Emma Livingston, she having subsequently intermarried with the defendant Henry W. Reed, executed to said Emma a deed of a described five acres of land, situate in Duval county, and being a part of the Davies grant, previously owned in common by said Eli and one Keeler, and subdivided in 1875; and that in consideration of such deed to said land, if the same should be thereafter joined in and adopted by Alphonso, the said Emma covenanted and agreed to pay to complainants $500, and to teach Alphonso in the English branches until he should acquire a fair English education. That previous to making this deed to Emma the complainant Eli, on September 20, 1875, he then being the owner of said land, made a

deed of the same to Alphonso, in which deed the said Ann did not join, but she retained her dower interest in the land; and that this deed was not recorded until February 19, 1878, but was shown to the said Emma, and she was fully informed of its contents at the time of the execution of the deed to her. That Emma represented to Eli and Ann that she could get the money which she had agreed to pay to them for said land from her father, whom she represented as then being in the state of Illinois, but that she wanted the deed made to her as aforesaid, to show to her father, to induce him to advance the said money, and that for that purpose alone, and before the consideration had been paid or performed, Eli and Ann delivered the deed to Emma; but she could not and did not obtain the said money from her father, and was aware that she could not at the time she made said promise and statement, and that she never has paid the consideration, or performed the part thereof to be performed in services, but utterly failed and refused so to do, although requested so to do by Eli and Ann. That the said Emma, although she promised to return said deed to complainants if the said funds were not procured from her father and paid to "your orators and oratrix" as aforesaid, yet she did not return, but refused to return, the deed "to your orators and oratrix;" and, contrary to the agreement on which it was given to her, and without ever paying or performing the consideration for the same, she had and procured the deed to be recorded in the records of said county, and undertook to claim title to the said land under the deed thus obtained by fraud, deception, and misrepresentation, although she was never in possession of said land.

(2) That on April 11, 1885, the said Emma and her husband, Henry, a defendant, in pursuance of said design to defraud your orators and oratrix, and to assert title under said fraudulent deed, made and executed, for some small insignificant sum, —the exact amount being unknown, but greatly less than the value of the land,— to the defendant Fannie M. Norris, wife of Caius S. Norris, a deed of said land, and Norris and wife took the title and deed with full knowledge of the above-mentioned fraud and misrepresentation of said Emma in procuring and recording the deed to her, and also with full knowledge of the right and title of Alphonso in the premises.

(3) That none of the defendants have ever had the possession or control of said lands, but Alphonso was in possession of the same at the time the deed was made to said Emma, and has been ever since, and is now, in possession thereof.

(4) That Alphonso was ready and willing at the time of the making of the deed by Eli and Ann to confirm and adopt said transaction, and make a deed of said land to said Emma, if she would carry out in good faith her said contract of purchase; but she has utterly and entirely failed so to do, and never intended so to do, but made said promise and covenant solely for the purpose of getting into her possession the deed as aforesaid.

(5) That your orators and oratrix frequently notified Norris and his wife of the fraudulent character of the deed held by Emma, and how she had obtained the same, before the pretended purchase by said Fannie, which pretended purchase is charged to be but a part of a common design between all of the defendants to use and claim title under said deed obtained by fraud and deception, and without consideration, as aforesaid.

(6) That the name of Fannie M. Norris is inserted in the deed from Emma, but, as your orators and oratrix are informed and believe, and so charge, the alleged purchase was made by Caius, and for his benefit, and that he has informed your orators and oratrix since the date of said deed that he claimed the right and title to said land under said deed.

(7) That Norris and his wife are going upon and trespassing upon the said land and cutting the wood and timber from the same, and are now attempting to carry off the wood and timber heretofore cut by them, and, although warned not to further trespass upon the land, or cut timber or wood from the same, still continue so to do. That the wood and timber on the land constitute a large part of its value, and such value will be greatly lessened by such cutting and removal. That defendants are asserting to the public that they claim the title to the land, and are thereby injuring complainants' title thereto, and depreciating its value, and preventing any sale of the same by "your orators and oratrix," and the said deeds upon the records cast a cloud upon the title of "your orators and oratrix."

(8) That the defendant Fannie, being a married woman, cannot be sued at law, and that no judgment obtained at law against her husband, Caius, can be made and collected by an execution issued out of a court of law against him.

(9) The prayer of the bill is for an injunction restraining defendants from claiming or asserting title to or bringing suit for the land under the said deeds, and from going on or trespassing upon the same, and from conveying or incumbering the same, and for a surrender of such deeds for cancellation by any of the defendants having the same, and for general relief and subpœna.

On the day the bill was filed a temporary injunction in accordance with the prayer of the bill was issued, the same having been served on Norris and wife on the 17th day of the same month.

On the 7th of December Reed and wife answered the bill, stating that the deed from Haworth and wife to said Emma was executed on the 27th of October, 1877, and recorded on November 19th following.

She, answering of her knowledge, and her husband on information and belief, states the facts and circumstances as to the execution of the deed to be as follows:

That several weeks before the deed was executed to her she had "refugeed" from Jacksonville, Fla., where she then temporarily resided, for the benefit of her health, to the beach below Mayport, in said county, as the yellow fever was then

prevailing, or supposed to prevail, in Jacksonville. That she boarded a few weeks at the Atlantic House, on said beach, and, meeting said Eli and Ann, she was prevailed upon to leave said house, at that time especially exposed to equinoctial storms, and take board at the residence of the said Eli at the old Pablo Plantation, in said county. While there, the said Eli having been attracted by certain letters written by her from Palatka, St. Augustine, and Jacksonville, in this state, respecting Florida, its climate and other advantages, and published the preceding winter and summer in the Cairo, Ill., and St. Louis, Mo., newspapers, he proposed to her to write a single article for the purpose of calling attention t · the lots of land lying along the beach below Mayport, owned and claimed by the said Eli, who in that connection referred to a newspaper correspondent, who, as the said Eli said, had previously published an article respecting the landed possessions of the said Eli, to whom, for his services aforesaid, he, the said Eli, had conveyed a lot of land on the said beach, and the said Eli offered to defendant Emma, if she would write an article in that vein, to make a conveyance to her of a lot of five acres of land of his premises, removed from the beach, as might be preferred by her. That the proposition was thereupon accepted by her, and she thereupon prepared an article, which was subsequently published in the Semi-Tropical, a periodical then published in Jacksonville, and which was satisfactory to Eli and Ann, and they thereupon cheerfully and without solicitation on her part, and in execution of said agreement, executed and delivered to her the deed of conveyance, which she accepted in full satisfaction and execution of said agreement to convey, and there was no other consideration for said land paid or performed or agreed upon.

That there was no condition whatever, expressed or implied, annexed to said deed, nor was there any provision that the said Alphonso should then or subsequently join in or otherwise assent to its execution, but the deed was delivered to her absolutely and unconditionally, and the statement in the bill as to Alphonso joining in the execution of the deed is untrue and an after-thought.

That so far from Alphonso's then asserting any claim to the lands so conveyed to said Emma, or any right or power to control a conveyance of the same, the said Eli and Ann, on the day the deed was executed to said Emma, executed, in the presence of the witnesses who attested this deed, and acknowledged before the officer who took and certified the acknowledgment of the same, a deed of conveyance to the said Alphonso, and this deed to him refers to and bounds on one side the premises so conveyed to him by the premises so conveyed to said Emma, and said deeds were duly recorded in the proper office of said county, that to Alphonso immediately following that to Emma. Certified copies of these deeds are annexed to the answer as part thereof.

That the transactions resulting in the deed to Emma were in all respects fair, free from fraud, indirection, and misrepresentation on the part of Emma, and were fully understood in all their parts by all the parties thereto at the time they were so consummated in the execution of said deed.

That shortly after the deed to Emma and the said deed to Alphonso were executed as hereinbefore shown, Alphonso went with Emma to said land, and pointed out said lands and the boundaries which separated the land of Emma from those so conveyed to Alphonso, and he was then and there exuberant in expressions of satisfaction that his father had executed the said deed to him.

That, as they are advised and believe, the lands conveyed to said Emma could not at the time of such conveyance have been sold for more than $10 per acre, and said Emma avers that she would not at the time have paid in cash $50 for the same, and she avers of her own knowledge that the consideration of $50 was inserted in said deed solely at the instance of said Eli, without any suggestion whatever from the said Emma, she supposing that the service rendered him as hereinbefore shown was valued by him at that sum.

The answer responds expressly to all allegations of the bill inconsistent with the above defense, and in effect denies or traverses all of them, and the whole case made by the bill. It also states that the respondents supposed they were in possession of said land so sold to said Emma, —the said Emma down to the time of her marriage in May, 1880, and these respondents since that time to the date of their deed to said Fannie Norris. That on the 11th day of May they sold and conveyed said land by deed duly executed and recorded to said Fannie for the sum of $150, which was duly paid, and was the fair and full value of said land. That the lands had been in market for several years before, and the highest bid was made on behalf of Mrs. Norris, to whom it was sold; and that in making such sale no thought or reference to the complainants was entertained, nor any suspicion that their deed would be assailed.

That said Emma resided to the time of her marriage, since said sale to her, in the state of Florida, and, since her marriage, in Waycross, Ga. She also affirms her solvency.

The answer of Caius S. Norris and his wife, Fannie, practically adopts upon information and behalf that of Reed and wife, stating, however, that they understood up to the institution of this suit that the consideration for the deed to Mrs. Reed was $50, as expressed therein, and that it had been paid, and that they never knew anything to the contrary until hearing the bill read, and averring that the value of the land was at the execution of said deed not more than $10 per acre. That not until October 13, 1885, upon sundry threats being made by said Eli to Caius, did they hear of any claim adverse to the title of said Emma. That some time after the execution of the deed to said Emma they heard some indefinite

rumors as to the said Alphonso having a deed from the said Eli, other than that executed October 27, 1877, and thereupon Caius went to the county records, and made diligent search for the rumored deed, but was unable to find any record of a deed to Alphonso than that of the deed of October 27th, and that, excepting such indefinite rumor, respondents never heard of the alleged deed of September 17, 1885, until hearing the bill in this cause read. That, so far from suspecting that Alphonso had any claim to said land, they, upon the land being conveyed to said Fannie, went to Alphonso in person, and told him of the purchase, and asked him if he knew where the boundaries to the Livingston tract were, and Alphonso answered that he did not know exactly where the boundaries were, as they had never been run by a surveyor, but that any one who could run a line with a compass could find the boundaries. That he owned the balance of the lot of which the Livingston tract was a part, for which his father had executed to him a deed on the day the Livingston tract was deeded to said Emma; and further said that one Scull was enough of a surveyor to run the said lines, and that he, Alphonso, was too busy with spring planting to meet said Norris and Scull and run the lines, which could be run without his assistance; and that defendants had a fine piece of land in the Livingston tract.

They admit that on April 11, 1885, Reed and wife conveyed the land to said Fannie, but deny that there was any design on the part of the co-defendants, or either of them, to defraud complainants, and each and every allegation of the bill to the effect that respondents, or either of them, has been or is aware of any fraud, deception, or misrepresentation on the part of said Emma or her husband. They say the conveyance was fair in every respect, and that the consideration was $150 cash, paid to Reed and wife, and that this was the fair and full money value of the land.

There are other features of the answer, some of which, as far as they are material to the case, will be noticed in the opinion.

C. P. & J. C. Cooper, for appellants. *A. W. Cockrell & Son*, for appellees.

RANEY, C. J. The defendants objected before the master who took the testimony to the competency of Eli Haworth and his wife, two of the complainants, as witnesses in support of the case made by the bill, on the ground of their marital relation, and the circuit judge sustained the objections and excluded their evidence. The correctness of this ruling is assailed by counsel for appellants.

The statutes in force at the time of the ruling complained of are those of February 4, 1874, and March 7, 1879, and January 29, 1885. The first of these (McClel. Dig. p. 518, § 24) provides that no person offered as a witness in any court or before any officer acting judicially shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto. There is a proviso, but it need not be noticed, as the case before us does not fall within any exception made by it to the general rule removing the disqualification of interest or parties. The second act (Id. p. 517, § 23) is as follows: "In the trial of civil actions in this state married women shall not be excluded as witnesses in cases where their husbands are parties and allowed to testify." The third act (Laws 1885, c. 3582, p. 24) is that in all actions for divorce or alimony in this state it shall be competent for the parties to testify, but no decree is to be granted upon the testimony of husband or wife alone. The legislation of the present year (Laws 1891, c. 4029, p. 56) cannot be considered.

In McGill v. McGill, 19 Fla. 341,—a divorce case, decided in 1882,—it was held that the common-law exclusion of a husband or wife as witnesses to affect the rights or interests of the other was not solely on grounds of property interest, but on ground of public policy, for the protection of the marriage relation, and that the statutes then in force—those of 1874 and 1879, supra—did not change the common law excluding husband and wife from testifying in a suit for divorce. It is, however, observed in the opinion—and, in our opinion, correctly—that these statutes innovate upon the rule of the common law to the extent that interest in the event of an action or merely being a party shall no longer exclude a witness from testifying, and that in civil actions married women are not excluded in cases where their husbands are competent witnesses. In Schnabel v. Betts, 23 Fla. 178, 1 South. Rep. 692, and in Storrs v. Storrs, 23 Fla. 274, 2 South. Rep. 368, the competency of the husband to testify in a civil action to which the wife was a party was before the court. The former case is one in which it was sought to charge the separate real property of Mrs. Schnabel with the value of improvements erected on it, and it was held that the statute of 1879 did not so modify the common law as to extend to the husband the right to testify for or against a wife in a civil suit against her. The Storrs Case is one in which the wife, by her next friend, filed a bill against her husband and his judgment creditor, to protect her alleged separate property from sale in satisfaction of the judgment, and it was decided, overruling the lower court, that the husband was not a competent witness to prove that the property levied on was hers.

The true principle of the common law, as disqualifying either a husband or wife as a witness where the other is a party to or interested in the event of the suit, is not the interest of the one offered as a witness in the event of the suit, but is public policy, founded on the preservation and peace of the marriage relation, (Hasbrouck v. Vandervoort, 9 N. Y. 153; Lucas v. Brooks, 18 Wall. 436; Whart. Ev. § 430;) and hence the removal of the disqualification of interest or of being a party to a suit does not affect the disqualification of husband and wife as a witness to a suit in which the other is interested or a party.

Our law-making power had seen fit to provide by the act of 1874 that neither interest in the result nor being a party to

the suit should, in cases not within its proviso, disqualify any person as a witness; and hence, if a husband was a party, he was not disqualified from testifying as to his own interest, even though his wife were a party, but he could not testify as to her interest if she was a party, or interested in the result; and likewise, under this act, if a wife was a party, or interested in the result, she could testify as to her own interest, (Williams v. Railroad Co., 26 Fla. 533, 8 South. Rep. 446;) but it did not extend to her any competency in excess of that given to a husband. The act of 1879, however, did extend to her additional competency. It says that wherever the husband is a party, and allowed to testify, the wife shall not be excluded as a witness. The purpose of this act was to remove the common-law disability as wife, which at the time of its enactment remained unaffected by prior legislation; so, wherever the husband was a party to a suit, and its character was such that his interest therein or connection with the suit would, under the act of 1874, not disqualify him from testifying as to his interest, his wife ceased, by virtue of the act of 1879, to be disqualified, as wife, or on grounds of public policy, from testifying as to his interests. Of course, where the character of the case was one falling within the exceptions named in the proviso to the act of 1874, and the husband, though a party, could not testify, the public policy disqualification referred to adhered to the wife, and prevented her from testifying as to his interests. The act of 1879 does not in any manner affect the competency or incompetency of the husband as a witness. Schnabel v. Betts, supra. The act of 1885 has made a special rule for cases of divorce and alimony, and has done away with the public policy disqualification of both husband and wife to testify in those cases; and more need not be said of it here, as the cause before us is not within its scope. This was the *status* of the law at the time of the trial of this cause.

Proceeding to apply these principles, we see that the case before us is one in which the husband, Eli T. Haworth, has, upon the face of the bill, no interest in the land in controversy. In 1875, he, according to the bill, conveyed to his son, Alphonso, his entire interest therein, and as between himself and his son the deed by his wife and himself of October 27, 1877, to Miss Livingston, was of no effect as a conveyance, although, as to Miss Livingston, if she took it without notice of the deed to Alphonso, and as to Mrs. Norris, if either she or Miss Livingston took without such notice, it was valid and effectual. The only effect of this deed, judging from the contention of complainants' bill, is that it would constitute a relinquishment of the dower of Mrs. Haworth, and that with it the contemplated deed from Alphonso, conveying the legal title, would, when made, vest a perfect title in Miss Livingston, discharged of the dower claim. The record then showing no individual interest of the husband in the land, and he consequently being, in so far as the land is concerned, a party merely in right of his wife, any testimony his wife may have given is, as between him and her, to be regarded as concerning her own, and not his, interests. As a witness as to her right to a surrender of the deed as fraudulently obtained and affecting her dower interest, Haworth was clearly incompetent, his exclusion as husband on the grounds of public policy not having been removed by any legislation. Regarding the bill, in so far as the husband is concerned, as one for the surrender of the deed as one fraudulently obtained, Mrs. Haworth was a competent witness in his behalf, and he in behalf of himself. In so far as the ruling of the judge conflicts with these views it was erroneous. To prove the case made by the bill in favor of the complainant Alphonso both Mr. and Mrs. Haworth were admissible as witnesses, either in his behalf or against him. Any disability as witnesses in Alphonso's behalf that might have resulted from their being parties, or from Mrs. Haworth's dower interest, was removed by the act of 1874, and there is none other attaching to either of them as witnesses as to Alphonso's case.

II. We will now consider the case in so far as it may be regarded as affecting any rights of Mr. and Mrs. Haworth.

The deed of October 27, 1877, from Eli Haworth and wife to Miss Livingston, is one by the terms of which the former, "the parties of the first part," grant, bargain, sell, aliene, remise, release, convey, and confirm unto the party of the second part, Miss Livingston, her heirs and assigns forever, in consideration of $50, the receipt whereof is acknowledged, the described five acres of land, (a part of which description is that it is bounded "on the north and south by lands owned by the party of the first part,") and "the said party of the first part, for their heirs, executors, and administrators, covenant that the said party of the first part was at the sealing and delivery of these presents lawfully seised in fee-simple of a good, absolute, and indefeasible estate of inheritance" of and in the above-bargained premises, "and have good right and lawful authority to grant, bargain, sell, and convey the same; and that the party of the second part, her heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, restriction, or disturbance of the said party of the first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and incumbrances of what nature and kind soever." There is also a covenant of general warranty.

This deed is signed and sealed by Mr. and Mrs. Haworth, and duly witnessed. There is also a separate acknowledgment in due form, made by Mrs. Haworth before a justice of the peace, to the effect that she executed the deed for the purpose

"of conveying all her right, title, and interest in and to the land in said conveyance described and granted."

It may be remarked that the evidence does not establish the assertion of the bill that Miss Livingston was aware, at the time she obtained the deed, or when she is alleged to have agreed to pay the $500 for the purposes charged, that she could not get the money from her father. The testimony falls short of proving that she made any fraudulent representations with a view to obtaining possession of the deed, or that the possession of it was obtained through fraud, accident, or mistake, or contrary to the intention of the parties. Towner v. Lucas, 13 Grat. 705.

It is sought to prove by parol evidence that Miss Livingston promised to return this deed if the funds were not procured by her from her father and paid to Mr. and Mrs. Haworth, and that such was the understanding and agreement under which the deed was delivered to and received by her, and also that the deed was not intended as an absolute conveyance of the property, but only given to her in order that she might show it to her father, and thereby induce him to let her have the money. The introduction of parol evidence for such purpose was objected to. Independent of any question of the competency of witnesses, we are satisfied that parol testimony is inadmissible for the purpose. Mr. Haworth cannot testify in his own behalf, nor Mrs. Haworth in her behalf, nor any one in behalf of either or both of them, to this end. We do not deny that it may be shown in behalf of Alphonso that Miss Livingston and Mrs. Norris bought with knowledge of his rights, whatever they might have been; nor do we mean to question or infringe upon the liberal rule as to proving a consideration not named in a deed, but, in our judgment, parol testimony is not admissible to show the alleged understanding or agreement between Mr. and Mrs. Haworth and Miss Livingston as to returning this deed. This deed is a perfect instrument, and the sole repository or evidence of the language of the contract between these parties, and their meaning is to be ascertained from its language, as applied to its subject-matter. 1 Greenl. Ev. §§ 272, 282. That the personal covenants therein may not be binding on Mrs. Haworth, and that, in the absence of proof to the contrary, the presumption is that her interest in the land was no more than dower, still the contract is not a conditional one, even in so far as she is concerned, and parol evidence is not admissible to show that it is such. The effort here is not to show a delivery in escrow, for delivery to a stranger is essential to an escrow, (Worrall v. Munn, 5 N. Y. 229; Devl. Deeds, § 314 et seq.; Trust Co. v. Cole, 4 Fla. 359;) nor is it to prove that the deed was never delivered, or that it came into her possession without their knowledge or consent, or surreptitiously, or illegally, which, it seems, can be proved by parol. (Trust Co. v. Cole, 4 Fla. 359; Black v. Lamb, 12 N. J. Eq. 108; Black v. Shreve, 13 N. J Eq. 455; Roberts v. Jackson, 1 Wend. 478; Devl. Deeds, § 295.) While it can be thus shown that a deed was not to be delivered until a condition was performed, and that possession of it has been obtained improperly before the performance thereof, or by fraud, accident, or mistake, yet it cannot be shown by parol that an actual delivery was made under an agreement that a condition should be performed, and the deed should not be operative unless it was performed. In the former case the purpose and effect of the evidence is to show that there was no legal delivery, but in the latter the effect of the evidence offered is to contradict an instrument, absolute on its face, by showing, contrary to the terms of such instrument, that it was not absolute, but conditional. Devl. Deeds, §§ 295, 314; Black v. Lamb, supra; Black v. Shreve, supra; Ward v. Lewis, 4 Pick. 518; High School Co. v. Iowa Evangelical Synod, 28 Iowa, 360; Railroad Co. v. Pfeuffer, 56 Tex. 66; Lawton v. Sager, 11 Barb. 349; Williams v. Higgins, 69 Ala. 517; McCann v. Atherton, 106 Ill. 31; Arnold v. Patrick, 6 Paige, 310; Plankroad Co. v. Stevens, 10 Ind. 1; Miller v. Fletcher, 27 Grat. 403; Duncan v. Pope, 47 Ga. 445; Simonton's Estate, 4 Watts, 180; Towner v. Lucas' Ex'r, 13 Grat. 705; Watson v. Hurt, 6 Grat. 633.

It is not pretended, nor is the case upon the theory, that anything has been incorporated into the instrument or omitted from it contrary to the purpose and understanding of the parties, nor that the grantee's possession of it was not given voluntarily by the grantors therein; nor, saving the unsupported allegation that Miss Livingston knew that she could not get the money from her father, is it claimed that any element of fraud entered into her getting possession of it; nor that she acquired possession through accident or mistake, or before it was intended that she should have it. It is the case where a deed as absolute in its terms as language can make it has been voluntarily delivered; and it is now sought to incorporate in or annex to it, by parol evidence, an agreement which will render the operation of its terms conditional and contradict them. In Ward v. Lewis it is said: "It could not have been delivered as an escrow, because it was delivered to the parties. An escrow can be delivered only to a third person. It could not have been delivered to the parties conditionally, to take effect upon the happening of any future contingency, because this would be inconsistent with the terms of the instrument itself. * * * To permit parties to a deed purporting to be absolute to show by parol evidence that it was conditional, and to avoid it for a non-performance of the condition, would be not only a violation of the fundamental rules of evidence, but productive of great injustice and mischief." In High School Co. v. Iowa Evangelical Synod, the opinion, delivered by DILLON, C. J., observes in effect: The deed contains no words making the raising of a $25,000 endowment a condition of the grant, and there was no mistake in the deed, nor was it intended by either party at the time of the execution of the deed that it should contain any such condition, and the case was not one of a bill to cor-

rect the deed; and that it was therefore plain that it was incompetent to ingraft such a condition upon the conveyance by parol evidence. In Railroad Co. v. Pfeuffer it was held that parol evidence is not admissible to defeat a right to land conveyed by deed, when its object is to establish a condition subsequent; and also that the absolute grant by deed of right of way is not defeated by the failure of the grantee to comply with the conditions upon which the grant was obtained, there being no charge of fraud. In Lawton v. Sager the referee admitted parol testimony to show that at the time of the delivery of a deed of assignment for the benefit of creditors it was agreed between Sager, the grantor therein, and the grantee or assignee, that the latter should procure certain creditors, who had commenced proceedings against Sager as an absconding debtor, to discontinue those proceedings, and come in with other creditors under the assignment, and that, upon his failure to effect this arrangement, he was to return the assignment to Sager. It was held that the admission of this testimony was erroneous, and that, if it be intended that a deed shall not take effect until some subsequent condition shall be performed, or event happen, such condition must be inserted in the deed itself, or else it must not be delivered to the grantee; that parol evidence was admissible as to whether a deed had been delivered or not, but not to prove whether a deed when delivered shall take effect absolutely or only upon the performance of some condition not expressed therein. "To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence. This deed, being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held to be an absolute conveyance, operative from that time." The doctrine of Williams v. Higgins, and that of McCann v. Atherton, is of practically the same effect; and the decision in Arnold v. Patrick was that, where a person who had contracted for the purchase of land obtained a deed of the same from the vendor under an agreement that it should not be used until the balance of the purchase money, then due, was paid, the delivery of the deed was valid to pass the legal title to the land to the vendee, subject to the vendor's lien for the purchase money. In this case the vendee represented to the grantor that the money would be obtained upon showing the deed to certain men then waiting at his store who would let him have the money as soon as they could see that he was to have a deed of the premises, and that the deed should not be used or put in force until the money was paid to the grantor, and the grantor signed and delivered the deed, stating it was not to be recorded or acknowledged until the purchase money was paid, and calling on a party to take notice it was only delivered conditionally. In Towner v. Lucas' Ex'r, 13 Grat. 705, it is held that parol evidence will not be received to ingraft upon a valid written contract an incident occurring contemporaneously therewith, and inconsistent with its terms; that the fraud which will let in such evidence must be fraud in the procurement of the instrument, and going to its validity, or some breach of confidence in using a paper delivered for one purpose and fraudulently perverted it to another; and that parol evidence was not admissible to prove in behalf of one of the sureties in a bond that he was induced to sign the bond upon the express promise of the obligee that he should not be required to pay any part of it, and that the obligee would give the surety a written indemnity to save him harmless.

Parol evidence not being admissible to show that the delivery of the deed to Miss Livingston was conditional, Mr. and Mrs. Haworth are, for this reason, and that indicated in the third paragraph of this subdivision of the opinion, not entitled to any relief on this record.

III. In view of the character of the case sought to be made in behalf of Alphonso Haworth, it being really one to remove cloud upon title, the question of the possession of the land at the commencement of the suit becomes material to the equitable jurisdiction invoked.

The bill alleges that none of the defendants have ever had possession or control of the land, but that Alphonso was in possession of it at the time the deed was made to Miss Livingston, and has ever since been, and is now, in possession of it; that defendants Norris and wife are going upon and trespassing on the land, and cutting the wood and timber from the same, and attempting to carry therefrom such wood and timber, and still continue to do so, though warned not to. The answer of Mrs. Reed and her husband is, upon this point, that they supposed they were in possession of the land,—the said Emma down to the time of her marriage, May 4, 1880, and they to the date of their deed to Mrs. Norris. Norris and wife deny each and every allegation of the bill as to the possession of the land by Alphonso since the execution of the deed to Miss Livingston, and aver that at the time of the execution of the deed to Mrs. Norris, which was April 11, 1885, Mr. and Mrs. Reed were in possession of the land, and that thereupon Mrs. Norris and her husband in her right took possession of it and had it surveyed, and that one of the stakes of the survey is still standing; and that on or about the 1st day of September, 1885, they had an employe to go on the land for the purpose of clearing the same for cultivation of fruit trees, and this employe, under their direction, went upon the land, and continued to clear the same from that day up to the time they received notice of the injunction issued in this cause; and that complainants knew of the actual, notorious, and continued adverse possession taken by these respondents, and not until October 13, 1885,—two days before

the filing of the bill,—did complainants or either of them let respondents know that they had any objection to such acts of possession, but on the day named Eli threatened that he would bring this suit if respondents continued in possession.

The testimony as to possession was taken between July 12 and August 15, 1886, and is as follows: Eli Haworth, who lived about three miles from the land, on the San Pablo plantation, says that his son, and himself for him, were at the time of the execution of the deed to Miss Livingston, and have always, up to the time of testifying, been, and were then, in possession, paying taxes upon it, and exercising all rights of possession; that Miss Livingston never took possession in any way; that nothing has ever been done on the land except what "we" have done; that his son was working on the land, and has been ever since occasionally. Edward Roundtree, a witness for complainants, who lives about seven miles south of Mayport, (the land being about one mile north or north-east of Mayport,) says that he knew Eli Haworth was in possession of the land; that Norris had a man on it clearing it up about October, 1885, and wanted witness to clear up an acre; would not "say for certain, it was about then though;" that Miss Livingston never had any one on it clearing it up; that this was the first time he saw Norris, or any one for him, working on the land; that he passed it every week, and Norris did not have any one there before. Alphonso, who lived with his father, except for the last year previous to testifying, says that Miss Livingston never had possession. To the question, "Who has been in possession of the land since Miss Livingston's deed was made, and what acts of ownership and possession have been exercised over the land?" he replies: "I have, myself. I have planted some orange trees on the land. Started to clear a piece some two or three years ago for the purpose of building. That is all I have done to it." He also testifies that he has never seen Miss Livingston or any one on this land; that he passes it two or three times a week, except the last year, when he has been working at Pablo beach. Mrs. Haworth says Miss Livingston never was in possession of it; that Alphonso has had possession since the deed to Miss Livingston, but has done nothing with it.

The answer of Norris and wife is responsive to the bill upon the point in question, and its statements are controlling evidence as to their possession, in the absence of sufficient testimony to overcome them. These statements show that they were in physical possession when the bill was filed, giving the acts constituting such possession, and not a mere general averment of possession. Roundtree's testimony tends to confirm them. Alphonso, according to his own statement, had been absent for a year before the time of testifying, and this year covered the period for which Norris and wife claim to have been in possession. He does not show that the orange trees were planted, or any other act of possession exercised, during this year or the period of the Norris' possession. No fact or act evidencing possession, and inconsistent with those stated as to the Norris' possession is shown; and neither Eli Haworth, nor Mrs. Haworth, nor Alphonso, testify that Norris and wife did not take possession in the manner averred by their answer; nor is it shown that these witnesses were in a position to know that it was not done. Admitting or assuming statements of the answer as coming from Norris are not evidence, they are yet so as coming from Mrs. Norris. They are made on her own knowledge as well as his; and his possession was hers in law, the legal title being in her, if not in Alphonso Haworth.

The material allegations of the bill as to possession are not sustained by the record.

In view of the above conclusion as to possession, it follows, since the claim or title of Alphonso to the land is legal in its character, that he has a sufficient remedy at law in an action of ejectment, and cannot successfully invoke the equitable jurisdiction for removal of cloud from title to land. Sloan v. Sloan, 25 Fla. 53, 5 South. Rep. 603; Byrne v. Hinds, 16 Minn. 521, (Gil. 469.) If Alphonso is entitled to an injunction against trespass pending an action at law he can apply for it. Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. Rep. 565. If Mrs. Norris' title was acquired for a valuable consideration, and without notice of Alphonso's, it is, against him and his father, a valid legal title, and, she being in possession at the time this bill was filed, a court of law is the forum in which to try the question of title between them.

The decree dismissing the bill is affirmed.

(23 Fla. 699)

LOGAN v. SLADE *et al.*

(*Supreme Court of Florida.* Oct. 16, 1891.)

INJUNCTION—WASTE OF ASSETS BY CHATTEL MORTGAGOR—RECEIVERS—AGREEMENT NOT TO RECORD MORTGAGE—ATTORNEY'S FEES—APPEAL—OBJECTIONS NOT RAISED BELOW.

1. A court of equity will prevent, by injunction, a mortgagor from impairing the value of or destroying the property embraced in the mortgage lien, on which the mortgagee has a right, by virtue of his mortgage, to rely for the security of his debt.

2. When a merchant on the day after the execution of a mortgage on his stock of goods in favor of some of his creditors disposes of a large amount of them to other creditors in payment of their debts, a court of equity is justified in enjoining him from selling said goods otherwise than for cash, and commanding him to pay the proceeds, after deducting expenses of sale, into the registry of the court.

3. If the remedy by injunction as above proves to be ineffectual, the court may appoint a receiver to take charge of the goods and dispose of them under its direction.

4. An agreement by the mortgagee not to record a mortgage of personal property for 20 days after its execution is a valid agreement between the parties to it, but such mortgage is void as to creditors and purchasers without notice whose rights attach before it is recorded.

5. An instrument in writing, executed by a mortgagee at the time of the execution to him of a mortgage of personal property, not to record the same within 20 days, and not then, if satisfactory payments were made in the mean time, unless, in the opinion of the attorneys of the mortgagee, it was necessary to protect his interest, construed to mean that if for good cause the

attorneys of the mortgagee filed the mortgage for record before the expiration of the 20 days, the mortgagor not having up to the time of recording made satisfactory payments, such action on the part of the attorneys, if necessary to protect the interest of the mortgagee, terminated the stipulation not to record the mortgage at all, if satisfactory payments were made.

6. The objection that a suit has been brought prematurely, or before the expiration of days of grace, cannot be raised primarily in an appellate court by a defendant who has both demurred to the bill and answered without interposing such defense.

7. The insufficiency of the proof upon which a chattel mortgage has been recorded cannot be urged primarily in the appellate court, where neither the demurrer nor the answer to the bill present it.

8. A stipulation for the payment of attorney's fees does not avoid a contract for the payment of money, of which it is a part; nor is a stipulation for the payment of a reasonable amount as attorney's fees illegal.

(*Syllabus by the Court.*)

Appeal from circuit court, Jackson county; JAMES F. MCCLELLAN, Judge.

Action by James B. Slade and others against George A. Logan to foreclose a mortgage. Decree for complainants. Defendant appeals. Affirmed.

STATEMENT BY THE COURT. The complainants, James B. Slade and Charles A. Etheredge, copartners under the firm name and style of Slade & Etheredge; Joseph S. Garrett, George J. Garrett, and Robert Y. Garrett, copartners under the firm name and style of Garrett & Sons; J. Pollock and L. Lowenstein, copartners under the firm name and style of Pollock & Co.; J. M. Eatherly, A. M. Young, George I. Waddey, Thomas Ellis, Will W. Crandall, and Harry Jones, copartners as Eatherly Hardware Company,—filed their bill in the circuit court of Jackson county against the appellant for foreclosure of a mortgage on the 20th of November, A. D. 1884. The bill alleges that the defendant on the 18th day of November, 1884, being largely indebted to the complainants, made and delivered to them his written obligations for the respective sums due to them, payable one day after date. These obligations contained stipulations to the effect that if they were not paid, and judgment was obtained against the defendant upon them, that he would waive the benefit of sections 1, 2, and 3 of the constitution of the state of Florida, and all laws of said state exempting property from forced levy and sale; that if said obligations were not paid at maturity they were to bear interest at 1 per cent. a month from date, and, if collected by an attorney, 20 per cent. attorney's fees were to be added and included in the judgment on the obligations. Such were three of the obligations alluded to. The one to Slade & Etheredge was of the same import, with an additional stipulation that, if defendant should ship them some cotton, he would be entitled to one dollar per bale thereon in addition to the value of the same. The bill further alleges that the defendant, to secure the payment of said obligations, made and delivered to the complainants a mortgage on some real estate in said county, and also upon a stock of goods then in defendant's store.

The bill prays for a foreclosure and sale of the mortgaged property, for an injunction to restrain the defendant from selling or otherwise disposing of any of the personal property, and for the appointment of a receiver. Upon a hearing on the bill and exhibits thereto, and affidavits in behalf of complainants, and counter-affidavit of defendant, the chancellor granted an order restraining the defendant from selling the goods mortgaged otherwise than for cash at not less than invoice prices, and requiring him to deposit in the registry of the court all sums received by him for goods sold since the execution of the mortgage, and also commanding him to deposit as aforesaid, at the end of each week, all money arising from the further sale of goods. The chancellor subsequently modified the order by allowing the defendant to retain in his hands a sufficient sum to cover clerk's hire and other necessary expenses incurred in conducting the business. Defendant demurred to the bill, and the demurrer was overruled; but, as this action of the court is not assigned as error, it is unnecessary to notice it further.

Defendant answered the bill, alleging that his signature to the mortgage and the four obligations described supra were procured by fraud, covin, deceit, misrepresentation, and a combination between Benjamin S. Liddon, Frank B. Carter, attorneys of complainant, and R. E. Farrish, as agent of the complainants Slade & Etheredge; that at the time of the signing the said obligations and mortgage he went to the office of Liddon & Carter, in Marianna, to see why they had brought suit against him on the claim of Garrett & Sons, which defendant claimed they had agreed not to sue on; that while there Farrish came in, and he and Farrish had an interview as to the claim of Slade & Etheredge; that he agreed with Farrish to give to Slade & Etheredge a mortgage to secure their claim, provided that the mortgage should not be recorded in 20 days, and that if within that time defendant should make satisfactory payments to Slade & Etheredge the mortgage was not to be recorded at all; that Farrish and defendant were alone when this agreement was made, and after making it informed Liddon of it, and requested him to draw up the mortgage; that Liddon told him that he did not want to break him up, and that he could give him his notes for the amounts due on the other claims, and drew up all the obligations, and defendant signed them without reading them or hearing them read; that there was no agreement that the claims of Garrett & Sons, Pollock & Co., and the Eatherly Hardware Company were to be included in the mortgage to Slade & Etheredge, and no intimation of the kind; that Liddon read the mortgage to him as though it was a mortgage to Slade & Etheredge alone; the names of the other complainants in the mortgage were not read to him by Liddon; that he never knew that the mortgage was to any other person besides Slade & Etheredge until suit was commenced against him; that at the time of the giving the mortgage Farrish and defendant agreed in writing as follows:

"Having received from George A. Logan a mortgage upon certain real estate and personal property to secure a debt due said Slade & Etheredge for one thousand and nineteen and 55-100 dollars, now, as the agent of said Slade & Etheredge, and in consideration of the execution of said mortgage, I do hereby agree that if W. H. Logan, father of said George A. Logan, will give to said Slade & Etheredge a guaranty of the payment of the amount above mentioned, and will also give a sufficient acceptance or security in the opinion of the attorney of said Slade & Etheredge for the further sum of nine hundred dollars, said Slade & Etheredge will advance said amounts to said George A. Logan on sixty days' time. It is also agreed that unless, in the opinion of the attorneys of the said Slade & Etheredge, it should become necessary so to do in order to protect their interests, that the aforesaid mortgage is not to be filed for record for twenty days from this date, November 18th, 1884; and that if payments upon the same at a satisfactory rate are made within said twenty days, that said paper is not to be recorded therein.

"R. E. FARRISH, for Slade & Etheredge."

Complainants filed their replication to the answer of defendant. Afterwards the complainants filed their petition for the appointment of a receiver. The petition recited the previous proceedings in the case, the injunction and modification of the same, and alleged that during the time that the defendant had been in possession after the issuance of the injunction, up to the time of filing the petition for a receiver, the sales averaged only $6 a day; that the last week's sales by the defendant, reported by him January 19th, were only $20, of which sum he deducted $10, clerk hire, or 50 per cent. of the entire gross proceeds; that, at the rate at which defendant was depositing money in the registry of the court, it would take 11 months to raise the sum required by the order of the court; that such sales had occurred during the business season, when sales were best, and that there was reason to expect they would be much less during the dull season, which was coming on in the summer. The chancellor granted the motion.

Testimony was taken by both parties before commissioners agreed on by them.

On final hearing the chancellor decreed that a master of the court should sell so much of the property remaining in the hands of the receiver as was necessary, in addition to the amount realized by the receiver from sales by him, to pay the respective debts of the complainants, including all costs, interest, and 20 per cent. attorney's fee. From this decree, and the interlocutory decrees mentioned, the defendant entered an appeal to this court, and assigned as error: (1) Granting the order of 28th November restraining defendant from selling the merchandise, except for cash, and requiring him to deposit the same in the registry of the court; (2) granting the order of 14th of February, appointing W. H. Milton receiver, and directing him to sell said merchandise; (3) granting the final decree in the cause.

John W. Malone and *John H. McKinne*, for appellant. *Liddon & Carter*, for appellees.

RANEY, C. J. 1. This case is on rehearing. The preceding statement and the next 10 paragraphs of this opinion were prepared by Chief Justice MCWHORTER, and are adopted and approved by the court as now constituted:

"The first error assigned is the granting the order restraining the defendant from selling said merchandise except for cash, and requiring him to deposit the proceeds in the registry of the court. The mortgage, if valid,—a question which we will consider hereafter,—was meant as a security for the debts described therein and intended to be secured thereby. It is a well-settled principle that a court of equity will restrain a mortgagor from doing any act that will destroy or impair the security upon which the mortgagee, by virtue of the mortgage, has a right to rely for the payment for his debt. If there were no such right in the mortgagee to preserve intact his security, and no such jurisdiction vested in a court of equity to aid him in its preservation, mortgages would be of little value. 2 Story, Eq. Jur. §§ 914, 915.

"The evidence shows that the mortgage was executed on the 18th day of November, 1884; that on the 19th, the day after its execution, goods were sold from the store to different parties, amounting in the aggregate to the sum of $305, to pay said parties debts owing them by the defendant. It is true the answer, which was filed February 20th, says that these goods were sold by defendant's clerk in his absence; but in his affidavit previously filed, to-wit, on the 22d day of November, three days after such sales, defendant swears that he 'had not sold or disposed of any goods, wares, or merchandise, except in the usual course of his business.' This denial, in the first place, when the transaction must have been known to him and fresh in his memory, and subsequent admission of it, and the attempt to avoid its force by saying it was done by his clerk in his absence, bear a suspicious appearance. If it is true that the goods were sold by the clerk in his absence, it nevertheless remains that he does not say that they were sold without his knowledge or direction. We must assume that such sales were known to and approved by him. It cannot be denied that the sales of over $300 worth of goods in one day after the mortgage was made, and no cash realized therefrom, being sold to pay his other debts, was an impairment of the mortgage, which the mortgagee had a right to prevent, and brings it within the principle mentioned above. There was no error in granting the restraining order.

"The next error assigned is the appointment of a receiver. We think the facts set forth in the petition, and which were not denied, justified the chancellor, in the exercise of a sound discretion, in appointing a receiver. The same reason that would induce the chancellor to grant an injunction to prevent the impairment or destruction of a mortgage security,

when the injunction was found insufficient for the purpose intended, would justify him in appointing a receiver, when it was made apparent to him that it was necessary for the preservation of the property intended as a security. It was apparent from the amount of sales that a longer time would elapse before the complainants could realize the amounts due them than the law would require them to wait. It was also apparent that the expenses were bearing too heavy a proportion to the amount of sales, and that some quicker and less expensive method was necessary.

"It will be seen from the pleadings that the bill seeks a foreclosure and sale of the property. The answer admits the making the mortgage, and seeks to avoid it on two grounds: That its execution was procured by fraud, and that the complainants agreed not to record it in 20 days, and not then, if satisfactory payments were made. These are the only two points that are raised by the bill and answer, and all that this court would be justified in deciding.

"A very careful scrutiny of the evidence convinces us that while the defendant, who it seems was young and without experience, was very probably not aware of the full legal consequences of the papers he signed at the time he executed them, that there was no fraud or misrepresentation on the part of the complainants or their agents to induce him to execute the mortgage and obligations. He did it voluntarily, and, if he made a hard bargain, he cannot complain. The answer does not deny any of the allegations of the bill. It sets up matters in avoidance, and defendant must be held to prove them. Lucas v. Bank, 2 Stew. (Ala.) 280. His proof is his own testimony and what inference might be drawn from the fact that the paper, supra, given to him by Farrish, as agent for Slade & Etheredge, and which was the only one of all of them which he was to retain, speaks of no mortgage but one to Slade & Etheredge.

"This, in connection with the fact that all the claims were embraced in one mortgage, we admit is a strong circumstance in support of his testimony. But we think it is overborne by the testimony of McKinnon and Farley, who are disinterested witnesses; by the testimony of Farrish, who is also disinterested as to the mortgage to all the complainants in the bill except Slade & Etheredge,—and there is no contention as to their mortgage except as to recording it, by the evidence of Liddon and Carter,—who all swear that the mortgage was read in full to defendant; and by his own letter to Liddon & Carter that he would come to their office, and either pay or secure the claim then in suit against him of Garrett & Sons, the other claims mentioned in the mortgage coming to their hands after he wrote the letter, and before executing the mortgage.

"The agreement not to record the mortgage within 20 days, and not then if satisfactory payments were made, is a question of some difficulty. An agreement not to record a mortgage of personal property within a limited time, not unreasonably long, would not, in our opinion, vitiate it so far as the parties to it were concerned, in the absence of a conflict with the rights of purchasers and creditors in the intervening time.

"If it was clear that by a contemporaneous written agreement the mortgagee had bound himself not to record the mortgage if satisfactory payments were made on it in the 20 days, an agreement not to do the very thing that the statute says is indispensable to its validity, we should be inclined to hold, if such payments were made, that the mortgage was rendered void by such agreement as a security for the unpaid balance after deducting the 'satisfactory payments,' so far as the personal property was concerned. The proviso that 'unless, in the opinion of Slade & Etheredge's attorneys, it should be necessary to record the mortgage in order to protect their interests,' applied only to the first clause as to the recording within the 20 days. It had no force as to the contingency of making satisfactory payments in the 20 days; that is, if the mortgage was not recorded in the 20 days, and in the mean time the mortgagor made such payments, it would have been the absolute right of the mortgagor, if the agreement was valid, that the mortgage should not be recorded.

"But the right to record the mortgage within 20 days, if the attorneys of Slade & Etheredge should think it necessary, and the exercise of it by recording the same before the lapse of that time, if for proper cause, necessarily nullified the last clause not to record it, if satisfactory payments were made, because the vitality of the agreement was dependent upon its not being recorded in the 20 days, or, if wrongfully recorded within that time, that such payments were made before the time mentioned had elapsed. After its record under the power to do so, if thought necessary to protect the interest of Slade & Etheredge, it being recorded before any satisfactory payments were made, the rights of the mortgagor, under the latter clause of the agreement, necessarily terminated.

"The facts set forth and considered heretofore, as being sufficient to justify the granting of the restraining order, were also sufficient to justify the attorneys for Slade & Etheredge in the exercise of the discretion vested in them in filing the mortgage for record."

II. It was also held in another paragraph of the opinion that certain points made in this court by the appellant could not be considered, because they had not been made in the lower court. These points were: That the suit was prematurely brought; that the mortgage was not recorded in accordance with law, or not sufficiently proven to entitle it to be admitted to record; and, third, that the obligations sued on were void because of the stipulations therein to pay attorney's fees. A rehearing was applied for on the ground that there was error in this conclusion, and, some doubts having arisen as to this conclusion, the rehearing was granted.

In Trust Co. v. Cole, 4 Fla. 359, it was held that an appeal in equity is substantially a rehearing of the cause, and the ap-

pellate court has the right to look into the whole case as it is presented by the record, and may even consider points made primarily there if raised by the pleadings and proofs; yet care must be taken that neither the appellant nor appellee be permitted to surprise or mislead his adversary, or to make objections which if made in the court below might have been obviated. See, also, Fairchild v. Knight, 18 Fla. 770; Proctor v. Hart, 5 Fla. 465; Beekman v. Frost, 18 Johns. 544; Bank v. Smedes, 3 Cow. 684; 2 Daniell, Ch. Pr. 1488 et seq.

In the case before us there was a demurrer to the bill as being multifarious, and because a prior mortgagee of the property was not a party, and, this demurrer having been overruled, the defendant answered, but in his answer he does not raise any of these defenses.

The objection that the suit was prematurely brought is based upon the idea that the writings obligatory sued on and secured by the mortgage were entitled to grace, and that the days of grace had not expired when the bill was filed. We will not be understood as assenting to the proposition that a bill single or writing obligatory is, either by the law-merchant or the statute of this state, entitled to grace. Rand. Com. Paper, § 1056; Tied. Com. Paper, § 32; Daniel, Neg. Inst. §§ 31, 34, 620; Skidmore v. Little, 4 Tex. 301; Fields v. Mallett, 3 Hawks, 465; McClel. Dig. p. 832, § 86; Cotten v. Williams, 1 Fla. 37; Bellas v. Keyser, 17 Fla. 100, 106, 107. But, however this may be, our opinion is that if the defendant had wished to test the merit of such a defense he should have done so by the proper pleading in the lower court, and at an early stage of the proceedings therein. Assuming that such a defense could have been found available, considering the nature of the suit and the character of the instruments secured by the mortgage, it was a defense which went, not in bar of the cause of action, but only to the bill or in abatement of the suit, and should have been interposed promptly, and before the defendant could be said to have waived it. 1 Daniell, Ch. Pr. 626, 627; Palmer v. Gardiner, 77 Ill. 143. The defendant did not attempt to raise such a defense by his pleadings, and to permit it to be raised here, after a long and expensive contest as to the validity of the mortgage, upon the grounds stated in the original opinion, would not only encourage the most misleading practice, but work a great wrong, by permitting the defendant to do now what he cannot reasonably be deemed to have ever intended before he appealed to this court.

The basis of the point that the mortgage was not duly proven for record, and therefore not legally recorded, and hence is not binding as a mortgage of the personal property mentioned therein, is an alleged deficiency in the affidavit of one of the subscribing witnesses upon which the instrument was admitted to record as such oath is shown by the appeal transcript as stated in the certificate of record indorsed on the original mortgage annexed to the bill as a part thereof. The bill distinctly alleges that the instrument had been correctly recorded on the proof, whose sufficiency is now attempted to be assailed. By failing, under these circumstances, to take exception in the lower court by proper pleading to the sufficiency of the proof and legality of the record, and contesting the foreclosure of the mortgage throughout a firmly contested and expensive litigation on other grounds, involving that of the right of the mortgagees to record the mortgage at the time they did, the appellant must be held to have waived any defect there may be in such proof. The defendant has tacitly admitted the sufficiency of the proof and the legality of the record in so far as it is dependent upon such proof throughout the litigation, and up to a point at which he cannot be permitted to take exception to it without imposing upon the complainants great hardship and loss, which proper practice upon the part of the appellant could have obviated. Proper practice dictates that he should be held to the position of a tacit admission of the sufficiency of the record knowingly taken by him in the lower court. The objection, taking the most favorable view of it, is not one fatal to the complainants' claim; but like that of the prematureness of the suit, discussed above, it would only go to the bill; and assuming the objection to the proof to be good, and that it could not, had it been made below, have been cured by showing, as for aught we know may appear in the record in the clerk's office, that there was the most sufficient proof of the execution of the instrument, there can be no doubt, in view of the testimony, that had complainants been compelled to dismiss the bill they could have had it recorded on due proof, and renewed the suit without delay, and without any considerable expense or loss of time.

The third ground, which is that the obligations are void because of the stipulation therein for the payment of attorney's fees, is also one which properly should have been taken by demurrer to the bill. There is no such ground in the demurrer filed, nor is it made elsewhere by the defendant's pleadings. However, if the law rendered any and all contracts of which a stipulation to pay attorney's fees was a feature, absolutely void, and their enforcement contrary to public policy, under any and all circumstances, which, in effect, is the position of appellant here, we are inclined to think the court should refuse to enforce such contract, although the effect of the feature was called to their attention primarily on appeal. Pittman v. Myrick, 16 Fla. 692; Crosby v. Huston, 1 Tex. 203; Foster v. Wilson, 5 Mont. 53, 2 Pac. Rep. 310. This, however, is not the effect of such a stipulation in this state nor elsewhere, according to the authorities which we have been able to find. The decisions of this court affirm the legality of a stipulation for reasonable attorney's fees. L'Engle v. L'Engle, 21 Fla. 131; Long v. Herrick, 26 Fla. 356, 8 South. Rep. 50. No contest as to the reasonableness of the amount stipulated for was made in the circuit court, and it is not attempted to be made here, if it could be.

The decree is affirmed.

(91 Ala. 32)

WALKER v. STATE.

(*Supreme Court of Alabama.* Nov. Term, 1890.)

ASSISTING PRISONER TO ESCAPE—INDICTMENT.

Code Ala. § 4002, imposes a penalty upon any person who conveys into the county jail anything "useful to aid any prisoner to escape therefrom, with the intent to facilitate the escape of any prisoner," etc., "or who, by any other act or in any other way, aids or assists such prisoner to escape." *Held*, that an indictment charging that defendant assisted in such an escape "by unlocking or opening the door or doors of the room or rooms of said jail, and by opening the window in one of the rooms of said jail," is bad, unless it charges that said acts were done "with intent to facilitate the escape," and that they were useful in aiding it.

Appeal from circuit court, Macon county; JAMES R. DOWDELL, Judge.

Walker was indicted for aiding the escape of prisoners from jail. Judgment of conviction, from which defendant appeals. Reversed and remanded.

Peyton Thompson, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

CLOPTON, J. Appellant was indicted and convicted under section 4002 of the Code, which declares that any person who conveys into the county jail "any disguise, weapon, tool, instrument, or other thing useful to aid any prisoner to escape therefrom, with the intent to facilitate the escape of any prisoner lawfully confined therein under a charge or conviction of felony, or who, by any other act or in any other way, aids or assists such prisoner to escape, whether such escape be attempted or effected or not, * * * must, on conviction, be imprisoned in the penitentiary for not less than two nor more than ten years." The indictment originally contained three counts. A demurrer having been sustained to the second count, and overruled as to the others, defendant was put to trial on the first and third counts, which are respectively framed under the first and second clauses of the statute. The jury having found the defendant guilty as charged in the third count, which, under our rulings, is an acquittal of the offense charged in the first count, it is unnecessary to consider the sufficiency of the latter count. The third count charges that defendant "did aid or assist Louis Key and Sing Bowen, who were then and there confined in the county jail of Macon county, Alabama, under the charge or charges of assault with intent to murder, to escape from such jail, in this, to-wit, by unlocking or opening the door or doors of the room or rooms in said jail, and by breaking or opening the window in one of the rooms of said jail." The statute, as has been said, is not merely an affirmation of the common law, but creates a new substantive offense, having three main ingredients: (1) A prisoner lawfully confined under a charge or conviction of felony; (2) conveying into the county jail or other place of confinement something useful to aid such prisoner to escape, or aiding or assisting his escape by any other act or in any other way, whether such escape be attempted or effected or not; (3) the intent to facilitate the escape of such prisoner. Wilson v. State, 61 Ala. 151. When the indictment charges that the offered assistance was by some other act or way than those specially named in the first clause of the statute, it is essential, in order to charge the complete statutory offense, that the indictment should aver the intent to facilitate the escape of the prisoner, and that such act or way was useful to aid him in escaping, unless it naturally so appears; these being necessary constituents of the criminal act, though mentioned only in the first clause in juxtaposition to the modes of assistance therein specially named. In Hurst v. State, 79 Ala. 55, it is said: "It would be necessary to aver what that other thing, act, or way was, and that it was useful to aid the prisoner's escape, unless by its very nature it appeared to be so. * * * The averment that it was done 'with intent to facilitate the escape' is indispensable. Without such intent the crime is not committed." Had the indictment averred the unlocking or breaking or opening a door or window of the room in which the prisoners were confined, this would naturally import usefulness in aiding them to escape; but whether unlocking or breaking or opening an outside door or window of the jail, or of any room other than that in which the prisoners were confined, would be useful to aid their escape, depends on the circumstances; and the indictment should have averred that it was useful. For the omission of both the averments mentioned, the third count is defective. Reversed and remanded.

(91 Ala. 62)

HARRISON v. STATE.

(*Supreme Court of Alabama.* Nov. Term, 1890.)

INTOXICATING LIQUORS—ORIGINAL PACKAGES.

Where bottles of liquor are placed in a wooden box, and shipped into the state to be sold on commission, the box is the original package. Keith v. State, (Ala.) 8 South. Rep. 353, followed.

Appeal from circuit court, Choctaw county; WILLIAM E. CLARKE, Judge.

Indictment against Harrison for selling liquor in violation of law. From a judgment of conviction defendant appeals. Affirmed.

Taylor & Carnathan, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

COLEMAN, J. The record contains no bill of exceptions, and we presume the evidence showed that the liquors sold were of the class averred by the indictment and forbidden by the statute. In framing indictments for a violation of the law against retailing, and of local prohibitory laws, regard should be had to the legal distinction of the various kinds of liquors, the sale of which is prohibited, and what is necessary to constitute an indictment sufficient to include them all. Tinker v. State, 90 Ala. 647, 8 South. Rep. 855; Brantley v. State, 91 Ala. 47, 8 South. Rep. 816; Allred v. State, 89 Ala. 112, 8 South. Rep. 56. The only error assigned in the record for revision is the judgment of the court sustaining the demurrer to defendant's second plea. The purpose of the plea was to raise the question as to when an "original package" becomes a "broken

package." The plea states that the bottles were packed in wooden boxes, and shipped to the defendant, to be sold on commissions; that after the boxes were received the defendant opened the boxes, took the bottles out, and sold the bottles of liquor separately. So far as the facts are presented in this plea, the precise question has been adjudicated. Keith v. State, 91 Ala. 2, 8 South. Rep. 353, (at present term.) The "original package" having been broken, the sale of each bottle of the prohibited liquor was a violation of the statute. The constitutionality of such statute has been too often recognized to require consideration. See, also, Tinker v. State, (opinion by McCLELLAN, J.,) 90 Ala. 638, 8 South. Rep. 814.

Affirmed.

(91 Ala. 282)

JACKSON *et al.* v. JACKSON.

(*Supreme Court of Alabama.* Nov. Term, 1890.)

RESTRAINING ACTION AT LAW—RIGHT TO INTERVENE.

1 An injunction restraining an action at law, issued on a bill by plaintiffs, as administrators, will not be dissolved on defendant's answer, alleging that the money sought to be recovered did not belong to the estate, but was her individual property, by gift from intestate, and was deposited with a firm, of which one of the administrators was a member; as the burden of proving such gift is on defendant.

2. Where a banking firm is sued to recover money deposited, a member of the firm cannot intervene as administrator of an estate claiming such deposit under Code Ala. § 2610, giving such right to one "not a party to the suit, without collusion with him."

Appeal from chancery court, Lauderdale county; THOMAS COBBS, Chancellor.

Bill of interpleader by Felix E. Jackson and another against Elizabeth Jackson. From the denial of motion to dissolve injunction, defendant appeals. Affirmed.

McClellan & McClellan and *O'Neal & O'Neal*, for appellant. *Simpson & Jones*, for appellees.

STONE, C. J. Aristides E. Jackson died intestate in January, 1887, and in March afterwards the appellees were appointed administrators of his estate. Felix E. Jackson and Andrew Jackson were partners in trade in the firm name of Jackson Bros. Soon after the death of intestate, Mrs. Elizabeth Jackson, his widow, deposited with Jackson Bros. $880 as her own money, and took their receipt therefor. Subsequently she demanded the money of them, but they refused to pay it to her, on the ground, as they alleged, that the money was claimed as part of the assets of the estate of the intestate, and was not hers. She thereupon instituted an action at law against them for the recovery of the money she had so deposited with them. Felix E. Jackson, one of the administrators, is the same Felix E. Jackson who is a member of the firm of Jackson Bros. The present bill was filed by the administrators. It asserts that said money is the property of the estate of Aristides E. Jackson; that Mrs. Jackson claims it under an alleged gift made by her husband to her in his life-time; denies that such gift was made; and prays an injunction against her suit at law. It charges that she is insolvent. A temporary injunction was awarded. The foot-note waives answer under oath. Mrs. Jackson filed a sworn answer. She admitted that without the $880 she is insolvent. She denies the averment of the bill that she took the money without authority, and avers that her husband gave it to her in his life-time. She demurred to the bill mainly on the ground that complainants had an adequate remedy at law,—to be particularly noticed further on. A motion was made to dissolve the injunction—*First*, for want of equity in the bill; and, *second*, on the denials contained in the answer. The chancellor overruled the motion to dissolve, and from that ruling the present appeal is prosecuted. We will first consider the question of the denials in the answer.

When the bill avers facts, the burden of proving which is entirely on complainant, then, if the sworn answer is made on knowledge and contains an unequivocal denial of the charges on which the right to an injunction rests, the general rule is that the injunction must be dissolved on the denials in the answer. 3 Brick. Dig. p. 352, § 303. But even this rule is not universal. Satterfield v. John, 53 Ala. 127; Chambers v. Iron Co., 67 Ala. 353; Davis v. Sowell, 77 Ala. 262. The present case, however, does not fall within the class described above. Under the averments of the bill, the burden of disproving the alleged gift from intestate to his wife does not rest on complainants. On the contrary, stated as the question is in the bill, it was for her to satisfy the court by proof that the gift had been made to her. The answer on this point is in the nature of a confession and avoidance, and will not avail to dissolve an injunction. Rembert v. Brown, 17 Ala. 667; Miller v. Bates, 35 Ala. 580. The chancellor did not err in refusing to dissolve the injunction on the denials in the answer.

The second ground taken in demurrer is that complainants had an adequate remedy at law, and therefore the bill is without equity. The remedy claimed in argument is what is known as our statutory provision for interpleader at common law. Code 1886, § 2610 Possibly a sufficient answer to this argument is that the enlargement of the jurisdiction of the courts of law, or the recognition or enforcement by them of equitable rights and interests, even when conferred in terms by statute, does not, in the absence of statutory prohibition, take away or impair the original jurisdiction of the chancery court. Lee v. Lee, 55 Ala. 590; Westmoreland v. Foster, 60 Ala. 448. We hold, however, that the statute invoked is not adapted to such a case as this. The double relation which Felix E. Jackson sustains to the transaction incapacitates him to seek redress under it. It can scarcely be said that F. E. Jackson, administrator, is not a party to a suit against F. E. Jackson; and he surely could not make oath that he in the one capacity is not in collusion with himself in the other. Other clauses of the statute might be commented on, but we deem it unnecessary. Section 2611, Code 1886, is

not suited to a suit on a moneyed demand. We hold that the bill contains equity, and that the chancellor did right in retaining the injunction until the hearing on the merits. Farris v. Houston, 78 Ala. 250.

Affirmed.

(68 Miss. 29)

VICKSBURG & M. R. CO. v. LEWIS *et al.*

(*Supreme Court of Mississippi.* Oct. Term, 1890.)

RAILROAD LANDS—TAXATION—EJECTMENT—MESNE PROFITS.

1. Under Code Miss. 1880, § 608, allowing a railroad company to pay a privilege tax, and thereby be exempt from all other taxes, on property "owned and used in operating the railroad," land which belonged to it, and formed part of its depot grounds, but which had been included within the inclosure of one owning adjoining land, and which continued to be so inclosed and used by him under the mistaken belief of all that it belonged to him, is not protected from taxation as land by payment of the privilege tax.

2. Where the railroad company defends an action of ejectment for the land brought by persons who had obtained title under a tax-sale, it cannot free itself from liability for mesne profits by permitting a third person to remain in actual possession.

3. Making non-user of the lot for railroad purposes at the time of the levy of the taxes, instead of at the time the privilege tax was paid, the test of its exemption from taxation, was harmless error, it appearing that it was not used for such purposes at either time.

Appeal from circuit court, Hinds county; J. B. CHRISMAN, Judge.

Ejectment by G. B. Lewis and others against the Vicksburg & Meridian Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Code Miss. 1880, § 608, allowed the railroad company to pay a privilege tax, and thereby be exempt from all other taxes on property "owned and used in operating the railroad." Plaintiff claimed the land under a sale for taxes assessed in 1880, after the railroad company had paid its privilege tax. Although the land belonged to the company before it lost title under the tax-sale, and was part of one of its depot grounds, it had for many years been included in the inclosure of one owning adjoining land, under the mistaken belief of all that it belonged to him. This land was known as the "Corson Lot."

W. L. Nugent, for appellant. *C. M. Williamson*, for appellees.

CAMPBELL, J. The evidence makes it clear that the "Corson Lot," for many years before 1880, and for years after that, was inclosed as a separate and distinct parcel of land, erroneously supposed not to belong to the railroad company, but to another owner, and not in any way used or even claimed by the company. Surely, under such circumstances, it cannot be successfully claimed that this lot was land owned by the company and used in operating its road, so as to protect it from taxation as land by reason of the payment of the privilege tax. The liability of the appellant for rent of the lot arises from the fact that it withheld the possession from the owners. Its yielding the house to Page could not free it from liability to the plaintiffs, who recovered the lot, and are entitled to mesne profits. The criticism of the first instruction for the plaintiff, because of its making non-user of the lot in operating the railroad at the time of the sale for taxes the test of exemption, is just, but unavailing as ground to reverse the judgment, because it is manifest that the same state of things existed in 1880 as did at the time of the sale, and on the facts the result is right. Affirmed.

(68 Miss. 429)

DAVIS v. NETTERVILLE.

(*Supreme Court of Mississippi.* Oct. Term, 1890.)

EXECUTION—CLAIMS OF THIRD PERSONS—ABANDONMENT OF LEVY.

Under Code Miss. 1880, §§ 1774, 1775, which provide that on return of an execution levied on property claimed by a third person, with the claimant's affidavit and bond, further proceedings on the execution shall be stayed for an amount equal to the value of such property till the final decision of the claim, a second levy of an execution on property to the full amount of the execution, though irregular, cannot be considered as an abandonment of the original levy.

Appeal from circuit court, Wilkinson county; RALPH NORTH, Judge.

An execution was levied by C. H. Netterville against Hugh L. Davis, and defendant's wife, Laura McG. Davis, executed a claimant's affidavit and bond. On trial of the issue there was judgment for plaintiff. Claimant appeals. Affirmed.

Claimant claimed title under a deed from her husband, executed March 8, 1888, and recorded July 17, 1881, but the record failed to show when it was filed for record. The execution was levied July 14, 1888.

W. P. & J. B. Harris and *Hugh L. Davis*, for appellant.

WOODS, C. J. Netterville, who was the plaintiff in execution in the trial below, caused to be levied an execution upon certain live-stock as the property of Hugh L. Davis. The appellant made claimant's affidavit and bond, and took charge of the property. Subsequently, and before the return of the writ into court, additional levies were made on other property to the full amount named in the execution. On the trial of the claimant's issue, this writ, with the sheriff's returns, was offered in evidence by plaintiff in execution, and was admitted over the objection of appellant, and this action of the court is assigned for error. The ground of appellant's contention is, that, inasmuch as section 1774, Code 1880, makes it the duty of the officer holding an execution, after affidavit and bond made by a claimant, to return such affidavit and bond with the execution, and as section 1775 declares further proceedings on such execution shall be stayed for an amount equal to the value of the property so claimed, as indorsed and returned by the officer, until the final decision of such claim, therefore the subsequent levies in this case without any stay of execution to the amount of the value of the property taken by the claimant, should be held to be an abandonment of the first levy on the property embraced in the pending proceeding. The vice of the officer's proceedings in making the levies consisted in making the second and third levies for an amount greater

than the statute authorized. The irregularity was in the subsequent levies; not in the first. The complaint lies properly to the action of the officer in making the later levies, and not to the first. Whether these later levies were invalid, or whether they were mere irregularities which may be corrected on application to the court out of which the process issued, it is unnecessary for us to determine. The right to make additional levies is not disputed by counsel, and, as the levy evidenced by the return which was admitted is unassailable, standing alone, we must hold that the subsequent irregularity in making the additional levies cannot be considered an abandonment of the original levy. Whatever the effect of the levy for an amount greater than that contemplated by the statutes cited on these additional levies, we must hold the original levy is in no way affected thereby, and hence that the action of the court was not erroneous.

The several other questions presented need not be considered by us, in view of the undisputed fact that the deed to the live-stock, though executed before the officer's levy, was recorded afterwards. It nowhere appears that this deed was filed for record before the day on which it was actually recorded. Under section 1178, Code 1880, making a conveyance from a husband to his wife valid when such conveyance is in writing and acknowledged and filed for record, it is declared that third persons are to be affected only by the filing of the conveyance for record. Before the conveyance from Hugh L. Davis to his wife had been recorded, and, so far as the record before us discloses, before the conveyance had been filed for record, (for, in the absence of any proof offered by claimant on this point, we cannot assume that it had been filed at an earlier day,) the execution had been levied and the rights of third persons had intervened. At the date of the levy upon the property involved in this suit, it is manifest that the claimant had no conveyance which she could assert or maintain against the appellee. This being determined, the other questions argued by counsel become immaterial. Montgomery v. Scott, 61 Miss. 409.

Affirmed.

(23 Fla. 680)

SCHLEICHER *et al.* v. WALKER.

(*Supreme Court of Florida.* Oct. 31, 1891.)

PARTNERSHIP—LIENS OF CREDITORS—SALE OF INTEREST BY PARTNER—DISSOLUTION—INSOLVENCY—REVIEW ON APPEAL.

1. Partnership creditors have not, as such, any lien on partnership assets.

2. The equity of partnership creditors to have partnership assets applied to partnership debts as against claims of creditors of any one member of the firm is dependent entirely upon the lien or equity of the other member or members of the firm to have such application.

3. One partner may, upon a voluntary dissolution of a firm, sell to his copartner all his interest in the partnership concern, and if he do so *bona fide*, before any lien has been acquired thereon by partnership creditors through an execution, an attachment, or otherwise, the transfer will, if such be the intention of the partners, vest in the purchasing partner, divested of the equity of the selling partner to have the partnership assets applied to partnership debts.

4. A stipluation or covenant by the purchasing partner to pay the firm debts is not fatal to the good faith of a transfer of the other partner's interest in the partnership concerns, nor to the divestiture of the joint ownership or partnership character of the property; but, to the contrary, such a covenant may be the sole consideration of the transfer.

5. Where one partner transfers his entire interest in the partnership concerns to his copartner, so as to vest in the latter the partnership assets as his sole property, a dissolution of the partnership results.

6. The purchasing partner may, as against any simple creditor of the partnership, assign for the payment of his individual debts the partnership property vested in him as his sole property by a transfer from his partner. It seems that he may exercise the same dominion over it which he can over any other individual property.

7. The fact that partners were insolvent six weeks or more after a transfer by one of them of his entire interest in the partnership concerns to the other does not establish their insolvency as of the time of such transfer, nor avoid a transfer as a fraud upon partnership creditors.

8. Where the questions of the good faith of a sale by one partner to another, and of an assignment by the latter to pay his creditors, and of the intent to hinder and defraud creditors, and of whether such sale was made in contemplation of insolvency, have been fairly submitted to a jury, its finding will not be disturbed by an appellate court unless the testimony justifies it at least clearly.

(*Syllabus by the Court.*)

Error to circuit court, Duval county; JAMES M. BAKER, Judge.

Action on two promissory notes by Schleicher, Schumm & Co. against William Ashmead and Clarence Ashmead. John T. Walker filed an affidavit claiming certain money in the hands of a garnishee, and verdict and judgment were rendered in his favor. Complainants bring error. Affirmed.

STATEMENT BY THE COURT. On March 7, 1884, William H. and Clarence H. Ashmead being partners under the firm name of Ashmead Bros., at Jacksonville, the latter executed to the former a bill of sale, whereby, "for and in consideration of the sum of six thousand dollars, lawful money of the United States, to me paid by William H. Ashmead, * * * the receipt whereof is hereby acknowledged," Clarence bargained, sold, and conveyed to William all his (Clarence's) interests in the assets of Ashmead Bros. On the 24th day of the same month William H. executed a written instrument, whereby he assigned and transferred to John T. Walker all moneys that he, William, "may be entitled to have from insurance effects from Ashmead Bros. on property of all kinds which was lost by fire in the building on Bay street, * * * destroyed by fire on the night of the 23d instant, in trust, however, that he shall collect the said money, and at once distribute the same *pro rata*, without any discrimination or preference, among all my creditors." It constitutes Walker his attorney in fact to demand, sue for, and receive all said moneys for the purpose aforesaid, and in his, William's, name and stead, or in that of Ashmead Bros., of whom William is "the successor by purchase and assignment," to execute

all proper receipts and releases. On the 27th of the month the plaintiffs sued William and Clarence, doing business as Ashmead Bros., in an action of *assumpsit*, and on the 29th procured a writ of garnishment, which was served the same day on one Foster, an agent of the North British & Mercantile Insurance Company. The plaintiffs' action was brought to recover on two promissory notes dated January 22, 1884, each for the sum of $200 principal, and maturing, one 30 and the other 60 days after date. To this action defendants appeared on April 7th, the day the declaration was filed.

On April 24th William H. and Clarence, partners under the firm name aforesaid, parties of the first part, executed a deed to Whitfield Walker, reciting that they were indebted to divers persons in sundry sums of money, which they were unable to pay in full, and granting, bargaining, selling, and assigning to said Walker, his heirs and successors, all the lands, tenements, goods, chattels, stock, promissory notes, debts, claims, demands, property, and effects of every description belonging to them, either as partners or individuals, wherever the same may be, in trust, to sell and convert the property into money, and to collect the debts and demands, and out of the proceeds of such sales and collections to pay (1) expenses, costs, and charges of the trust; (2, 3) out of the proceeds of the sales of the individual property of each partner to pay his individual debts, and the surplus to carry into the fund for the payment of partnership creditors; (4) to pay rent due for premises occupied by them; and (5) to apply the residue to the liabilities of the said parties of the first part, in full or ratably, according to the sufficiency, giving him full power to demand, recover, and receive of and from every person or persons all property, debts, and demands due, owing, and belonging to the parties of the first part, or either of them.

On May 5th there was judgment by default, followed by a final judgment on the 17th for $405.24 and costs. On the same 5th day of May the garnishee answered, stating that the loss by fire had been adjusted at $3,000, and that the company was indebted to Ashmead Bros. in this sum, but that on the morning next after the fire, and before the writ of garnishment was served, the garnishee was notified that Ashmead Bros. had assigned all their interest under the said fire loss to John T. Walker, and that since then a copy of the assignment had been served, the same being annexed to the answer. The answer submits the question as to whom the money is due to the court.

On the 24th of August John T. Walker filed an affidavit entitled in the above cause, and to the effect that the money in the possession of the garnishee was *bona fide* his property as trustee for the purposes mentioned in the above deed of assignment to him, and upon this claim a jury was sworn on January 11, 1885, to try the issue thus made between the plaintiffs and said Walker, and, having heard the evidence, they found for the claimant. A motion for a new trial was made and overruled, and judgment was rendered that claimant had the right of property in the hands of the garnishee, and that he recover costs of the plaintiffs, etc.

The bill of exceptions shows that upon this trial the plaintiffs, who are plaintiffs in error, introduced in evidence the record of their suit and rested, and thereupon the claimant introduced the above bill of sale from Clarence to William H. Ashmead, and the deed of assignment from the latter to such claimant, John T. Walker, and rested. The plaintiffs then put in evidence the deed of assignment from the Ashmeads to Whitfield Walker, and also placed on the stand William H. Ashmead, who testified as follows: "My name is William H. Ashmead. I was one of the firm of Ashmead Bros., composed of Clarence H. Ashmead and myself. I am the William H. Ashmead to whom the bill of sale was made by Clarence H. Ashmead, and I am the person also who made the assignment to John T. Walker, and also one of the parties who made the assignment in the name of Ashmead Bros. to Whitfield Walker. At the time I made the assignment to John T. Walker I was indebted individually in small amounts to one or two persons, and owed my brother, Clarence H. Ashmead, the six thousand dollars mentioned in the assignment from my said brother to myself. My brother and myself, finding it best to continue the business after the said bill of sale was executed, rescinded the sale, and afterwards executed the assignment to Whitfield Walker. At the time we executed the assignment to Whitfield Walker we were insolvent. At the time that my brother, Clarence, sold out to me, we did not announce any dissolution of our copartnership in the papers or any other way. We afterwards found that I could not go on in business satisfactorily to both of us, and we thus rescinded the sale, and made the subsequent assignment."

The following instructions were asked by the plaintiffs, but refused, and the refusal of each of them excepted to:

"(1) If the jury find from the evidence that, at the time of the execution of the assignment to John T. Walker, William H. Ashmead was indebted to Clarence H. Ashmead, his former partner, in the sum of five thousand and odd dollars, as a part of the consideration of his purchase, then the said assignment to Walker, as a matter of law, is fraudulent and void, and the jury must find for the plaintiffs, and that the funds in the hands of the garnishee are subject to plaintiffs' garnishment.

"(2) Partners may make *bona fide* sales of their property at any time before their creditors acquire a lien, but a sale, directly or indirectly, to one of the partners, with a stipulation that he will pay the firm's debts, is not such a *bona fide* sale as to divest the property of its character as firm property primarily liable for firm debts; and a partnership creditor, by his attachment or garnishment, creates a lien paramount to the claim of the partner so purchasing or an assignee of said partner."

The judge, however, charged the jury,

at the request of the claimant, as follows:

"(1) If you believe from the evidence that the assignment from Clarence Ashmead to William Ashmead, and the assignment to John T. Walker, were made in good faith, and without any intent to hinder, delay, or defraud the plaintiffs or other creditors of Ashmead Bros., you will find for the claimant.

"(2) If you believe from the evidence that the assignment from Clarence Ashmead to William Ashmead was not made in contemplation of insolvency, and was made without intent to hinder, delay, or defraud the plaintiffs or other creditors of Ashmead Bros., and that the assignment to Walker was in good faith, and without any such intent, you will find for the claimant."

There were also charges as to the form of the verdict, which need not be recited.

Each of the charges given at the request of the claimant was excepted to.

A. W. Cockrell & Son, for plaintiffs in error. *Walker & L'Engle*, for defendant in error.

RANEY, C. J. In Griffin v. Orman, 9 Fla. 22, and 10 Fla. 9, there had been a partnership between Sewell, Orman, and Young, under the name of Orman & Young, and the period for which, by the articles, it was to last, had expired, but there had been no settlement between the partners, when, in January, 1829, Orman and Young sold their entire interest in the assets of the concern, for the consideration of $17,500, payable out of such assets, which payment was so made to Sewell, he assuming the payment of the debts of the firm, and executing to them a bond, with surety, conditioned for the payment of the same. It was contended that Orman and Young had an equitable lien upon the partnership property for amounts which they had paid for the firm subsequent to the sale. This court held that this would, notwithstanding the dissolution, have been so, but for the agreement represented above, the effect of which was, in its opinion, that the partnership stock became the exclusive property of Sewell, and that Sewell should pay all the debts, and the indemnity bond being for security that he would do so. It will be borne in mind, says the opinion, that the partnership property was not left in the hands of Sewell to pay the debts with, he assuming the trust. "The partnership is dissolved; a final settlement made; an agreement entered into between the partners, in which the creditors are not parties, that Sewell, as a part of the purchase money, will pay all the debts, not specifically out of the partnership property, but that he would pay them, and as an indemnity against their suffering he executes a bond with security." That the fact of taking this bond with security, and the fact of Orman and Young covenanting to warrant and defend against their claim, seemed conclusive that it was the intention of the parties that the effects assigned to Sewell should be appropriated to his private use.

In West v. Chasten, 12 Fla. 315, there was an agreement between the remaining and the retiring partner by which the former assumed the debts of the firm, and agreed to save the latter harmless from the same, the latter transferring and assigning all his interest in the goods to the remaining partner; and it was held that by virtue of this agreement the partnership property ceased to be joint property, and the lien or equity of the retiring partner to have a sale of the property and an application of it to the joint debts was destroyed. See, also, Upson v. Arnold, 19 Ga. 190.

It is true that these decisions were in cases between former partners, but it must be remembered that the right or equity of a creditor of a partnership to have partnership assets applied to partnership debts as against the individual creditor of any one member of the firm is through that lien or equity of the other member or members, which constitutes the right of the latter to such application. Story, Eq. Jur. §§ 675, 1253; Story, Partn. §§ 358, 360; Washburn v. Bank, 19 Vt. 278; Bardwell v. Perry, Id. 292; Rice v. Barnard, 20 Vt. 479; Smith v. Edwards, 7 Humph. 106; Ex parte Ruffin, 6 Ves. 119; Ex parte Williams, 11 Ves. 3; Ex parte Rowlandson, 2 Ves. & B. 172; Baker's Appeal, 21 Pa. St. 76; Clement v. Foster, 3 Ired. Eq. 213; Story, Partn. § 359; Dimon v. Hazard, 32 N. Y. 65; Sage v. Chollar, 21 Barb. 596; Robb v. Mudge, 14 Gray, 534; Rankin v. Jones, 2 Jones, Eq. 169.

One partner may, upon a voluntary dissolution of a firm, transfer to his copartner all his interest in the partnership concern, and if he do so *bona fide* and for a valuable consideration, before any lien has been acquired thereon by partnership creditors through an execution, an attachment, or otherwise, the same will, if such be the intention of the partners, vest in the purchasing partner as his sole or individual property, divested of the right or equity mentioned above, in the selling partner. Not only do the authorities cited above affirm this proposition, but the two decisions of this court are in conflict with the theory of the second instruction asked by the plaintiffs in error,—that a stipulation upon the part of the purchasing partner to pay the firm debts would be fatal to the good faith of the transfer and to the divestiture of the joint ownership or partnership character of the property. There are numerous authorities in which the transfer has been sustained, and the vesting of the property in the purchasing partner as his individual property has been upheld as against the claims of firm creditors, notwithstanding the presence of such a covenant; and such covenant may be the sole consideration of the transfer. West v. Chasten, 12 Fla. 315; Story, Partn. § 359; Croone v. Bivens, 2 Head, 339; Dimon v. Hazard, 32 N. Y. 65; Ladd v. Griswold, 4 Gilman, 25. The fact, however, is that in the case before us there was no such stipulation, and whether such an obligation upon the purchasing partner is implied by the terms of the agreement is a proposition which has not been argued. If it is implied, the same result follows as if it had been expressed.

It is also settled that where one partner

transfers his entire interest in the partnership concerns to his copartner, so as to vest in him the partnership assets as his sole property, a dissolution of the partnership results, and the purchasing partner may, as against any simple creditor of the partnership, assign the property thus vested in him as his sole property, for the payment of his individual indebtedness. He can exercise the same dominion over it that he might over any other individual property. A partnership creditor can, of course, sue him and his former partner, and can levy his execution on the separate property of either, just as he could have sued both before the transfer, and have levied upon the joint property of the firm or the several property of either member; but if, before a lien has been thus or otherwise acquired by the firm creditors, the purchasing partner shall have transferred or applied in good faith the effects which have thus become his sole property to the payment of his individual indebtedness, such transfer or assignment will be sustained in favor of such individual creditor. The selling partner by his sale parts with the equity which he would have retained had he not sold his interest to his copartner, and thus falls the support of any claim to such equity by partnership creditors. The purchasing partner, as sole owner, has, as against partnership creditors, the same right to apply this sole property to his individual debts as he has against individual creditors who have not acquired a lien thereon by attachment or execution, or in other lawful manner. Bullitt v. Chartered Fund, 26 Pa. St. 108; Dimon v. Hazard, 32 N. Y. 65; Sage v. Chollar, 21 Barb. 596; Coover's Appeal, 29 Pa. St. 9; Allen v. Center Valley Co., 21 Conn. 130; Rankin v. Jones, 2 Jones, Eq. 169; Baker's Appeal, 21 Pa. St. 76; Menagh v. Whitwell, 52 N. Y. 146; Robb v. Mudge, 14 Gray, 534.

At the time Clarence Ashmead sold to William H. Ashmead, the plaintiffs in error had no lien on the partnership assets. This is clearly affirmed by the authorities cited above. Clarence had the right to make, and William the right to receive, the transfer, and, if done in good faith, the partnership creditors cannot complain. Its validity depends upon the *bona fides* of the transaction. Ex parte Williams, 11 Ves. 3. Where, at the time of the transfer, the firm and each of the partners are insolvent, as in Ex parte Mayou, 4 De Gex, J. & S. 664, or the firm had become insolvent, as in Yale v. Yale, 13 Conn. 185; Roop v. Herron, 15 Neb. 73, 17 N. W. Rep. 353; and Wilson v. Robertson, 21 N. Y. 587, —the transfer, it seems, should be held fraudulent and void as to the partnership creditors. Yet there is authority to the effect that insolvency at such time will not, of itself, avoid the transfer. Howe v. Lawrence, 9 Cush. 553; Allen v. Center Valley Co., 21 Conn. 130. These parties may have been entirely solvent at that time, notwithstanding their subsequent insolvency, (Ex parte Fell, 10 Ves. 347; Ex parte Walker, 4 De Gex, F. & J. 509,) and if they were such subsequent condition will not defeat a transfer which was not otherwise fraudulent. That they were insolvent when the second assignment was made does not prove that they were so a month and a half before, when the sale was made by Clarence to William H. Ashmead. Though there is testimony that this sale was rescinded, there is none that John T. Walker was a party to the rescission, or that it was before the assignment to John T. Walker, or that the assignment of the insurance money to John T. Walker was ever abrogated. The questions of the good faith of the sale to William and of his assignment to John T. Walker, and of intent to hinder and defraud creditors, and of whether or not such sale was made in contemplation of insolvency, were fairly submitted to the jury, and they have passed upon them, and there is no testimony in the record that justifies interference by an appellate court with their verdict. To justify such interference it must appear at least clearly that they have erred.

The authorities cited by plaintiffs in error do not conflict with the views we have announced. The language quoted from Burrill on Assignments (section 88, p. 120) refers to an assignment by one partner to a third person, and in the same section it is said that an assignment by one partner of all his interest to the other partner or partners works a dissolution of the firm, and the remaining partner may thereupon execute an assignment of all his property, whether belonging to the previous firm or not, in trust for the payment of his individual creditors. Pomeroy v. Benton, 57 Mo. 531, was a suit involving questions between partners, as was Filbrun v. Ivers, 92 Mo. 388, 4 S. W. Rep. 674. In Marsh v. Bennett, 5 McLean, 117, the assignment by the retiring partner to the remaining one was expressly "for the purpose of paying" off the partnership creditors, thus constituting or continuing him a trustee for such creditors. Conroy v. Woods, 13 Cal. 626, holding that where a partner buys the interest of his copartners, and agrees to pay the firm debts, the property of the firm remains bound for such debts just as before the sale, is in conflict with the above decisions of this court and the weight of authority. Yale v. Yale and Wilson v. Robertson are explained above, as is Dimon v. Hazard. Cannon v. Lindsey, (Ala.) 3 South. Rep. 676, holds that the appropriation of partnership assets by one partner to the payment of his own debts without the assent of the other partner is a fraud on the latter; and Arnold v. Wainwright, 6 Minn. 358, (Gil. 241,) in so far as it should be noticed, involves the question of the rights of the purchaser of land, partnership assets, where the legal title stood in the name of a partner.

We will not be understood as expressing an opinion whether or not the assignment to John T. Walker is one for the benefit of his individual creditors, and excluding creditors of the firm; nor as intimating that Clarence Ashmead would be permitted to be paid out of the proceeds of the assignment as against the plaintiffs in error, even if the sale to him had not been rescinded, (Strattan v. Tabb, 8 Ill. App. 225;) nor as committing ourselves as

to whether the use made of the "claim" proceeding in this case is proper.

The judgment is affirmed.

(68 Miss. 714)

WISE *et al.* v. HYATT.

(*Supreme Court of Mississippi.* April 27, 1891.)

JUDGMENT AGAINST ONE OF TWO DEFENDANTS—ADVERSE POSSESSION—BREACH OF COVENANT.

1. The fact that, in a suit against two defendants, no summons was served on one, nor judgment rendered against him, does not render the judgment against the other void.

2. A tenant in common of land cannot acquire a title adverse to that of her co-tenants.

3. A guardian of infant wards cannot, by purchasing a tax-deed of lands belonging to them, destroy their estate.

4. Where, in an action by certain grantees of land against their grantor for breach of warranty of title, the declaration alleges the sale of an entire lot, but the deed, filed as an exhibit, shows that only a portion was sold, and the answer admits that such portion was sold, it is error to dismiss the bill, since it entitles the grantees to recover for any breach of warranty as to such portion.

Appeal from chancery court, Yazoo county; H. C. CONN, Chancellor.

Bill by Wise Bros. against Rebecca P. Hyatt for costs of protecting a title warranted by defendant. Dismissed. Complainants appeal. Reversed.

Lot 131, in Yazoo City, was a portion of the estate of one L. L. Hyatt, who died in 1865. Said Hyatt made a will giving this lot to his wife and children, (there being four minor children,) to be shared equally by said wife and four children, the wife being designated by his will as the guardian of said minor children. When the children arrived at the age of naturity, in 1889, they conveyed their interests in this lot to appellee; and after this conveyance appellants, Wise Bros., bought from Mrs. Hyatt, with other property, all of this lot 131, except a portion theretofore sold to another party, receiving a deed with general warranty of title. Before the children sold their interests to their mother, the appellee, two of them, R. W. and C. L. Hyatt, had been in business, and in the course of said business some eight or nine judgments were recovered against them, and after the purchase of the lot by Wise Bros. from Mrs. Hyatt executions on the judgments against R. W. & C. L. Hyatt were issued, and levied on their two-fifths interest in said lot 131, and at the sale under these executions Wise Bros. bought the interests involved to protect their title. And now Wise Bros. file this bill in the chancery court to recover from Mrs. Hyatt the amount paid by them at the sale under execution to protect the title warranted by her. Mrs. Hyatt answered the bill, alleging that it was not necessary that Wise Bros. should have bought at the execution sale, since she had acquired title as against the children by adverse possession of more than 10 years, evidencing her adverse holding by a deed to her from the state, the lot having been sold to the state for the taxes of 1876. Besides that, the judgments were void, because, in the returns of the sheriff on the summons in the cases when judgments were rendered, the officer signed his name without anything to show his official character, and because the names of the plaintiffs in the judgments rendered are not the same as those set forth in the summons.

W. S. Epperson, for appellants. *Henry & Richardson*, for appellee.

WOODS, C. J. 1. If all the judgments against R. W. & C. L. Hyatt were absolutely void, there was not an outstanding, paramount lien on lot 131, and the purchase of the interest therein of R. W. & C. L. Hyatt by the appellants, at execution sale, conferred no title, and imposed no obligation upon appellee to reimburse appellants for the sum so expended in extinguishing such supposed lien. But an inspection of the record fails to satisfy us that the judgments were void. The various summonses were apparently properly executed by a competent officer. The fact that in one of the suits against R. W. & C. L. Hyatt the summons was not served upon C. L., and that no judgment was entered against him, does not assist appellee's contention. While no interest of C. L. Hyatt was vendible under the execution issued on the particular judgment, still the interest of R. W. Hyatt was properly sold thereunder, and that interest was acquired by appellants. But, generally, we repeat, the judgments were not void, and appellants' contention on this point is not well taken.

2. In 1865, under the will of L. L. Hyatt, appellee and her four children became tenants in common of the lot 131. We must presume, from the evidence before us, that these children were minors, and that appellee was their guardian. Without any change of this trust relationship, and without any change in the estate in common in said lot, appellee acquired a tax-title to an undivided half interest in the lot, and now claims title to the entire lot by possession of 10 years. She cannot be permitted to do this on two grounds, viz.: (1) She was tenant in common at the time of her purchase from the state, and her purchase cannot be asserted adversely to the rights of her co-tenants; and (2) she stood in the relation of guardian to minor wards at the time of her purchase, (as we must presume,) and she cannot be permitted thus to destroy the estate of her infant wards. It is to be borne in mind that any ratification and assent to this purchase of the tax-title by the co-tenants was made about 12 years after the purchase, and after the rendition of the judgments above referred to against R. W. & C. L. Hyatt.

3. While the bill on its face charged a sale of the whole of lot 131 by appellee to appellants, the exhibit filed with the bill, the conveyance itself, disclosed that only the portion of lot 131 was sold and conveyed which the answer of appellee avers was sold and conveyed. The complainants were entitled to any less relief than the particular relief prayed, if the evidence justified. The better practice is to set the cause down for hearing to the end that the legal principles involved may be first settled by the court. When this has been done, and favorably to complainants, but

the court, for want of evidence, or because arithmetical or other calculation, necessary to stating an account, are required before the court can say precisely what relief shall be granted, then the court should, whether asked or unasked, refer the matter to a master to take the needed evidence, and state the account, showing the exact condition of the parties. On the case as presented, the complainants were entitled to some relief, and the unconditional dismissal of their bill was error. Reversed and remanded.

(68 Miss. 255)

BUFKIN v. LYON *et al.*

(*Supreme Court of Mississippi.* Oct. Term, 1890.)

LEVY ON STOCK IN TRADE—PARTY IN BUSINESS—EVIDENCE.

O. sold to W. a stock of goods, and put him in possession under a bill of sale. The business was carried on in the same store where O. had formerly conducted it in his own name. W. employed O. as clerk, and as such put him in possession. W. put up his sign after the sale to him, and it remained several days, when O. took it down, but no other sign was put up. Thereafter the goods were levied upon by plaintiffs as the goods of O. *Held* that, in the absence of anything else to show who was transacting the business, the goods were not subject to levy under Code Miss. § 1300, providing that, if any person shall transact business in his own name, all the property used or acquired in such business shall be liable for his debts.

Appeal from circuit court, Perry county; A. G. MAYERS, Judge.

Claim by W. H. Bufkin for goods levied on by I. L. Lyon & Co. as the goods of O. E. Bufkin. Judgment for Lyon & Co., and claimant appeals. Reversed.

The goods levied on had been the property of O. E. Bufkin, but he had sold them to W. H. Bufkin, and put him in possession under a bill of sale. The business was continued in the same store where O. E. Bufkin had been carrying it on. W. H. Bufkin hired O. E. Bufkin as clerk, and as such put him in possession. After the sale to W. H. Bufkin, he put up a sign with his name on it. This remained up a few days, when O. E. Bufkin took it down, and no other sign was put up in place of it.

J. L. Morris, for appellant. *N. C. Hill*, for appellees.

CAMPBELL, J. It does not appear from the statement of facts who transacted business as to the goods, and that is the material inquiry and the determining factor under section 1300[1] of the Code. O. E. Bufkin was in possession as clerk, and, presumably, what he did was in that capacity, and in the name and behalf of his employer, as there is nothing to suggest the contrary. The fact that the clerk had taken down the sign of his employer did not subject the goods of his employer to the demands of the creditors of the clerk. There must have been more than this to effect such a result. If the clerk transacted business in his own name as apparent owner, and used or acquired the goods in such business, the statute makes them his as to his creditors; but it is not in the power of a clerk merely by taking down the sign of his principal to subject the goods of the principal to the seizure of the creditors of the clerk. There is nothing to show that the goods were used or acquired by O. E. Bufkin in business transacted by him in his own name. He had owned the goods, it is true, but had sold them, whereby they became the property of another, and as such were not liable for his debts, unless made so by section 1300; and they are not shown to have been, as already stated, because it is not shown that O. E. Bufkin transacted business in his own name, and used or acquired the goods in such business. In Wolf v. Kahn, 62 Miss. 814, "the seller was in and about the store just as he had been when owner. He who had been up to that hour clerk then became owner. * * * The sign (of the former owner) remained over the door. His revenue and privilege licenses remained posted in the room. Lewis Kahn, the purchaser, who had been the clerk, and Max Kahn, the clerk, who had been the owner, were in and about the store just as they always had been. Every appearance that would lead to the belief on the part of the public that Max was transacting the business as before was presented, and nothing was done or said from which an inference could be drawn that he had retired from business, and his late clerk had embarked in it;" and these facts were held to make the goods liable to the creditors of Max Kahn, who acted as owner after the alleged sale, just as he had done before. The case before us differs from that in several important particulars. This was not a sale by an employer to his clerk, and the purchaser put up a sign over the door with his name on it, which remained up until taken down by the clerk, and that is all that appears. The question is not how significant the facts would be on an issue, whether the sale was in good faith or not, but do they bring the case within the operation of section 1300?—and that is answered in the negative. Judgment reversed, and judgment here for the claimant, which is the judgment which should have been rendered in the circuit court.

[1] Section 1300 provides that, if any person shall transact business in his own name, all the property used or acquired in such business shall be liable for his debts

(68 Miss. 288)

JACKSON v. DUNBAR *et al.*

(*Supreme Court of Mississippi.* Oct. Term, 1890.)

DEATH OF JOINT LESSOR—ACTION BY SURVIVORS—MISJOINDER OF PLAINTIFFS—WAIVER.

1. Where a lease stipulates for the payment of the rent to the persons who jointly made the lease, the right of action thereon is on the death of one in the survivors.

2. The misjoinder of a party plaintiff is no ground for reversal, where objection was not made as prescribed by Code Miss. § 1511, and the recovery was in the name of the parties only who had a right of action.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

Action by Beatrice Dunbar and others on a lease for rent against W. L. Jackson, executor of M. E. Jackson. Judgment for plaintiffs, and defendant appeals. Affirmed.

The lease was made by William H., Beatrice, Kate, and Ida Dunbar to M. E.

Johnson. Before the action William H. Dunbar and M. E. Jackson had died. The parties plaintiff were the three survivors and the guardian of certain grandchildren of William H. Dunbar. Recovery, however, was in the name of the three surviving lessors. There was a conflict of testimony as to the amount of rent due.

W. P. & J. B. Harris, for appellant. *James G. Leach*, for appellees.

CAMPBELL, J. The testimony is conflicting, and we are unwilling to disturb the verdict on the facts. We agree with the counsel for the appellant as to the legal rights of a life-tenant and the owners of the expectancy, but in this case we are not informed by the record as to the precise relation sustained towards the land by W. H. Dunbar, said to have been life-tenant, and his three daughters, who with him were payees of the rent. The father and his three daughters united in making the lease, and the rent was stipulated to be paid to them,—why we do not know,—but when W. H Dunbar died the right of action on the obligation given to the four for the rent was in the survivors, who recovered a part of the sum sued for in this action. The guardian of the minor children of Adams had no right of action, and was improperly made a coplaintiff; but objection was not made to this in the mode prescribed by law, (Code, § 1511,) and no harm was done by the misjoinder, as the recovery was in the name of the three who had a right of action on the obligation for rent. Affirmed.

(68 Miss. 523)

EFFINGHAM *et al.* v. HAMILTON.

(*Supreme Court of Mississippi.* April Term, 1891.)

MANDAMUS—TO SCHOOL SUPERINTENDENT—INTRODUCTION OF TEXT-BOOKS.

Act Miss. Feb. 22, 1890, (Laws, p. 86,) provides that a committee of teachers shall be appointed in each county to select a uniform series of text-books for the public schools, and that, after such selection, the county superintendent shall contract with the publishers for supplies of such books. A committee made a selection of books, but the county superintendent refused to sign the contract with the publishers. Afterwards another committee was convened, and without authority adopted the books of other publishers, with whom the superintendent entered into a contract. The first-named publishers applied for *mandamus* to compel the superintendent to contract with them. *Held* that, notwithstanding their clear legal right, and the unlawful conduct of the superintendent, the writ was properly refused, because the books of the other publishers had already been introduced into the schools, and a change would have seriously affected public interests.

Appeal from circuit court, Holmes county; C. H. CAMPBELL, Judge.

Mandamus by Effingham, Maynard & Co. to compel G. T. Hamilton, superintendent of schools of Holmes county, to sign a contract with the petitioners for supplies of books for the public schools. Act Miss. Feb. 22, 1890, (Laws, p. 86,) provides that a committee of teachers shall be appointed in each county of the state to select a uniform series of text-books for the schools; and that, after the committee has made a selection, it shall be the duty of the county superintendent to enter into a contract with the publishers for supplies of such books. The committee appointed in Holmes county selected the books of the petitioners, but the superintendent refused to sign the contract required by the statute. From an order sustaining a demurrer to the petition the petitioners appeal. Affirmed.

Hooker & Wilson, for appellants. *Noel & Tackett*, for appellee.

CAMPBELL, J. Upon the facts stated in the petition before us, and which upon demurrer must be taken as true, the right of the petitioners to have a contract made with them by the defendant, and to have their books selected by the committee on the 6th of October taught in the public schools of Holmes county, is indisputable. The refusal of the defendant to contract with them, as required by law, was wholly indefensible. He had no discretion about it. His plain duty was to proceed to contract, in pursuance of the action of the committee, and then "to see that only the adopted text-books are used" in the schools; and, if this were a matter affecting only the parties to this action, there could not be a doubt of the right of the petitioners to compel the performance of his official duty by the defendant in the matter wherein they have a pecuniary interest. But it is not in every case of clear legal right, and the absence of a sufficient legal remedy, and where, therefore, *mandamus* is an appropriate remedy, that it will be issued. It is settled by numerous decisions that a sound judicial discretion is to be used, and, where circumstances make it unwise and inexpedient to allow this writ, to refuse it when sought to enforce merely private right. 14 Amer. & Eng. Enc. Law, 97, and cases cited; State v. Board, 24 Wis. 683; People v. Board, 27 N. Y. 378. We are therefore called on to consider the situation, and determine the propriety of refusing the writ. The petition shows that for some reason, after the action by the committee to select text-books on October 6th, and its dissolution, the state board of education (assuming, as its order shows, that the text-book committee of Holmes county at their meeting on October 6, 1890, failed to adopt a complete list of books for use, etc.) directed the defendant to reconvene the committee to supply the omission, and, acting upon this, he attempted to reconvene the committee, and appointed others to fill the places of those who refused to meet again; and at a meeting of the committee thus constituted, (consisting of some of the former committee and of some substitutes,) on November 8th, there was a revocation of the former action as to the books published by the petitioners and a selection of others, and in pursuance of this action the books of other publishers have been contracted for and introduced into the schools, and are being taught. We are thus informed that a committee claiming the right to act has revoked former action on which the right of the petitioners is founded, and that its action has been carried out so far as to result in a contract with other publishers whose publications

have been introduced into the schools. The patrons of the schools have incurred the expense of procuring the books, as we must assume, and the teachers are required by the superintendent of education to teach these books, and have no discretion about it. In view of these complications, and the evil consequences likely to arise affecting public interest, we deem it proper to deny the remedy sought. It is to be remembered that the object of the law providing for the selection of a uniform series of text-books for the public schools, and of all its provisions, was for the benefit and protection of the people, and not of book publishers; and, while they may acquire rights, and be entitled to their protection and enforcement in proper cases, they must be subordinated to the public interest as to the particular remedy here invoked. Affirmed.

(68 Miss. 447)

SIMS *et al.* v. WARREN.

(*Supreme Court of Mississippi.* Oct. Term, 1890.)

TAXATION—ASSESSMENT—DESCRIPTION OF PROPERTY—TAX-DEED.

An assessment roll showed that 40 acres of a certain quarter section was assessed at $2.50 per acre, and 120 acres at $1 per acre, but failed to identify either tract. Complainant claimed the north 80 acres under a tax-deed conveying to him 80 acres of the quarter section, without further description. *Held*, that under Laws Miss. 1878, p. 28, providing that no failure to designate the precise locality of any subdivision of land within a section should vitiate the assessment or the sale thereof for the non-payment of taxes, but that it might be shown by parol testimony to what particular subdivision such assessment or sale was intended to apply, the assessment, otherwise void for uncertainty, was not aided by testimony of the assessor that he intended to sell the 80 acres on which taxes had not been paid by C. and M., and that one of them had paid taxes on 40 acres assessed at $2.50 per acre, and the other on 40 acres assessed at $1 per acre, and by the testimony of C. and M., to each of whom a receipt had been given for taxes on 40 acres in the quarter section, that they owned the south 80 acres of the quarter section, and thought they were paying taxes on the land owned by them.

Appeal from chancery court, Itawamba county; BAXTER MCFARLAND, Chancellor.

Suit by N. B. Warren against R. P. W Sims and others to confirm title to certain land claimed by complainant under a tax-sale. Judgment for complainant, and defendants appeal. Reversed.

Complainant claimed under a tax-deed conveying to him "80 acres of the S. E. ¼ sec. 10, T. 8, R. 8, in Itawamba county." The bill claimed under this deed the north half of the quarter section. The assessment roll merely showed that 40 acres of the quarter section were assessed at $2.50 per acre, and 12 acres at $1 per acre, and left it indefinite as to which 40 acres were intended to be assessed at $2.50 per acre, or what 120 acres were intended to be assessed at $1 per acre. The deputy tax collector testified from memoranda made on the assessment roll at the time the taxes were being collected that one Cummings had paid the taxes on the 40 acres assessed at $2.50 per acre, and the administrator of one Morris had paid the taxes on 40 of the 120 acres assessed at $1 per acre. It was shown by these persons that the land owned by and on which they supposed they were paying taxes was the south 80 acres of the quarter section. The receipt issued to each of them was for the taxes on 40 acres of the quarter section, without any further identification as to the particular 40 acres. For former report, see 7 South. Rep. 226, 67 Miss. 278.

Clifton & Eckford, for appellants. *Newnan Cayce*, for appellee.

COOPER, J. We find nothing in this cause as presented by the present record distinguishing it from the case presented on the former appeal. The attention of counsel and court was then directed to the sufficiency of the assessment of the land to uphold its sale for taxes, and we held it to be insufficient. Sims v. Warren, 67 Miss. 278, 7 South. Rep. 226. It is now attempted to support the assessment and supply its defects by evidence of what the tax collector did and intended to do in making the sale of the land for the taxes, and by evidence that payments made by Cummings and the administrator of the estate of William Morris were intended by them as payment of the taxes on other lands in the same subdivision, and thus, by the process of exclusion, to show that the land sold was delinquent. The additional testimony, in effect, only shows that the collector intended to sell 80 acres of a tract of 160 acres, which 80 acres was whatever was not intended to be paid on by Cummings and Morris' administrator. The receipts given by the collector to these parties do not show upon what lands taxes were paid, and it is only be applying the receipts to the land owned by them that they are made to cover these, rather than any other land of like quantity in the subdivision. The decree of the court below necessarily rests upon the predicate that there may be a valid sale for taxes without a valid assessment of the land sold, or that an assessment insufficient in the description of the property may be cured by applying it to any property not paid on before the sale for taxes. The constitution requires an assessment of property for taxation, and this the legislature may not dispense with. The fundamental purpose is to secure equality and uniformity of the burden of taxation according to the value of the property taxed. To reach valuation there must be identification of the thing to be valued. If the whole of the subdivision in which the land in controversy is located had been valued at one price, a different question would be presented. But 40 acres of the 160 were assessed at $2.50 per acre, and the remainder at $1 per acre. On the face of the roll it is impossible to say to which part of the subdivision the valuation of $2.50 is to be applied, or to what that of $1 relates. The assessment required by the constitution must be provided in any scheme declared by the legislature for taxation. This accomplished, the constitutional command is obeyed, and it is within legislative discretion to provide nothing further save the machinery by which taxes shall be levied and

collected upon the assessment thus made. But an assessment within and according to the constitution must be made before there can arise the power of sale provided by any legislative scheme or plan. The revenue act, under which the sale of the lands here in controversy was made, (Laws 1878, p. 23,) provided "that no failure to designate the precise locality of any subdivision of land within a section * * * shall be held to vitiate the assessment, or the sale thereof for the non-payment of taxes so assessed, if the section, township, and range within which the land is situated be properly entered on the rolls; and it may be shown by parol testimony on any proceedings to vacate such assessment, or in any controversy respecting the conveyance of any such lands when sold for the non-payment of taxes, or any subsequent conveyance, to what particular subdivision such assessment or sale was intended to apply." Until it be shown that there was a valid assessment of property, it is useless to inquire whether a sale otherwise regular has been made, for the invalidity of an assessment nullifies all that follows. The question always returns, has there been a valid assessment of the property sold? Looking to the evidence in this cause, we find nothing in aid of the assessment except the intention of the tax collector in making the sale, and this is an irrelevant and inconclusive matter, throwing no light upon the material inquiry as to what lands were assessed. Nor do we think it would have been competent to show by parol the intention of the assessor, undisclosed by what he did in fact do and record upon the memorial provided by law as the exponent of his action. There cannot be an assessment of lands, within the constitutional requirement, which rests only in the memory and purpose of the officer. There must be official action evidenced by the roll he is required to make. "The roll must furnish the clue which, when followed by the aid of parol testimony, conducts certainly to the land intended. It is admissible only to apply the description on the roll, which must give the start and suggest the course, which being followed will point out the land intended to be assessed." CAMPBELL, J., in Dodds v. Marx, 63 Miss. 443. In that case the court was construing a provision of the Code which provided for the admission of parol evidence if there is "enough in the description on the roll to be applied to a particular tract of land by the aid of such testimony," while the act controlling the question now under investigation provides for the introduction of such evidence where the section, township, and range are given on the roll. The act now under consideration is narrower than the Code provision, for under it parol evidence is only admissible where the section, township, and range are given, while under the Code provision it is admissible whether the section, township, and range are or are not on the roll. Under neither is it competent to do more than to apply the description to a particular tract; otherwise it would be to create an assessment by parol, which cannot be done. Reversed and remanded.

ELMSLEY v. GEORGIA PAC. RY. CO.

(*Supreme Court of Mississippi.* Oct. Term, 1891.)

KILLING STOCK ON RAILROAD TRACK.

A railroad engineer cannot take chances of an animal getting off of the track, where he has an opportunity of easily avoiding all possibility of an injury.

Appeal from circuit court, Washington county; R. W. WILLIAMSON, Judge.

Action by Bridget Elmsley against the Georgia Pacific Railway Company for the value of an animal killed by defendant's train. From a judgment for defendant plaintiff appeals. Reversed.

The instruction for the defendant, to which objection was made, was that "a railroad has a right to a clear track, and that it is not liable for stock killed by its trains on its track unless they have failed to use ordinary care and prudence to avoid striking such stock, and it is not the duty of the engineer to stop his train when he sees stock upon the right of way. Unless there is a reasonable probability of the train striking such stock, it is his duty to make schedule time, using only reasonable diligence in avoiding striking animals upon the track; and in this case, if the jury believe, from the evidence, that the train was not going at full speed when the mule was seen upon the track, and that the engineer blew his stock-alarm whistle," etc.

D. C. Wasson, for appellant. *Yerger & Percy*, for appellee.

COOPER, J. The instruction asked and secured by the defendant is erroneous because it relieves the defendant from liability for the injury inflicted upon the property of the plaintiff, (a mule,) if at the time the engineer attempted to run by the animal there was a reasonable probability that it would not be struck by the train. The servants of the company may not speculate upon the probable consequences of an act apparently dangerous, and which was voluntarily entered upon with full opportunity of easily avoiding all possibility of injury. It cannot be said that the chances were great that the mule would quietly stand upon the narrow strip of land while the train ran by, nor that it would change its position and collide with the train. The engineer, with full knowledge of the danger, elected to take the chance of the animal remaining quiet; but it was at the risk of his employer, and not at that of the owner of the animal, that the experiment was tried. The judgment is reversed, and cause remanded.

(69 Miss. 245)

KING v. ILLINOIS CENT. R. CO.[1]

(*Supreme Court of Mississippi.* Oct. Term, 1891.)

RAILROAD COMPANIES—LIABILITY FOR TORTS OF SERVANT.

Under Act Miss. Feb. 22, 1890, which provides that station agents of railroad companies shall preserve order in the waiting-rooms, and may arrest and deliver to some officer all persons guilty of disorderly conduct, the acts of such agents are imputable to the company.

Appeal from circuit court, Hinds county; J. B. CHRISMAN, Judge.

Action for false arrest by F. B. King against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Plaintiff was traveling, and arrived in Jackson at 2 A. M., over the Illinois Central Railroad, intending to go to Vicksburg that morning. While in the waiting-room, he had need to visit the closet, and asked of the porter where to find it. The porter directed him to the gentlemen's closet on the north end of the depot, but King failed to find it, and, returning to the waiting-room, entered the ladies' closet. He was ordered out first by the porter, and then by Mr. Montgomery, the depot-master, but refused to come until he got ready. When he did emerge from the closet Mr. Montgomery arrested him, and sent him to jail, where he remained until 4 P. M. next day, when he was discharged. *Calhoon & Green*, for appellant. *J. B. Harris*, for appellee.

CAMPBELL, C. J. We reject the view that depot or station agents of railroad companies are by "An act to amend the railroad supervision laws of this state," approved February 22, 1890, made officers of the state, and its representatives in the exercise of the power conferred, so as to relieve their principals from responsibility for their acts. The act cited creates the power and the duty prescribed to be exercised and performed by depot or station agents as such and for their principals. Under the act they are neither more nor less than depot or station agents, with the additional power and duty prescribed by it to be exercised and performed for and in behalf of their employers. The language of the act excludes the theory that they are made officers, for it provides that they shall "arrest and deliver to the custody of the most convenient sheriff or constable, or other proper officer," etc., thus showing that the power devolved on them is to be exercised at their place of business and in their capacity as its supervisor. The act is a part of the scheme of railroad supervision by the state, and its effect in the matter now being considered is to make it the duty of railroad companies through their depot or station agents to preserve order in the waiting-rooms in their respective stations. It is made a company or corporate duty to be performed by the designated representative of the company, and for the performance or non-performance of which the company is responsible. Neither the company nor the agent can avoid or shift the responsibility. It is fixed by law, and is not dependent on the action of the company or the view of its officers or agents. Every depot or station agent, whatever may be his instructions or his understanding, is made a conservator of the peace, "with authority to preserve order in the waiting-rooms," and the duty to arrest and deliver to some officer "all persons who are guilty of disorderly conduct." The manifest purpose of the legislature was to secure the preservation of order in the waiting-rooms through the designated officer or agent of the railroad company, and what he does or fails to do in reference to this duty is imputable to the railroad company as its act or omission. What is "disorderly conduct," within the meaning of the act, so as to authorize arrest, is to be determined from a consideration of the subject-matter dealt with by the legislature, and the evil intended to be guarded against. We will not attempt to define it. Each case must be determined by its own facts. "Circumstances alter cases." The law should be so interpreted and administered as, on the one hand, not to unduly fetter a depot or station agent in the discharge of the duty to preserve order in the waiting-rooms under his care; and, on the other hand, to protect the citizen against an unwarrantable interference with his liberty. Generally it will not be difficult to distinguish and characterize the conduct so disorderly as to call for arrest. It does not appear from the record that there was a determination by the circuit court of the question whether or not the plaintiff was guilty of disorderly conduct warranting his arrest, for the case was disposed of by the view that the railroad company was not re-

[1] A person arrested on a charge of disorderly conduct on the cars of an elevated railway company, and convicted thereof, cannot maintain an action for malicious prosecution against the company. Nor can he maintain an action against the company for false imprisonment, the arrest having been made by a police officer, and the imprisonment directed by the public authorities. Oppenheimer v. Railway Co., (Sup.) 18 N. Y. Supp. 411.

Defendant's ticket agent, acting under a notice given him by police officials to look out for a five-dollar counterfeit, and describing three men passing the same, supposing a bill presented at his window by plaintiff in payment for tickets to be one of the counterfeits, and supposing plaintiff and his companion to be the persons described, after giving plaintiff his tickets and change, sent for a police officer, and directed their arrest, while they were seated on the station platform waiting to take the next train. The officer stated that he knew the two men as reputable men, and that there must have been a mistake, but the agent insisted upon their arrest for passing counterfeit money, and they were arrested, but were, after an hour, discharged; the bill passed being pronounced genuine. *Held*, that the agent was acting without the line of his duty in taking the bill which he supposed to be counterfeit, and causing the arrest; and, it not appearing that plaintiff was at the time of his arrest in the agent's custody, or under his protection, with respect to the execution of the contract of transportation, defendant could not be made liable for his conduct. EARL and FINCH, JJ., dissenting. 14 N. Y. Supp. 456, reversed. Mulligan v. New York & R. B. Ry. Co., (N. Y. App.) 29 N. E. Rep. 952.

sponsible in any event for the arrest. Therefore the question as to the justifiableness of the arrest is involved in our consideration of the case only by the fact that, if it was clearly justifiable, the party would have no ground for complaint. It seems probable that the learned circuit judge did not consider the arrest as justifiable, and in this view we concur, but, disagreeing with him as to the other question, the judgment cannot stand. Reversed and remanded.

(69 Miss. 34)

JULIENNE v. MAYOR, ETC., OF CITY OF JACKSON.

(*Supreme Court of Mississippi.* Oct. Term, 1891.)

KILLING DOG RUNNING AT LARGE—CONSTITUTIONAL LAW.

1. A dog may lawfully be killed by a police officer when running at large, contrary to an ordinance ordering all dogs confined, though it had just escaped, and was being pursued by plaintiff to return it to confinement.

2. Summary proceedings of the most stringent character, for the destruction of dogs kept contrary to municipal regulations, are entirely within legislative power.

Appeal from circuit court, Hinds county; J. B. CHRISMAN, Judge.

Action by J. C. Julienne against the mayor and aldermen of the city of Jackson for the value of a dog killed by a police officer. From a judgment for defendants, plaintiff appeals. Affirmed.

Frank Johnston, for appellant. *J. B. Harris*, for appellees.

COOPER, J. Though the plaintiff's dog was not permitted to be at large knowingly, but escaped from his close and was soon thereafter followed by the plaintiff's wife for the purpose of returning him to confinement, he was nevertheless "running at large," within the meaning of the ordinance of the city, and was lawfully killed by the city marshal. It may be conceded that the plaintiff had a property right in the animal, and might have recovered his value as against one unlawfully killing him. But, of all property, dogs are more peculiarly the subject of police regulations than any other class. They are very generally kept and considered of value because of their tendency to revert to their savage state, and to attack as an enemy any stranger who may approach them; and it is because of the danger to the public arising from these instincts that they are so often and so generally subjected to police regulations, especially in cities and towns. It is held with great unanimity by the courts that regulations of the most stringent character, and the most summary proceedings for the destruction of these animals kept contrary to such regulations, are entirely within legislative power, and free from constitutional objection, though the property of the owner is destroyed without notice or hearing, in the execution of the law. In Massachusetts it has been held that a dog, not licensed and collared according to the provisions of law, may be shot within the owner's close by the officers. Blair v. Forehand, 100 Mass. 136. So in New Hampshire, under a statute providing that "no person shall be liable by law for killing any dog which shall be found not having around his neck a collar of brass, tin, or leather, with the name of the owner or owners engraved thereon," it was held that a private person might lawfully kill a dog having on a collar on which was engraved the initials of the owner's name, even though he knew who was the owner, the court saying: "Actual notice of the ownership of the dog will not supersede the necessity of a compliance with the statute. Its provisions are direct and positive, and the consequences of a neglect of the statutory requirements are explicitly enacted." Replying also to the argument that the act conflicted with the constitution, in that it was a taking of private property for public uses, or deprived the owners of their property in dogs, the court said the act had no such effect, "but merely to regulate the use and keeping of such property in a manner that seemed to the legislature reasonable and expedient. It is a mere police regulation, such, as we think, the legislature might constitutionally establish." Morey v. Brown, 42 N. H. 373; Cooley, Const. Lim. p. 741. The judgment is affirmed.

(68 Miss. 454)

ILLINOIS CENT. R. CO. v. PETERSON.

(*Supreme Court of Mississippi.* April Term, 1891.)

CARRIERS — LIVE-STOCK SHIPMENTS — RIGHT TO STOP AND UNLOAD — ENFORCEMENT OF UNITED STATES LAWS.

1. Where a railroad company, under a special contract, furnishes an entire car, in which stock may be fed and watered, to a shipper, who loads it with "emigrant movables" and several horses, the contract requiring that he load the car and accompany it, and feed, water, and care for the stock at his own risk and expense, and exempting the company from liability for delays, and there is no agreement as to any layout along the route, the shipper does not, in the absence of a custom to that effect, acquire by such contract the right to have the car stopped and laid out so that he may rest his horses, and thus save them from suffering and death, but can only secure such delay by abandoning the contract, or by contracting anew for the use of the car for a longer time.

2. Rev. St. U. S. § 4386, providing that animals transported on railroads shall be unloaded and fed at certain intervals, and that a penalty shall be recoverable in the federal courts for every violation of the act, is a statute with the enforcement of which the state courts are in no way concerned.

Appeal from circuit court, Hinds county; J. B. CHRISMAN, Judge.

Action by Peterson against the Illinois Central Railroad Company to recover damages for the death of two horses and injury to several others while being transported over defendant's railroad. Judgment for plaintiff. Defendant appeals. Reversed.

W. P. & J. B. Harris, for appellant. *E. E. Baldwin*, for appellee.

WOODS, C. J. Under the special contract in evidence, and under which the appellee seeks a recovery, the defendant corporation let to appellee an entire car, to be used by him in the transportation of what

is denominated "emigrant movables," consisting, in this instance, of six horses and a lot of miscellaneous property,—corn, feed-stuff, furniture, etc. The car was under the charge and in the care of appellee, was loaded by him at his own discretion, and was held in the defendant's yards at Chicago, to meet appellee's wishes, for about three days, in order to permit him to complete his load; and this while the horses were all on the car, they having been loaded at a point 30 miles north of Chicago. The contract stipulated, for the railroad company, against liability on its part, except for injuries resulting from collisions or derailment in transportation. That the railroad limited its liability for willful injuries or gross negligence is not contended by its counsel. By this special contract the appellee agreed to feed, water, and take care of his stock, and to load and unload the animals, and to exempt the railroad company from loss occurring by jumping from the cars, delay of trains, or any damage the stock might sustain, except such as should result from collisions or derailment of cars in course of transportation. Suitable provision was made for feeding and watering the stock on the car, and they were properly fed and watered by appellee, who accompanied the stock, without further charge than the price paid for the use of the car. After the stock had been loaded and kept confined in the car for nearly three days, the appellee completed his additional loading, and the car was taken in charge by appellant, to be transported on its route to Jackson, Miss. The next day after leaving Chicago appellee discovered that one of the young stallions was down in the car. He got it up, but before reaching Centralia, and about a day after the journey had been begun, the same young animal was found down again, and, as was thought by appellee, to be down finally, as he expresses it. On reaching Centralia appellee made application to the railroad company's agent to be laid out for 24 hours, to the end that he might rearrange his load, (then plainly seen to have been improperly loaded,) and to rest his stock, which application was not accepted and complied with, though the car of appellee was actually taken out of the train in which it was being carried, and was permitted to lie at Centralia for a few hours,—a time too short, however, as appellee thought, to afford him opportunity to unload, rest his stock, and rearrange the load.

The question, then, which meets us on the threshold of the case, and whose determination by us may prove conclusive of the entire controversy, is, had the appellee the right to demand that he be laid out at Centralia? If he had this right, how was it acquired? Was it an implied obligation resting upon the railroad? If it finds rest under the contract, it will be found by implication. There is no express obligation of this character appearing on the face of the instrument. If it was an implied obligation on the railroad, how is the implication raised? If it was the custom of the railroad company to lay out cars in which a few horses were carried, then there was an implied obligation assumed to comply with such custom on the part of the railroad. But the undisputed evidence perfectly shows that, while it was the custom to lay out car-load lots of animals every 24 or 28 hours, in order that they might be fed, watered, and cared for, no such custom prevailed or existed in cases where a few animals only were loaded in a car, and where provision was made thereon for watering and feeding the animals. The custom was unknown in cases of the latter character. Nor does the absence of the custom seem unnatural; there being no necessity, apparently, in ordinary cases, for any unloading. The cases referred to by appellee's counsel in Railroad Co. v. Adams, 42 Ill. 474, and Railway Co. v. Thompson, 71 Ill. 434, raised an implied obligation on the carrier to throw water on hogs crowded in a car, because of the known custom of railroads to so apply water to that particular animal. The other case relied upon by counsel for appellee is that of Kinnick v. Railroad Co., (Iowa,) 29 N. W. Rep. 772. In that case the railroad company received a car-load of hogs from plaintiff, and, after loading and starting them on their journey, there was such delay, by reason of the wrecking of another train, that a number of the hogs died; and the court held, as it was a natural propensity of hogs to struggle to get near to or away from the doors of a car, when it is left standing, and to "pile up" on each other in such struggles, and thereby produce injury or death, and as it appeared that the injuries complained of were attributable to the failure of the railroad company to give the animals any attention during the 12 hours during which the train was standing still because of the obstructing wreck, that the company was liable because of its negligence, in this extraordinary danger to the animals, in failing to do what the delay and consequent peril to the animals required should be done. We fail to see any support in any of these cases for the proposition that there was an implied obligation in the case at bar upon the railroad company to lay out the car, which appellee had hired, for 24 hours, at Centralia. The contrary is involved in these decisions, as we understand them.

In the absence of any custom imposing obligation to lay out on the appellee, what is there in the conduct of the parties to the contract before us which will authorize us to say that any purpose to lay out the car, after it had been started on its way to its destination, was in the minds of the company and the appellee? What is the foundation for implying that the minds of the parties ever dwelt upon or met in any unexpressed agreement that appellee should have such right? We have been unable to find any circumstance, even, which tends to support that proposition. On the other hand, there is much in the evidence of the appellee which strongly shows that he regarded the use of the car as confined to one continuous trip He placed three horses in each end of the car, and then partitioned both ends in front of the horses, their heads being to-

wards the middle doors of the car. He likewise made stalls for the horses, respectively, within the partitioned spaces, and then he proceeded to fill up the vacant space in the middle of the car with a large quantity of corn and other feed-stuff, household goods, etc. The whole arrangement of the car-load, as made by the appellee, precluded the unloading of the car, unless with much labor and considerable time. It is perfectly apparent that neither when the contract was executed nor when the car was loaded was there any thought of having a layout accorded him while on the way, in the mind of appellee himself, even. We fail to find any ground for maintaining that there was any implied obligation, under the contract, to give appellee the desired layout.

It is said by counsel for appellee that by section 4386, Rev. St. U S.,[1] a definite rule for the transportation of animals is created, and penalties prescribed for disregard of the rule. With this rule and its enforcement the courts of the state are no way concerned. But the act itself, in a subsequent section, provides for the recovery of the penalty in a civil action in the proper federal court. It is waste of words to say more. Is there an obligation, founded in common humanity, which required the railroad company to lay out appellee's car, in order that dumb brutes may have relief from suffering and rescue from death? It is not necessary for us to answer. The evidence satisfies us that the appellee did not himself think the stock in the condition indicated in the foregoing question when he made his request at Centralia to be laid out. Surely it cannot be believed that, if he then knew, or had reason to know, that very valuable stallions (one of which he had paid $800 for) and valuable mares were in peril of impending death or serious injury, self-interest, as well as humanity, would not have constrained him to make a new contract for longer use of his car, or, if necessary, to abandon altogether his then contract with the railroad company, and take the chances of the trifling loss of $60, which he had bound himself to pay the railroad, by then and there unloading his car and leaving the train. It is manifest that by keeping his stock on the car for three days before starting them southward from Chicago, and by so loading the car as to render it impossible to take the stock out without great trouble and delay, the appellee had placed himself in the unfortunate situation which confronted him at Centralia, and from which he could only extricate himself by making a new contract for the use of the car for a longer time than originally thought needful, or by abandoning his contract altogether, and removing his stock from the train. As these views, for the present, appear to cut up by the roots appellee's contention, we find it unnecessary to express any opinion on any other point involved. Reversed and remanded.

[1] This statute provides that animals transported on railroads shall be unloaded and fed at certain intervals, and that a penalty shall be recoverable in the federal courts for every violation of the act.

(63 Miss. 483)

BERRY v. DOBSON *et al.*

(*Supreme Court of Mississippi.* April Term, 1891.)

HOMESTEAD—ACQUISITION AND ENFORCEMENT—OCCUPANCY—OWNERSHIP.

1. Code Miss. 1880, § 1248, allowing a homestead exemption in lands "owned and occupied" as a residence, requires that the right be founded, not merely on occupation, but on the ownership of some assignable interest; and a widow derives no right from her deceased husband to lands which were conveyed by him before his marriage, and which he was afterwards allowed to occupy merely as tenant at will.

2. A deed to the property which the widow procures after her husband's death from his grantee will not support a claim for homestead, where it appears that the creditors of the husband have already levied upon the land, and secured an adjudication in their favor, and against the said grantee, for the sale thereof.

Appeal from chancery court, Rankin county; H. C. CONN, Chancellor.

This was a bill by Eliza A. Berry against Sol Dobson and others asking that a homestead be decreed to the complainant as against the creditors of her deceased husband. It appeared that in August, 1885, defendants recovered a judgment against W. H. Berry and his wife, who were then occupying the land in controversy as a homestead. In November, 1887, Berry and his wife conveyed the premises to D. D. & L. W. Berry. Afterwards the wife died without issue, and Berry married the complainant. The grantees permitted him to continue his occupation of the premises as if no conveyance had been made, and after his death his widow occupied them. The deed to D. D. & L. W. Berry was not recorded, and the defendants, considering that W. H. Berry at the death of his first wife had lost his homestead right as against their judgment, caused execution to issue on the land. D. D. & L. W. Berry then had the deed recorded, and filed a bill to enjoin the sale. Complainant failed to show that defendants had notice of the unrecorded deed, and a decree was entered that the land be sold to satisfy the judgment. W. H. Berry and his wife were not parties to the suit. The widow afterwards procured a deed for the premises from D. D. & L. W. Berry, and filed the bill in the present suit, asking that the sale be enjoined, and that, by virtue of the said deed and her occupancy of the land, her right to a homestead exemption be recognized. The court sustained a demurrer to the bill, and complainant appeals. Affirmed.

H. S. Cole and *Calhoon & Green*, for appellant. *J. R. Enochs* and *A. J. McLaurin*, for appellees.

CAMPBELL, J. The appellant had no right as to the land derivative from her deceased husband, for he had no interest in the land which was transmissible. He was not owner of any estate in it. He was but tenant at will, and this tenancy terminated at his death. Homestead right is founded on ownership of some assignable interest in the land. It must be "owned and occupied." It may be the lowest kind of estate, but it must be an interest in the land. Code, § 1248; 9 Amer.

& Eng. Enc. Law, tit. "Homestead." The husband had no interest whatever in this land, but had conveyed it and was a mere occupant. It would be a strange doctrine that an owner of land could put a family on each quarter section of his land, and thereby place it beyond the reach of creditors,—his own and the occupant's,—which would result, if the occupant could claim it as exempt. The appellant had no right, by virtue of the conveyance of the land to her, for her grantors had nothing to convey. They had been adjudged against by the decree of the chancery court, and the appellant, as their grantee, was in privity with them, and bound by the decree. Affirmed.

(68 Miss. 510)

COHEA *et al.* v. JEMISON.

(*Supreme Court of Mississippi.* April Term, 1891.)

WILLS—NATURE OF ESTATE DEVISED.

1. A will directing the executors to sell testator's land, and to divide the proceeds equally among his children, does not by implication vest the executors with title to the land; and consequently the title and right to possession remain in the heirs until the sale, and they are the proper parties to maintain ejectment for the land.

2. The fact that a will confers on the executors a discretion to carry on testator's farm for a year does not vest them with an estate in the land for a longer period than the possession is necessary for that purpose.

Appeal from circuit court, Hinds county; C. M. WILLIAMSON, Special Judge.

Ejectment by Clara T. Cohea and others against Elizabeth Jemison for an undivided 14-15 of a lot of land. The court directed a verdict in defendant's favor on the ground that plaintiffs had not the legal title to the land. Plaintiffs appeal. Reversed.

Perry Cohea, plaintiffs' ancestor, died in 1848, leaving a will, the first item of which contained the language: "I do accordingly devise, will, and dispose of all my worldly estate." By clause 13 of his will, he directed his executors to complete a contract for the sale of a specified tract of land, which he had entered into in his lifetime, by conveying the land embraced therein to the vendee on the payment of the price. Clauses 14 and 17, so far as material, are as follows: "(14) It is my will that all my remaining lands in Hinds county shall be sold by my executors upon such terms and upon such credit as in their discretion shall deem most advisable for the interests of all concerned in my estate. It is my will, and my said executors are directed, to lay off said remaining lands into lots of ten, twenty, and thirty acres each, and sell the same upon the most advantageous terms, securing the payment thereon in a safe and satisfactory manner." "(17) After all of my just debts and legacies are paid, and charges on my estate provided for, it is my will and desire that all moneys remaining in the hands of my executors, from whatever source arising, shall be equally divided among my said children, Eliza Jane Stone, George J. Cohea, David A. Cohea, Edward W. Cohea, and the heirs of the body of my daughter Sophia Jelks, (now deceased;) the said heirs of her body collectively taken to receive, however, only such portion in said division as their mother, were she living and named with my last aforesaid children, would have been entitled to under said division, said portion to be equally divided among said heirs of her body." J. Stone, David A Cohea, and Samuel Mathews were appointed executors, with power to carry the will into effect. They sold nearly all of the land as directed by the will, excepting, among others, lot 6, in the city of Jackson, comprising 26 acres. Two executors, Stone and Cohea, subsequently died, and Mathews resigned. In 1872, W. B. Jelks, a son of testator's daughter Sophia Jelks, was appointed administrator *de bonis non*. He was entitled, as one of the devisees mentioned in testator's will, to an undivided 1-15 of the lands remaining unsold. He was in possession of lot 6, and finally disposed of it in small parts, to different persons. In 1889, plaintiffs, as heirs and devisees of Perry Cohea, brought this action of ejectment for an undivided 14-15 of a portion of lot 6, conveyed to defendant, Elizabeth Jemison, by Jelks; and the identity of plaintiffs, as heirs of Perry Cohea, was established.

E. E. Baldwin, for appellants. *Calhoon & Green* and *M. M. McLeod*, for appellee.

COOPER, J. The general rule is that a devise of lands to executors to sell passes the interest in it; but that a devise that lands shall be sold by executors confers but a naked power. 7 Amer. & Eng. Enc. Law, 275. But in the absence of language conferring an estate upon the executors an estate by implication will arise where, from the nature of the trust conferred, it is necessary that an estate should exist in the trustee for its execution; and, where an estate is expressly given, it will be limited in duration to the trust to be performed, if a precise period for its termination can be shown. 3 Jarm. Wills, c. 34. Clearly, Cohea did not expressly devise the lands in controversy to his executors, and, if they took any estate in them, it arose by implication from the power and duty of selling the lands and distributing the proceeds. The better view, and that supported by the weight of authority, is that a mere power to sell land and distribute the proceeds does not require any estate in the executor, and therefore none exists by implication, and consequently that until the sale the title and right of possession remain in the heir at law. Greenough v. Welles, 10 Cush. 571. Fay v. Fay, 1 Cush. 93; Herbert v. Smith, 1 N. J. Eq. 141; Ferebee v. Procter, 2 Dev. & B. 439; Hall v. Burr, 9 Johns. 104; Haskell v. House, 1 Const. (S. C.) 106; Bergen v. Bennett, 1 Caines Cas. 1; Bogert v. Schauber, 7 Cow. 187; Romaine v. Hendrickson, 24 N. J. Eq. 231; 1 Williams, Ex'rs, 725; 7 Amer. & Eng. Enc. Law, 725. The discretion given to the executors to carry on the farm of the testator for one year could in no event confer upon them an estate by implication for a longer time than the possession was necessary for the purpose indicated. It follows that the legal title to the land sued for remains in

the heirs at law of the testator, and the court erred in excluding the plaintiffs' evidence. Reversed and remanded.

(68 Miss. 609)

STORY v. STATE.

(*Supreme Court of Mississippi.* April Term, 1891.)

HOMICIDE — CONTINUANCE — ABSENT WITNESSES — SPECIAL VENIRES — EXAMINATION OF JURORS ON VOIR DIRE — EVIDENCE OF MOTIVE — HARMLESS ERROR.

1. At the time a motion was made in a murder case for a continuance to procure witnesses, it was not known whether they would be present or not at the time set for trial, and as a matter of fact every witness desired appeared in court at the time set, save one, on whom process had not been served, and who was shown to have permanently removed to another state. *Held*, that there was no error in refusing to permit the application.

2. After the special *venire* of 30 drawn from the jury-box had, on the motion of defendant, been quashed, it was announced to the court that the names in the box were exhausted, and the court ordered the sheriff to summon a special *venire* of 30 in defendant's case, and overruled defendant's motion that the court direct the clerk to make up a jury-box by depositing therein the names appearing on the jury-list for the year. *Held*, that there was no error, as, in the absence of evidence to the contrary, it must be assumed that the officers had discharged the duties imposed on them by law, and that the jury-box had been legally exhausted.

3. There is nothing prejudicial to a defendant in the court's examining jurors on their *voir dire* as to their competency, allowing counsel to suggest questions, but not permitting them directly to interrogate on the subject, turning them over, however, to counsel, after being satisfied as to their competency, to question with a view to peremptory challenge.

4. In a murder case, where the killing was admitted, and only the circumstances were in dispute, and the evidence showed that defendant was a comparative stranger to deceased and his affairs, without hatred or ill will towards him, the state may, for the purpose of showing motive, prove that a third person entertained hatred for deceased, and desired to get rid of him, and that he sent defendant to do the killing.

5. The state introduced evidence that defendant committed the homicide at the instigation of J., and that after the killing J.'s son promised defendant to send a telegram to his father to procure him on defendant's bond. The son, on his cross-examination by the state, was asked if he had sent the telegram, and, without any objection by defendant, answered that he had. After objection by defendant to the further question as to contents of the telegram, witness, without waiting for any direction of the court, gave the contents of the telegram: "E. [defendant] killed B., [deceased;] justifiable; will be home on tomorrow's A. M. train." *Held* that, no objection having been made to the evidence of the fact of the sending of the telegram, the error, if any, in admitting its contents was harmless.

Appeal from circuit court, Holmes county; C. H. CAMPBELL, Judge.

Eugene Story was convicted of murder of Barney Kleinfelder. A new trial was denied, and he appeals. Affirmed.

After defendant had stated that he desired a special *venire*, the court ordered that there be drawn from the jury-box the names of 30 persons to constitute a special *venire*. On motion of defendant, the special *venire* so drawn was quashed. Thereafter it was announced to the court that the names in the box were exhausted. The court then directed the sheriff to summon a *venire* of 30 men, overruling defendant's motion that the court direct the clerk to make up a jury-box by depositing therein the names appearing on the jury-list for the year.

Haden & Dodd and *J. E. Gwin*, for appellant. *T. M. Miller*, Atty. Gen., and *Hooker & Wilson*, for the State.

COOPER, J. We find no error in the rulings of the court below in refusing to permit the appellant to make an application for a continuance when the *venire* was ordered, or in directing the writ of *venire facias* to the sheriff, when, upon the motion of appellant, the *venire* drawn from the jury-box was quashed, or in overruling the application for a continuance made by appellant on the day fixed for his trial, or in the examination of the jurors upon their *voir dire*, and impaneling the jury by which he was tried and convicted. When the defendant first asked the court to permit him to prepare his application for a continuance, it was properly refused, because it could not then be known whether his witnesses would or would not be present at the time fixed or about to be fixed for trial, and if they should be in attendance the ground of the application would fail, as it did fail; for on the day of trial every witness desired by the defendant appeared in court, save one, on whom process had not been served, and who was shown to have permanently removed to another state.

The *venire* drawn from the jury-box was, upon the motion of the defendant, quashed, and it then appeared that the jury-box had been exhausted. The defendant then moved the court to direct the clerk to make up a jury-box by depositing therein the names appearing on the jury-list for the year. The court properly overruled this motion, for, in the absence of any evidence to the contrary, (and none was offered by the defendant,) it must be assumed that the officers discharged the duties imposed on them by law, and that the jury-box had been legally exhausted. In this condition of affairs nothing remained for the court except to secure the *venire* in the method adopted.

We find nothing in the rule announced by the presiding judge for the examination of jurors prejudicial to the defendant That rule was that the judge would undertake the examination of jurors upon their *voir dire* touching their competency, permitting and inviting counsel to suggest any questions they desired to be asked, but not permitting them to directly interrogate the jurors upon the subject of their competency, and, after each juror had been found competent by the judge, he was then to be examined by counsel directly, with a view to peremptory challenge, but for no other purpose. The rule thus announced by the presiding judge is to be commended, rather than reprehended, for its operation is to prevent an unnecessary consumption of the time of the court, assures full and impartial examination of jurors, and violates no right of one charged with crime. Under its operation, an impartial jury,

against no member of which is objection taken, was secured to the accused, without his having exhausted the peremptory challenges allowed him by law.

On the trial of the cause it appeared that Barney Kleinfelder, the deceased, by an arrangement between himself and Dr. Muntford Jones, had erected a saw-mill on the plantation of the latter, which was operated by Kleinfelder, who received three-fourths of the lumber cut from the timber on Jones' place, Jones receiving the remaining fourth, and that for some months before the homicide there had been a disagreement between Jones and Kleinfelder in reference to their business. Austin Williams, the principal witness for the state, and the only eye-witness to the killing, gives the following history of what preceded, and the circumstances attending, the killing: On or about the 1st of November, 1889, the defendant, Story, and Muntford Jones, Jr., a son of the owner of the plantation, appeared on the place, each armed with a new Winchester rifle and a pistol. They took their meals at the house of this witness, (a negro,) and, there being no vacant house on the place, slept at night in his cotton-house. Story had a pair of saddle-bags, the contents of which were one undershirt, one pair of drawers, and some Winchester cartridges. Story and Jones arrived at the house of witness in the afternoon, and Story some time thereafter suggested that they should go to the mill. Jones replied that he was too tired, and preferred to wait until morning. The next day they met at the mill, and, after their return, witness heard a conversation between them in which Story said, "They are fine fellows." Jones replied, "Yes, but I want a settlement." Story then said, "If you cannot get a settlement, let us do what we came here to do." Jones replied, "No; we came from Kosciusko, through Durant, Lexington, and Tchula, with our guns, and it will not do to have trouble so soon." Story then suggested, "We will get him off to himself some day, and lose him. I came here to get those fellows off the place, and will do it if I have to kill every one of them." On another occasion, at the house of the witness, Story, Jones, and Kleinfelder were all present, as were several other persons. It was night, and, when no one was looking at them, Story and Jones "winked and batted their eyes at each other and at witness, and made signs to him," which he interpreted as meaning that he should get the others out of the house, so they might kill Kleinfelder. Story then went and called the two negroes who had his pistols, and got the pistols. The witness then took Jones aside, and told him not to kill Kleinfelder in or about his (witness') house, as it would involve witness. Jones then had a whispering conversation with Story, and returned and told witness "it was all right." Story got up, and stood with his back to the fire, and witness then called him aside, and said to him that he did not want any murder at his house. When Kleinfelder was about to leave the house, Story said to him, "Go out this way," directing him to the door which led through the cotton-field. Kleinfelder said, "No;" he would go the other way. Then Story insisted upon his going through the field. Story and Kleinfelder then went out together, and walked off some distance in the dark. Witness then told Jones not to let any murder be done, and he replied that there would not be, and called Story, who returned, and he and Jones stood out doors, and talked awhile, but witness did not hear the conversation. The circumstances of the homicide, which was on November 14th, as given in the language of this witness, are as follows: "On the day of the killing of Kleinfelder I went across the bayou to John Parrot's to weigh some cotton, and found no one there. I came on back late in the evening, and passed by where Story was looking for a squirrel, stopped, and asked him what he was doing. He said he was after a squirrel, and asked me to shake a bush so as to turn it for him. I did so, and saw a hole in the tree that a squirrel could go into, and told Story of it, and that I did not have time to fool there. I then left him, and came up the road, and met Kleinfelder about a hundred yards from where Story was. I stopped, and told him I wanted to get some lumber, and gave him the size of the house, and asked him to make out the bill. While we were talking Story came up, holding his gun through his arms, inside of his elbows, behind and across his back, and stood near Kleinfelder, with the muzzle of the gun pointing towards his right side. Story threw or moved himself by motion of his body to and fro, and changed his right hand to the trigger and lock of the gun. All at once the gun went off. Kleinfelder said, 'Oh, Christ,' and leaned forward. Then Story handled his gun. Kleinfelder said, 'Don't shoot me,' and threw his arms across his chest or front of his body. Story then threw the butt of his gun to his shoulder, and fired another shot, and Kleinfelder fell to the ground. Story then shot him again. Story then told me to go up and feel in Kleinfelder's pocket, and see if he had a knife. I refused to do it, and Story leveled his gun on me, and said he had killed two men where he came from, that Dr. Jones would bond him and get him out of it, and told me if I did not do it he would shoot me. I then went up to Kleinfelder, and felt in his pocket, and felt the knife, but I told Mr Story I did not find a knife. We then went up towards my house, and met Mr. Jones, about thirty yards from the place of killing. Jones said, 'What is the matter?' Story said, 'I have killed Barney Kleinfelder down the road.' Jones asked if he was dead. Story replied, 'Yes; dead as hell.' Jones asked, 'Did you find a knife or any weapon on him?' Story replied, 'No.' Jones said, He had a knife; I saw it about a half hour ago.' We all three then went to the body. Jones took Kleinfelder's knife from his left-hand pocket, and opened and placed it by his side. He then took Story's knife, and cut Story's coat. Story said, 'Take care, fellow, don't cut my coat too much. This is all the coat I have.' Story and Jones then talked the matter over, and agreed

what we were all to swear to about the killing. Story told me that if I did not swear to what he had agreed on he would kill me wherever he found me, and that Dr. Jones would back him up in it; and, if my evidence sent him to prison, he would kill me whenever he got out, it made no difference how long. What was agreed on I stuck to until I heard Story was in jail. I was afraid to do otherwise. We then went back to my house. Story then said to Jones, 'I have done what I agreed to, and I want my pay.' Jones said, 'I will telegraph to my father, and he will go on your bond.' At the time Kleinfelder was killed he had a bottle of coal-oil in his right hand and a stick in his left, with a sack across the stick, and a ham in each side of the sack. He appeared astonished at the first shot; not a thing indicated that Story intended to shoot. He had no knife in his hand at the time, and not an unkind word had been said. After the second shot he fell on his right side, and was shot the third time while in that position." The witness also stated, that on one occasion Story said to Jones that they could kill Barney and Jake Kleinfelder, but it would be a pity to kill the young lad, (a younger brother of deceased, who was also at the mill;) that when the others should be killed he would leave the place anyway; that on one occasion Jones and Story got up a wild-hog hunt, and invited Kleinfelder to go on it, who agreed to go, but did not do so; that afterwards, in a conversation between Jones and Story, they said Kleinfelder had saved his life by not going. The witness further said that he was the manager for Dr. Jones on his place, and that Story said to him that in any controversy between the landlord and outsiders the tenant should be on the side of the landlord. This witness, on cross-examination, admitted that, on the examination before the coroner's inquest, he had testified that when Story came up to where witness and Kleinfelder were talking about the lumber, he requested Kleinfelder to keep an accurate account of all lumber sawed by him on the partnership mill. That Kleinfelder inquired in an angry manner, "What in the hell have you got to do with it any way?" That Story said, "It is a part of the business for which I was sent here." That Kleinfelder then said, "I will kick hell out of you, and will settle this matter with you right now," and lunged at Story with his knife, cutting him on the breast of his coat, and that Story then shot and killed him. He also admitted that after his arrest, and while in jail, he had made similar statements to several persons, but explained that this was because of his fear of Story.

The state proved by a brother of the deceased that a short time before the killing young Jones had attempted to have a settlement of the partnership affairs between his father and the deceased, but failed to agree, and that while the discussion between Jones and the deceased was in progress Story sat near by with his rifle across his lap. It also was proved by this witness that immediately after the killing he went to the body of his brother, and found it lying on the back, with the sack of hams under it, a bottle of coal-oil clenched in the right hand, the right pocket partly turned out, and the knife lying near the left side in the blood; that there were three wounds on the body made by balls from the rifle,—one entering above the left hip, traversing the body, and coming out on the right side of the neck; one entering in front, and passing out at the back a little above the point of entrance; and the third entering beneath the left ear, and cutting the hat-band on the right side at its exit. The state, over the objection of the defendant, was permitted to show in evidence the following facts: By the brother of the deceased, that there was a pending lawsuit between Dr. Jones, the owner of the plantation, and the deceased. By the witness Austin Williams, that he had gone to Kosciusko several times during the year to see Dr. Jones, who was very bitter against Kleinfelder, and got witness to appear before the grand jury as a witness against him, whereby several indictments were secured against him, by reason of which Kleinfelder was unfriendly towards witness, which defendant knew, and he knew that witness wanted to get Kleinfelder off the place. By witness Neal, that in February preceding the homicide he had a conversation with Dr. Jones in reference to the trouble between Dr. Jones and the deceased, in which conversation Jones said that "Kleinfelder had sent him [Jones] word that he was going to make cat-fish bait out of him, and he never talked to Kleinfelder without having his hand on his pistol; that he was going to get rid of him, a blue-bellied son of a bitch, and would kill him if he were to make a motion against him." By witness Millsaps, that he was the manager of the store on the Marcella plantation of Mr. Richardson, which is about two and a half miles from Dr. Jones' place; that in the spring preceding the homicide he had a conversation with Dr. Jones, in which he stated that he desired to get rid of deceased, and would force him off his place; and by this witness it was proved that the following letter had been written to him by Jones, whose handwriting he recognized, which letter was also admitted in evidence, over the defendant's objection: "Kosciusko, Miss., May 30, 1889. E. F. Millsaps—Dear Sir: I hear that Kleinfelder is selling all my lumber to Gen. Miles, and to Marcella, too. Is it true? Please inform me by return mail how many Winchesters are on Marcella, and how many boys can I rely upon, and who are they? What became of those deer dogs that Mr. Alford had on Marcella? Your friend truly, M. JONES." Also, over like objection, the following letter written by Dr. Jones to the deceased: "Kosciusko, Miss., June 6, 1889. B. P. Kleinfelder—Dear Sir: I wrote you two weeks ago for a statement of lumber sawed at my mill up to date. I heard nothing from you. Again I ask you for the amount of lumber sawed at my mill, and notify you to saw no more; to shut my mill down from this day on. We saw no more on shares; our agreement is at an end. A settlement is required, and you to

remove from my plantation. M. JONES." Objection was made to one other piece of evidence, which will be hereafter noticed. Objection was taken to all the evidence above noted, on the ground that the declarations of Jones therein referred to were not made in the presence of the defendant; that they were remote in time and irrelevant in character; that, if introduced by the state under the theory that a conspiracy was formed between the defendant and Jones for the murder of Kleinfelder, they were made long before any supposed conspiracy had been formed, and were not acts done or declarations made in the prosecution of the common purpose.

It is unnecessary to consider the evidence in the light in which it is supposed by appellant's counsel to have been introduced. There is another view, and the one we infer held by the court below, in which its competency, resting upon a totally different principle than that which applies where the act of one co-conspirator is sought to be used in evidence against another, is apparent. The act of one co-conspirator is admissible against the other, because, in contemplation of law, the act of each is the act of all. Its competency as evidence rests upon the same principle that underlies the relation of principal and agent in legitimate affairs, and is subject to the same limitations that are there applied. It is for the same reason that the act of an agent in civil affairs beyond the scope of his agency, and the act of a co-conspirator not done in the prosecution of the common purpose, are incompetent to bind, and therefore incompetent as evidence against the principal in the one case, or the conspirator on trial, in the other. That reason is that the act is not that of the person against whom it is invoked, done through the hand of another, but is the independent, unrelated act of the person by whom it is done. Where a conspiracy is formed to do an act, all are bound by the act of each in the prosecution of the common purpose, for the object of the conspiracy calls it into existence, and he who seeks to accomplish that object acts, not only for himself, but for all others who, by joining with him, aid, encourage, and authorize the act he does. 4 Amer. & Eng. Enc. Law, § 621, note 5. But a person actually committing a crime is none the less responsible for it whether he acts for himself alone or for himself and others. Upon the trial of the actual perpetrator of an offense, it is not necessary for the state to show by direct evidence the motive which impelled him to commit it. A malicious killing of itself implies some unlawful motive, and the state need not establish what that is by specific proof. But it does not follow that because it need not, therefore it may not, make such proof. It cannot be said that the motive with which an act is done is irrelevant to explain its character or to strengthen the probability that the person shown to have committed it was impelled by such motive rather than some other. Mr. Stephen, in his admirable Digest on the Law of Evidence, thus formulates the rule: "Where there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say: Any fact which supplies a motive for such an act, or which constitutes preparation for it; any subsequent conduct of such person apparently influenced by the doing of the act; and any act done in consequence of it or by the authority of that person." Steph. Dig. Ev. p. 36, art. 7. In treating the subject under inquiry, Mr. Roscoe says: "But there are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of. This cannot be done merely with the view of inducing the jury to believe that, because the prisoner has committed a crime on one occasion, he is likely to have committed a similar offense on another, but only by way of anticipation of an obvious defense." 1 Rosc. Crim. Ev. 140. In Rex v. Clewes, 4 Car. & P. 221, upon an indictment for murder of one Hemmings, it was opened that great enmity existed between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and said that he would give £50 to have him shot; that the rector was shot by Hemmings; and that the prisoner and others who had employed him, fearing that they should be discovered, had themselves murdered Hemmings. Evidence of the malice of the prisoner was given without objection, and it was then proposed to show that Hemmings was the person by whom the rector was murdered. This was objected to, but LITTLEDALE, J., decided that it was admissible. In Hunter v. State, 43 Ga. 483, it was held competent, as tending to show motive on the part of the accused, to prove that he was the rejected, and the deceased the accepted, suitor of a particular lady, and that rumors of an approaching marriage between the lady and the deceased were brought to the knowledge of the accused. The court there said: "In the administration of the criminal law, any fact shedding light upon the motives of the transaction will not be excluded from the consideration of the jury, whether it goes to the attestation of innocence or points to the perpetrator of the crime." For a like purpose, it has been held competent to show that the defendant and deceased both sustained a relation of illicit intercourse with the same woman, (State v. Larkin, 11 Nev. 316;) that the prisoner was in the habit of having illicit intercourse with the wife of the deceased, (Stout v. People, 4 Parker, Crim. R. 71;) that the step-children of the accused, with one of whom he had illicit intercourse, had left his house and gone to that of the deceased, who refused to give them up, (Fraser v. State, 55 Ga. 326;) that the deceased had a few days before killed a near relative of the prisoner, (Kelose v. State, 47 Ala. 573;) and in Hendrickson v. People, 1 Parker, Crim. R. 406, and State v. Green, 35 Conn. 203, in which cases the prisoners were charged with uxoricide, it was held competent to anticipate the presumption of

conjugal affection, and show, in the one case, that the prisoner was not in truth the husband of his supposed wife, because he had a living wife at the time of his marriage to the deceased; and, in the other, that by the will of the wife's father the prisoner had been disappointed in his expectations of pecuniary gain in becoming connected with the family. In many of these cases the expression is used that, even where such evidence is inconclusive and of but slight value, it is proper to submit it to the jury under admonition not to assume the crime from the mere motive.

It would be difficult to imagine a case in which such evidence should be admitted if it was incompetent under the facts of the present one. If the testimony of the state's witness was believed by the jury, the defendant, by his own declarations, had connected the malice of Dr. Jones towards the deceased, and his desire to have him driven from his plantation, with the killing, as the motive by which he was impelled. It appears as an uncontroverted fact that the appellant had never seen or heard of Kleinfelder until the day before he, with young Jones, appeared on the farm. Naturally the accused would have insisted before the jury that a killing so barbarous and horrid as that testified to by the state's witness could not occur without some motive potent enough to impel the act, and that he, a confessed stranger to the deceased and his affairs, without hatred or ill will of any kind against him, and without occasion for desiring to injure him, could not, in the nature of humanity, have done the deed as detailed by the witness. In anticipation of this defense, the state laid the fountain of malevolence a step beyond, and attempted to show that the hatred towards deceased resided in another, and that the prisoner murdered him because of the procurement of that other. The fact of the killing stands confessed; its details are alone in controversy. According to the state's witness, the killing was of unparalleled barbarity, so exceptional in character as to stagger credulity, but for the fact that the wounds on the body and the incumbered hands of the dead man lend potent corroboration to his story. The defendant claimed that he was the party assailed, and that he killed the deceased in necessary self-defense. Under these circumstances, it was especially important that the state should, if possible, establish the motive of the crime. Looking to the whole evidence, that for the state and the defense, it is not difficult to trace the crime from its inception to its consummation. On the 30th of October, according to defendant's own testimony, he was employed by Dr. Jones to go to the plantation to guard convicts who were to be secured in the following January. Young Jones and the appellant, armed with two Winchester rifles and pistols, with one change of underclothing for the two, and fully supplied with cartridges, left Kosciusko for the plantation the next day. In two weeks' time Jones was rid of the man whose presence on his plantation annoyed him, and the appellant stood before the jury explaining how the deceased, with a bottle of coal-oil in one hand and two hams and a knife in the other, made a sudden and violent assault upon him, who was then armed with a Winchester rifle, and how, in defense of his life, he slew him. Under the facts of this case, if the evidence admitted to show motive were as clearly incompetent as under the law it is competent, we should still hesitate to disturb a verdict otherwise so abundantly supported.

It remains to notice but a single other exception. After the homicide, according to the testimony of Williams, young Jones promised the accused to send a telegram to his father to procure him to become surety upon appellant's bond to appear and answer for the killing. When upon the stand as a witness for the defendant, Jones was asked if he had sent the telegram, and, without objection by the defendant, replied that he had. He was then asked to state its contents, whereupon the defendant objected on the grounds—*First*, that the telegram was the best evidence of its contents; and, *second*, that it was incompetent, in any event, against defendant. The court seems not to have ruled upon the whole objection. The bill of exceptions states that the judge ruled that the witness could not be required to answer until the telegram should be first shown him. Whereupon the witness, without waiting for the court to direct him to answer, replied, giving the contents of the telegram as follows: "Eugene killed Barney; justifiable; will be home on to-morrow's A. M. train." We are not prepared to say that this evidence should have been admitted, but, since no objection was made to the evidence of the fact that the telegram was sent, we find nothing in its contents as proved tending to the injury of the defendant. The judgment is affirmed.

(68 Miss. 660)

HUGHSTON v. BOARD OF SUPERVISORS OF CARROLL COUNTY.

(*Supreme Court of Mississippi.* April Term, 1891.)

COUNTY ASSESSOR—ADDITIONAL COMPENSATION FOR PAST SERVICES.

A county assessor, who has received from the county five cents for "each individual assessed" by him during the years 1888 and 1889, as provided by Act Miss. Feb. 16, 1884, then in force, is not entitled to an additional compensation under Act Feb. 14, 1890, § 1, which directs the county board of each county to allow the assessor five cents "for each poll assessed" by him in 1888 and 1889, where he has "not received any allowance heretofore," since there is no plainly expressed purpose in the act of 1890 to give the assessor a compensation in addition to what he has already received for his services in those years.

Appeal from circuit court, Carroll county; C. H. CAMPBELL, Judge.

Action by P. M. Hughston, tax assessor of Carroll county, against the board of supervisors of said county, for $315.15, additional compensation alleged to be due him for his services in 1888 and 1889, under Act Miss. Feb. 14, 1890. Judgment for defendant, and plaintiff appeals.

On the trial it was admitted that plaintiff had performed the services sued for;

but the county showed that he had been paid $203.80, in full for making individual assessments in 1888, which included the assessments of polls, and that he had been paid $231.65 in full for similar services in 1889. Act Miss. Feb. 16, 1884, (Laws 1884, p. 17,) in force during 1888 and 1889, provides: "The board of supervisors in each county shall allow the assessor five cents for each individual assessed, payable out of the county treasury." Act Feb. 14, 1890, (Laws 1890, p. 35,) provides as follows: "Section 1. The boards of supervisors of the counties in this state shall make an allowance to the assessor in their counties amounting to five cents for each poll assessed in 1888, and the same in and for 1889, where the assessors have not received any allowance heretofore by the boards of supervisors or auditor. Sec. 2. Hereafter the assessors of the various counties in this state shall have and receive, in addition to the compensation now allowed by law, five cents for each poll assessed in each year, to be paid out of the county treasury on an allowance by the board of supervisors."

Somerville & McClurg, for appellant. *Southworth & Stevens*, for appellee.

CAMPBELL, C. J. The first section of "An act for the relief of assessors in this state and for other purposes," approved February 14, 1890, does not contain apt words to entitle assessors to five cents for each poll assessed in 1888 and 1889, in addition to the compensation allowed by former laws. If it was the purpose to give additional compensation for past services, it should have been plainly expressed. Affirmed.

(63 Miss. 630)

WILLIAMS *et al.* v. STATE, to Use of FLIPPIN *et al.*

(*Supreme Court of Mississippi.* April Term, 1891.)

ADMINISTRATOR'S BOND — LIABILITY OF SURETIES — LIMITATION.

1. The death of an administrator of an unsettled estate does not start the running of the statute of limitations in favor of the sureties on his administration bond, since the liability of the deceased administrator is not fixed until the decree of the court approving the final account submitted by his administrator, and the statute does not begin to run until the rendition of such decree.

2. The rule that a decree finally settling an administrator's account, and fixing the amount due from him to the estate, is *prima facie* evidence against the sureties on his bond as to the amount of their liability, when sued by the distributees, applies also where the decree is rendered after the administrator's death on a final account submitted by his administrator.

3. The sureties on the bond of a deceased administrator are not chargeable with any misapplication of the assets of his own estate, made by his administrator.

Appeal from chancery court, Grenada county; B. T. KIMBROUGH, Chancellor.

Action by the state, to the use of Martha E. Flippin and others, against W. S. Williams and others, sureties on the bond of Samuel F. Flippin, administrator of the estate of John P. Flippin, deceased. Powell Flippin, a son of the administrator, Samuel F., and a grandson of the intestate John P., was not joined as a party plaintiff. Judgment for plaintiffs, and defendants appeal. Affirmed.

R. Horton and *A. H. Whitfield*, for appellants. *William C. McLean*, for appellees.

COOPER, J. John P. Flippin died in December, 1877, and in January, 1878, administration upon his estate was granted to Samuel F. Flippin, who qualified and gave bond, with the appellants as his sureties. In November, 1878, Samuel F. Flippin died intestate, and administration upon his estate was granted to one Williams, who, as such administrator, filed the final account of his intestate as administrator of the estate of John P. Flippin. This final account, as passed, showed a balance of $1,241.59 due by the deceased administrator to the estate of his intestate, and on the 15th of September, 1883, a decree was rendered thereon against the administrator of the deceased administrator for that sum. Administration *de bonis non* of the estate of John P. Flippin was granted to Mrs. Mary E. Flippin, and, the estate having been finally settled, the present suit is brought by the distributees of John P. Flippin against the sureties upon the bond of Samuel F. Flippin to recover the amount of the said decree, less the sum of $562.74, paid by the administrator of Samuel F. upon the same, the estate of Samuel F. having been fully administered as an insolvent estate. This suit was brought on the 11th of September, 1888, more than six years after the death of Samuel F. Flippin, but less than six years from the date of the decree above referred to. The defendants pleaded the statute of limitations of six years after the death of the administrator and before suit brought in bar thereof, and the action of the court below in disallowing this plea presents the first ground of the errors assigned.

It is urged by the appellants that the death of the administrator terminated the trust for the faithful administration of which they had become bound, and that, since any *devastavit* by their principal must have preceded this event, the statute of limitations then began to run, and by the lapse of the statutory period between the death of the administrator and the institution of this suit they are discharged of all liability as sureties on his bond. To this contention on the part of the sureties it is sufficient to reply that, though the administrator may die, the administration committed to his hands continues in the court until closed by his personal representative in the manner directed by law. The death of the administrator is not a *devastavit* of the estate, and confers no right of action either upon the administrator *de bonis non* of the original intestate or upon his distributees. It is the decree of the court having administration of the estate rendered upon the final account of the original administrator made by his administrator which fixes the liability of the deceased administrator, and from its date the statute of limitations begins to run. Nunnery v. Day, 64 Miss. 457, 1 South. Rep. 636; Cooper v. Cooper, 61 Miss. 676.

The defendants objected to the introduction in evidence against them of the decree of September 15, 1883, rendered upon the final account of Samuel F. Flippin as administrator, by his administrator, Williams, on the ground that it was *res inter alios acta*, and therefore incompetent. It is conceded by counsel that since the decision of Lipscomb v. Postell, 38 Miss. 476, it has uniformly been held in this state that an account of the administrator in the course of administration, or a judgment or decree against him, is admissible in evidence against the sureties, and makes a *prima facie* case to be rebutted by them. The contention is that a different rule should apply to an account rendered by the personal representative of the deceased administrator, for whom and for whose acts the sureties have not bound themselves. Counsel rely principally upon the decisions of the supreme court of Alabama, notably that of Martin v. Ellerbe, 70 Ala. 334. In that state it seems to be settled that a decree in the administration of an estate rendered upon the final account of an administrator by his administrator cannot be given in evidence in a suit against the sureties on the administrator's bond, but that a decree made upon the account of the principal administrator is conclusive against his sureties. We cannot concur in the correctness of the views entertained by the Alabama court. We can perceive no well-founded distinction between one decree and the other when both are made by the court having jurisdiction of the administration, and in the course thereof. The condition of the bond of the administrator is that he shall "perform the duties required of him by law," which duties consist in the due administration of the estate by the payment of debts and the distribution of the remainder among those entitled to receive it. There is much confusion and diversity, both of argument and decision, upon the question of the competency and effect in evidence of a judgment or decree against the principal, when offered against the sureties upon his administration bond. In Alabama such judgment or decree is conclusive, but a decree upon an account rendered by the administrator of the administrator is not evidence at all. In North Carolina a judgment against the administrator is not evidence at all against the sureties. McKellar v. Bowell, 4 Hawks, 34. In Virginia, South Carolina, Georgia, New York, and Mississippi, the argument is against the competency of the evidence; but the decisions are that it is competent, but not conclusive, evidence. Munford v. Overseers, 2 Rand. (Va.) 315; Craddock v. Turner, 6 Leigh, 116; Lyles v. Caldwell, 3 McCord, 225; Ordinary v. Condy, 2 Hill, (S. C.) 313; Bryant v. Owen, 1 Ga. 355; Douglass v. Howland, 24 Wend. 35; Lipscomb v. Postell, 38 Miss. 476. As we have observed, we are unable to adopt the distinction of the supreme court of Alabama, by which a difference is made between the decree against the administrator on an account rendered by him and a decree rendered against the estate of such administrator upon his final account rendered by his administrator. Each is a decree in the administration of the estate; each is conclusive against the principal in the bond or his personal representative; and each is upon an account filed in the administration of the estate by the first administrator,—one being rendered by him in person, and the other by his personal representative for him. It is to be remembered that the statute provides for both accounts as a part of the lawful administration of the estate, and it is for that that the sureties have bound themselves. Their obligation is that the administrator shall account for and pay over the estate committed to his charge. "The decree is evidence that he has been called upon and has not performed this obligation, and thus proves the breach assigned." Lyles v. Caldwell, 3 McCord, 225. The appellees are not chargeable with any misapplication by the administrator of the estate of Samuel Flippin of the assets of his estate. They had no control over the same, and could not have prevented the payment to Powell Flippin, who, it is conceded, was not entitled to receive anything until the debts of Samuel should have been fully paid. But this was a mere wasting of the estate of Samuel Flippin, and for that his administrator, and not appellees, must respond.

The decree is affirmed.

(63 Miss. 691)

GAYDEN v. TUFTS.

(*Supreme Court of Mississippi.* April Term, 1891.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF ASSIGNEE—CONDITIONAL SALE.

Code Miss. 1880, § 1300, providing that all property used or acquired by a trader in his business shall, as to his creditors, be liable for his debts, and be in all respects treated in favor of his creditors as his property, gives his assignee for the benefit of creditors no better title than he had himself to property used in his business, and which he held under a contract, acknowledged and duly recorded, providing that the title should remain in his seller until all the installment notes for the purchase thereof had been paid, there being at the time of the assignment notes due and unpaid and others not yet due.

Appeal from circuit court, Montgomery, county; JAMES T. FANT, Judge.

Replevin by James W. Tufts against R. T. Gayden for a soda fountain and apparatus. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant was the assignee for the benefit of creditors of a firm of druggists to which plaintiff had sold the property by a contract acknowledged and duly recorded, providing that title should remain in plaintiff until the several installment notes for the purchase thereof should be paid. The property was used by the firm in its business, but at the time of the assignment there were several notes due and unpaid and several others not yet due. Defendant took possession of the property, claiming it by virtue of the assignment and the provision of Code Miss. 1880, § 1300, that all property used or acquired by a trader in his business shall, as to the creditors of such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property.

Sweatman, Trotter & Knox, for appellant. *Calhoon & Green*, for appellee.

CAMPBELL, C. J. As the assignee held by the same title by which his assignors did, the plaintiff was entitled to recover. 1 Amer. & Eng. Enc. Law, 854. Affirmed.

(68 Miss. 719)

STATE, to Use of LAFAYETTE COUNTY, v. HALL *et al.*

(*Supreme Court of Mississippi.* April Term, 1891.)

COUNTY TREASURERS — PENALTIES — LIABILITY OF SURETY—PLEADINGS.

1. The provision of Code Miss. § 369, that if a county treasurer shall neglect to make a report to the board of supervisors at their regular meeting, or at other times, when required, he shall forfeit the sum of $200, is in the nature of a punishment to the treasurer individually, for which his sureties are not liable.

2. A complaint in an action on the bond of a county treasurer alleged that the treasurer failed to make reports to the supervisors at their regular meeting, as required by Code Miss. § 369; that by reason thereof the board were not informed that the treasurer had mingled the general funds of the county with the school funds, and of the mingled funds had embezzled a certain amount; that by mingling the funds the treasurer had made it impossible for plaintiff to know what particular fund was embezzled, and because of such want of knowledge plaintiff was unable to recover on the general bond given by the treasurer for county funds; that, if the treasurer had made the reports required by law, the board would have been informed of the condition of affairs, and would have prevented further embezzlement; that the losses therefore resulted from the failure of the treasurer to report as required by law. *Held*, that the complaint did not state a cause of action, as the failure to report was not the proximate cause of the damages, but the abstraction of the funds, and there was no direct allegation that the general funds had been embezzled.

Appeal from circuit court, Lafayette county; JAMES T. FANT, Judge.

Action by the state, to the use of Lafayette county, against J. M. Hall, county treasurer, and the sureties on his general bond. A demurrer interposed by the sureties was sustained, and plaintiff appeals. Affirmed.

Phil. A. Rush and *Edward Mayes*, for appellant. *C. B. Howry* and *H. A. Barr*, for appellees.

COOPER, J. This is an action brought by the state for the use of Lafayette county against Hall, the former treasurer of the county, and the sureties upon his official bond. The declaration contains two counts. By the first count the plaintiff seeks to recover the sum of $2,800, being 14 forfeitures of $200 each, for failures by the treasurer to comply with the provisions of section 369 of the Code, which provides that "the county treasurer, at every regular meeting of the board of supervisors and at such other times as may be required by the said board, shall make to such board a detailed report of all moneys received by him and of the disbursement thereof, and of all debts and sums of money due to or from the county, and of all other proceedings in his office, so that said receipt, disbursement, and debts may clearly and distinctly appear. He shall also, at the time of making such reports, bring all moneys belonging to the county treasury to the board of supervisors, to be counted by said board; and if any county treasurer shall neglect to make such report he shall forfeit the sum of two hundred dollars, to be recovered by suit in the name of the board of supervisors of the county, for the use of the county." By the second count the plaintiff sets out the failure of the treasurer to make the reports required by said section of the Code at the 14 meetings of the board specified in the first count, and then avers that by reason of his neglect so to do the board of supervisors were not informed of the fact that the treasurer had mixed and mingled the general funds of the county (for the security of which he had given the bond sued on) with the school fund of the county, (for which he had given no bond, though required by law so to do,) and of the mixed and mingled fund had embezzled, wasted, and misapplied the sum of $443.90; that by mixing and mingling the said funds the treasurer had made it impossible for the plaintiff to say or know which particular fund was embezzled, and because of such want of knowledge the plaintiff is unable to recover on the general bond given by said treasurer for the county funds; that, if the treasurer had made the reports required by law, the board of supervisors would have been thereby informed of the true condition of affairs, and would have made such orders and taken such steps in the premises as would have prevented further embezzlement by the officer; and that the embezzlements were of repeated, but small, sums, some of which were committed after the reports required by law should have been made; wherefore the plaintiff averred that the said losses resulted from the failure by the treasurer to report as required by law, and demanded judgment on the bond for the sum embezzled. A demurrer was interposed by the sureties on the bond, which was sustained, and the plaintiff appeals.

Two questions are presented by the record: (1) Are the sureties liable for the forfeitures declared by section 369 of the Code? (2) If the sureties are not liable for the forfeitures declared as such, do the facts averred in the second count show an actionable breach of the bond for which the damages claimed may be recovered? The first question is answered in the negative upon the authority of two decisions of this court as well as that of cases in other states. The forfeiture or penalty declared by the statute is in the nature of punishment to the officer *eo nomine*, and is additional to the liability upon his official bond for such actual damages as may result from his failure to perform the duty imposed by the section. In State v. Nichols, 39 Miss. 318, the action was to recover against a sheriff, who was by the statute made liable "for the acts of their deputies" for a false return made by his deputy, the penalty imposed by a statute declaring that "if any sheriff or his deputy, coroner, or other officer, shall make a false return on any process, such sheriff, deputy, etc., shall for every such offense be

liable to pay the sum of five hundred dollars," or to be recovered on motion and notice given to "such sheriff, deputy," etc. It was held that the law created a penal offense against the individual liable to it, and that the penalty could not be enforced against the sheriff. A parent brought suit against a clerk and the sureties upon his bond to recover a penalty for the unlawful issuance of a license for the marriage of plaintiff's child. The statute declaring the penalty was that "if any clerk shall issue a marriage license without the requisites before prescribed, or in any other manner, such clerk shall for each offense forfeit and pay the sum of one thousand dollars for the use and benefit of the person suing for the same, to be recovered by action of debt before any court having cognizance thereof." It was held that the issuance of the license was a breach of the official bond, and that the plaintiff might sue the clerk and his sureties for the actual damages sustained, but that for the penalty imposed the officer alone was liable. State v. Baker, 47 Miss. 88. To the same effect are McDowell v. Burwell's Adm'r, 4 Rand. (Va.) 317; Treasurers v. Hilliard, 8 Rich. Law, 413. In Tappan v. People, 67 Ill. 340, the court, upon a construction of the statute, and principally because the penalty prescribed was a certain per cent. upon the sum withheld by the officer, and to be recovered in the same action as the principal sum, for which the sureties were unquestionably bound and were to be sued, was of opinion that the legislature intended to charge the penalty as liquidated damages upon the officer and his sureties. The second question involved must also be answered in the negative. Not, however, for the reason that the act neglected to be done was not an official duty, but because the damages alleged to have resulted are too remote. It is not shown by the averments of the declaration that the failure was directly the cause of injury. The averment is that, if the reports required by law had been made, the board of supervisors would have been informed of irregularities in the keeping of the moneys of the county, which irregularities gave opportunity for the embezzlements subsequently committed, and concealed the fact that prior embezzlements had occurred. The difficulty is that the loss to the county flowed not from the neglect to make the reports, but from the distinct and independent act of the officer in abstracting the fund; and this act, regardless of its origin, must be considered as the proximate cause of the injury, for redress of which indemnity is sought against the sureties. It is difficult to perceive upon what principle they can be liable by reason of the cause or occasion of the act, when non-liability for the act itself is admitted. The difficulty in this case, as in a former one between the same parties, (8 South. Rep. 464,) lies in the fact that the pleader imports into his pleadings the uncertainty which he supposes to exist in the evidence necessary to support the plaintiff's action. Instead of averring distinctly that there has been an embezzlement or unlawful conversion of the fund secured by the bond upon which he sues, (as he must do to escape the demurrer of the sureties,) and putting upon the defendants the burden of accounting for the lawful disbursement of the county funds which came to the hands of the delinquent treasurer, the pleader assumes that the burden of showing what fund was abstracted rests upon the state, and, being doubtful whether the state can support that burden, states in his declaration, not a cause of action, but the facts from which he doubts the existence of one. If the treasurer has not embezzled any of the fund secured by the bond upon which suit is brought the plaintiff cannot recover. If, on the other hand, there has been any embezzlement of that fund, no matter whether it was taken from that fund, kept separate and apart from the school fund, or from a mingled fund of which that formed a part, the delinquent, and those who became his sureties, must make good the loss. The question really involved is one of evidence and of the burden of proof; the declaration in this cause converts it into one of pleading. The demurrer was properly sustained, and the judgment is affirmed.

(63 Miss. 723)

McDONALD v. STATE.

(*Supreme Court of Mississippi.* April Term, 1891.)

LOCAL OPTION—ILLEGAL SALES—INDICTMENT.

Under Act Miss. March 11, 1886, (local option law,) providing that the commissioners of election shall canvass the returns, determine the result, and within 10 days make a report of the result, which shall be spread on the minutes of the board, such report is the only evidence of the result of the election; and therefore an indictment for selling in violation of such law, which merely alleges that an election was held, resulting in a majority against the sale, and that within 10 days a report was returned to the board of supervisors and spread on its minutes, but fails to state that the commissioners determined the result and made the report, is defective.

Appeal from circuit court, Franklin county; W. P. CASSEDY, Judge.

Defendant was convicted of unlawfully selling intoxicating liquors in violation of the local option law, (Act March 11, 1886,) and appeals. Reversed.

The indictment alleged that an election was duly held under said act, resulting in a majority of votes against the sale, and that within 10 days thereafter a written report was returned to the board of supervisors, and was spread on the minutes of the board, but failed to allege that the commissioners of election had canvassed the returns, determined the result, and made a report.

H. Cassedy, for appellant. *T. M. Miller*, Atty. Gen., for the State.

CAMPBELL, C. J. By section 4 of "An act for preventing the evils of intemperance," etc., approved March 11, 1886, it is provided that the "commissioners of election shall canvass the returns so made to them, and shall ascertain and determine the result, and shall within ten days after the election make a written report to the board of supervisors, verified by their affidavits, of the result so declared by them upon such canvass and return,

which said report shall be spread upon the minutes of the board," etc. This is made the evidence of the result of the election, and is the only evidence on the subject admissible. Until the commissioners of election determine and report the result, it is as if no election had been held. This indictment is defective in not averring that the commissioners of election had determined and reported to the board that a majority of the votes cast were "against the sale." So far as shown by the indictment, the result may have been determined and reported by anybody. No intendment can be made in favor of the indictment, which must show everything required to sustain a conviction under the act. The indictment should have been quashed. Reversed, indictment quashed, and appellant held to answer in the circuit court any new indictment which may be found against him.

(68 Miss. 636)

BRADY v. COOK.

(*Supreme Court of Mississippi.* April Term, 1891.)

VERDICT IN REPLEVIN—SEPARATE VALUATION.

Where on a trial in replevin it appears that defendant, after giving a forthcoming bond, disposed of the articles, so that he cannot return them, it is unnecessary that the jury assess the value of the articles separately, there being no reason therefor except when a return is possible.

Appeal from circuit court, Sunflower county; R. W. WILLIAMSON, Judge.

Replevin by John Cook against Susan P. Brady for several bales of cotton and cotton seed. Judgment for plaintiff, and defendant appeals. Affirmed.

The jury did not value the several bales of cotton separately, but gave a gross sum as the value of all the bales. It appeared, however, on the trial that defendant, after giving a forthcoming bond, had sold the cotton, and that return thereof could not be made.

Calhoon & Green, for appellant. *Chapman & Paxton*, for appellee.

CAMPBELL, J. We find no reversible error in this record. The failure of the jury to assess the value of the several bales of cotton separately was not made a ground for a new trial in the circuit court, and would not have been available if it had been, because it was shown that the cotton had been sold, and the proceeds received by Mrs. Brady. The reason of the requirement to find the value of each of several articles differing in value is that the defendant or co-obligors in the replevy bond given may make return of the thing, if return thereof be adjudged; but when it appears that it has been disposed of, and cannot be returned, as in this case, the reason fails. Affirmed.

(68 Miss. 325)

BRAMLETT v. ROBERTS.

(*Supreme Court of Mississippi.* Oct. Term, 1890.)

ESTOPPEL—BY DEED—AFTER-ACQUIRED TITLE.

Code Miss. 1880, § 1195, provides that a quitclaim deed shall pass all the estate of the grantor, and shall estop him from asserting a subsequently acquired adverse title. *Held* that, while such an estoppel is limited, under said section, to the particular estate which the deed purports to convey, a reference therein to the lands as being the same acquired at sheriff's sale is not to be taken as designating the particular estate conveyed, but only as descriptive of the lands; and any subsequently acquired adverse title, therefore, inures to the benefit of the grantee.

Appeal from chancery court, Wilkinson county; CLAUDE PINTARD, Chancellor.

This was a bill by Fitts against D. C. Bramlett asking that an adverse title to land subsequently acquired by the respondent be decreed to inure to the benefit of the complainant, as his grantee. The facts set up were that the respondent had quitclaimed to the complainant a half interest in certain land which he had purchased at execution sale, and held under a deed from the sheriff; that subsequently he quitclaimed the remaining half to the complainant in the same way; that prior to the said conveyances the wife of the respondent had purchased certain of the lands at a tax-sale; that complainant, when he heard of the tax-deed, demanded that the respondent remove the cloud of his wife's claim, and that the latter, although asserting the superiority of the said claim, procured a deed from his wife to himself in order that the question might be the more easily tested whether he was bound to protect the title to the respondent. The lands conveyed to the complainant were referred to in the descriptive part of the deeds as the same lands acquired by the respondent at execution sale. After the commencement of suit, Charles Roberts acquired the title to the lands in controversy, and was admitted as complainant, instead of Fitts. There was judgment for complainant, and respondent appeals. Affirmed.

A. G. Shannon and *D. C. Bramlett*, for appellant. *J. H. Jones*, for appellee.

CAMPBELL, J. We recognize the doctrine that the estoppel of a conveyance of land is only "co-extensive with the estate, right, or interest which the conveyance purports to pass," as held in McInnis v. Pickett, 65 Miss. 354, 3 South. Rep. 660, but the conveyances by Bramlett were not restricted to an estate less than the entire half-interest conveyed by each. He conveyed a half interest in the land by one instrument and the other half by the other. The reference in the conveyances to the sheriff's deed to him conveying the lands was for purpose of description of the lands, and not a particular interest conveyed. The sheriff's deed purported to vest in him a fee-simple, and his conveyances must be held to have been intended to pass a like estate. Therefore any title to these lands subsequently acquired by him inured to and vested in his grantee by virtue of section 1195[1] of the Code.

Affirmed.

[1] Code Miss. 1880, § 1195, provides that a conveyance of quitclaim shall be sufficient to pass all the estate of the grantor in the land conveyed, and shall estop him from asserting a subsequently acquired adverse title.

(69 Miss. 116)

STATE *ex rel.* NOEL, District Attorney, v. HAMILTON, Superintendent.

(*Supreme Court of Mississippi.* Oct. Term, 1891.)

SEPARATE SCHOOL-DISTRICTS—ORGANIZATION—OUTSIDE PUPILS.

1. Under Act Miss. 1886, §§ 42, 76, which provide that an incorporated town of 750 or more inhabitants may constitute a separate school-district if the town authorities so elect, the levy of a tax to carry on the school beyond the constitutional period of four months in each year is not an act precedent to the organization of such district, but a duty which may be enforced when deemed necessary.

2. Section 45 of the act, which provides for the admission to such school of pupils of the county outside of such district on payment by the county of "the actual *pro rata* cost of tuition for all such children," means such proportionate part of the entire tuition in such school as the number of outside pupils bears to the whole number attending the school.

3. The words "cost of tuition" mean the tuition in the separate school-districts, and not in the county at large.

Appeal from circuit court, Holmes county; C. H. CAMPBELL, Judge.

Application by E. F Noel, district attorney, to the circuit court, for *mandamus* to G. F. Hamilton, superintendent of schools, to issue pay certificates. From a judgment for defendant, and an order denying motion for new trial, plaintiff appeals. Reversed and remanded.

The petition for the *mandamus* shows the organization of the separate school-district of Durant, the teaching of the school, the cost of tuition for each scholar, and the number of outside scholars attending, the amount due by the county for such scholars, the payment by Hamilton of a part of the tuition claimed by the Durant school, the demand and his refusal to pay the balance. Three special pleas were filed, to which demurrers were sustained. No answer was filed traversing the allegations of the petition; but a plea of not guilty was filed, which was treated by the court as a proper plea, and as raising the general issue, and the case went to trial. The superintendent claimed, among other things, that the mayor and aldermen of Durant did not levy a tax for 1890 to carry on a school for three months over and above the constitutional period of four months, as provided for by law. The jury found for the defendant, Hamilton, and the court ordered the town of Durant to pay the costs. Motion for new trial was overruled.

Hooker & Wilson, for appellant. *W. P. Tackett* and *J. E. Givin*, for appellee.

WOODS, J. 1. It is not disputed that the municipal authorities of the town of Durant, by appropriate action, have elected to constitute that town a separate school-district; but it is contended for appellee that a failure to levy a tax by that municipality sufficient in amount to carry on free public schools in the town each year for three months over and above the constitutional school term in the common schools generally, is a thing necessary to be done to constitute a separate school-district. The incorporated town of 750 inhabitants or more may be constituted a separate school-district at the pleasure of the town authorities. Whenever the town authorities officially elect to accept the privileges and duties of a separate school-district, the work is done. The official declaration of the creation of the separate school-district is the one act essential to its constitution The levy of a tax sufficient to maintain the free public schools in such town is a duty imposed upon the municipality, whose observance may be compelled in proper cases by appropriate remedies; but the observance of a duty imposed is not essential to the creation or continued existence of the separate school-district. The tax for the maintenance of the free public schools in the separate district is to be laid and collected only when necessary to maintain such schools. If by any means such schools may be maintained without the levy of a tax, then no duty rests upon the town to make the levy. If a levy is necessary during any year to maintain the school in the separate school-districts in towns of 750 inhabitants or more, and the town authorities neglect or refuse to make one sufficient to that end, they may be compelled to do so by proper legal proceedings. This view appears clear when sections 42 and 76 of chapter 24, Acts of 1886, are read together.

2. The remaining question is, what sum or amount shall be paid by the county for the tuition of educable children, who attend the schools of a separate school-district, such children not residing in such separate school-district? Section 45 of the act of the legislature, just referred to herein, declares that "educable children may attend the school of any such separate school-district in the county, and the county shall pay, during its free school term, the actual *pro rata* cost of tuition for all such pupils. In no other cases shall pupils attend a free school out of their district, unless said school be in their county." It is to be observed that the statute is designed for the benefit of educable children of the county, outside the separate school-district. It entitles them to attend the free public schools of the separate school-district, with or without the consent of authorities in the separate district. Such educable children of the county are not burdened with the taxes for erection and repair and furniture of school building in the separate school-districts, nor do they contribute to the tax fund for fuel, and other necessaries for the free public schools of such separate district. On these very favorable terms it is the right of educable children of the county who reside outside the separate school-district to enter and appropriate and enjoy the advantages of schools in such separate district on conditions more favorable than those enjoyed by the children of the separate district; for they pay no tax to build the school-houses, to furnish them, to heat them, or to secure other necessaries. The single condition annexed to the admission of the children from the county outside of the separate school-district to its free public schools is the payment by the county of what is termed by the forty-fifth section "the actual *pro rata* cost of tuition for all such children." This must be held to mean such proportionate part of the

entire cost of tuition in the separate school-district as the number of outside pupils bears to the whole number of scholars attending such schools. The cost of tuition to be paid by the county for outside pupils shall bear that proportion to the entire sum expended for tuition in the schools of the separate district which the number of outside pupils bears to the total number of scholars. The words "cost of tuition," in the phrase above quoted from said forty-fifth section, plainly refer to the cost of tuition in the separate school-district, and not to the cost in the county at large. The construction of the statute which we have given will alone satisfy its language, in our opinion.

Reversed and remanded.

(69 Miss. 92)

STATE *ex rel.* ADAMS, Revenue Agent, v. THIBEDEAUX.

(*Supreme Court of Mississippi.* Oct. Term, 1891.)

COLLECTION OF LIQUOR LICENSE.

Rev. Code Miss. § 1109, provides that any person selling liquor at his place of business in less quantities than one pint shall pay the regular retail tax, and authorizes the sheriff to collect such tax. Act Miss. Feb. 22, 1890, provides for a revenue agent whose duty it is to collect delinquent revenues of the state. *Held*, that the revenue agent was not authorized to proceed against one violating the law until the sheriff, knowing of the violation, neglected or refused to collect the tax.

Appeal from circuit court, Yazoo county; J. B. CHRISMAN, Judge.

Action by Wirt Adams, revenue agent in behalf of the state, against J. L. Thibedeaux for the collection of retail liquor tax. From a judgment for defendant on demurrer, with costs, plaintiff appeals. Reversed as to costs, and affirmed on the demurrer.

Thibedeaux was merchandising in Warren county in 1889 and 1890, and, it was said, sold vinous and spirituous liquors in less quantities than one gallon, without paying the privilege license, as required by the Code of 1880. In his declaration the revenue agent averred that the tax collector, whose duty it was to collect said tax, had failed and neglected to do so at the proper time, and that he now had no remedy at law against the defendant. By failing to pay the privilege license tax of $200, the defendant became liable in the sum of $1,000, payment of which plaintiff demanded and the defendant refused; wherefore the suit. The defendant filed several demurrers to the declaration, the sixth reading: "The law provides amply and exclusively, and in a more prompt and efficient manner, for the collection of the proper penalty for the wrongs complained of by the plaintiff." "Eight. The law makes it exclusively the duty of the tax-collector to collect in such cases, and provides a special remedy in default," etc. "Twelve. That the said declaration shows no special assessment by the board of supervisors," etc. The ruling of the court below was that the demurrers should be "sustained with leave to amend, and the said plaintiff thereupon declining to amend the said declaration, or to plead, it is by the court further considered that said plaintiff take nothing by his writ, and that the said defendant have and recover his costs," etc.

Calhoon & Green and *Barnett & Thompson*, for appellant. *E. E. Baldwin*, *M. Marshall*, *Murry F. Smith*, and *J. Hirsh*, for appellee.

WOODS, J. The act of the legislature of February 22, 1890, entitled "An act to provide for the collection of delinquent revenue in this state, and for other purposes," has for its leading purpose, manifestly, the coercion of delinquent tax collectors. Secondarily, its purpose is to secure collections of taxes due which the tax collectors refuse or knowingly fail to collect. To carry out this scheme for the collection of unpaid taxes primarily from delinquent collectors, and secondarily from delinquent tax-payers, provision is made for the creation of a revenue agent. This revenue agent is clothed with certain powers, but the language employed in the act is not so well chosen as to put the real scope and extent of the agent's duties and powers beyond controversy. That the revenue agent is a collector simply, without any power to make assessments, has already been declared by this court in the case of State v. Addler, 68 Miss. 487, 9 South. Rep. 645. It is equally clear that he is not armed with power to collect taxes which may become due under the legal methods by which property may be placed on the assessment rolls. Such taxes are to be collected and paid over by the tax collector, the officer, under our laws, specially charged with that duty. It is clear, too, that the revenue agent may not sue for and collect license or privilege taxes until the tax-collector has refused or knowingly failed to collect such taxes. In support of this view, it must be remembered that, as part of the machinery created by law for the safe, regular, and uniform collection of the public revenues of the state derivable from taxes, the tax-collector has imposed upon him the duty and responsibility of the collection of taxes, and we must not give the construction to the act creating the revenue agent which will deprive the regular collector of the functions and emoluments of his office; but, as was held in the case of State v. Taylor, 68 Miss. 730, 9 South. Rep. 894, he shall not act in conjunction or co-operation with the collector, but rather adversely to him. He is to proceed against the collector primarily for any failure on his part to discharge his duty according to law in collecting and paying over taxes, and he is, secondarily, to proceed against the individual tax-payer who is delinquent for taxes due from him, only when the collector refuses or knowingly fails to discharge his duty to collect such taxes from the individual tax-payer. We are not to suppose that the law may receive such constructions as will devolve the same important public functions at the same time upon two distinct officers. The regular and orderly collection of the state's revenues is not to be interrupted and imperiled by the struggles between rival officers, and by the legal contests which would inevitably arise be-

tween the contending officers. The regular collector, with the moderate compensation provided by law for his official service in collecting the revenues in the usual way, is to collect without interference. When he refuses to do his duty in collecting, or when he knowingly fails to do his duty, then the revenue agent's duty to proceed against the delinquent collector arises, and then, too, his duty arises to proceed against the individual tax-payer, whose taxes due the delinquent collector has refused or knowingly failed to collect. Any other view would involve the collection of the revenues in endless confusion. Moreover, it is not to be supposed that the statute was designed to give to the revenue agent one-fourth of such taxes collected by him, when the regular collector is required and may be compelled to perform the same work for the usual small compensation. Again, it is the right of the sheriff and tax collector to make collections of taxes, and until he refuses or knowingly ails to do so this right is not to be taken away from him. The case before us now will admirably serve to illustrate this view. It is alleged that the appellee was a merchant who secretly sold spirituous liquors at retail at his place of business, and that he concealed such sales of liquor to evade the payment of the tax imposed by section 1109, Code 1880, but that now his liability has been discovered, and hence the revenue agent sues to recover the tax due under said section, the sheriff and tax collector having failed and neglected to do so,—neglected to do so because of the liability having been concealed, and not because of the tax collector's knowingly having failed. The knowledge of such liability now being known, it became the duty of the tax collector to proceed to collect the tax due, and the presumption must be indulged that the collector will do his duty. If he shall refuse, or now knowingly fail, to do so, the revenue agent shall proceed against the collector and the sureties on his official bond, and against the delinquent tax-payer himself. Whenever the revenues of the state can be collected in the ordinary mode provided by law, the interests of the public and the rights of the collector require that it be so done, and only when the ordinary machinery fails is it intended that the extraordinary agent shall interpose. In the construction of this statute creating the revenue agent we must not overlook the very important fact that this court, in the case of French v. State, 52 Miss. 759, has determined that the sheriff and tax collector has rights which cannot be taken from him; and this decision is to be regarded as approved and adopted by the constitutional convention of 1890, which continued in the new constitution substantially the provision as to sheriffs with reference to which this decision was made. In view of this, we are not to give the statute under consideration such construction as will authorize the collection of taxes, hitherto collectible only by the sheriff and tax collector, by the revenue agent, except only in cases where the former officer refuses or knowingly fails in the discharge of his duty. Furthermore, unless the view we are enforcing be the true one, we will be driven to concede that the legislature intended to arm the revenue agent with powers so extraordinary and sweeping as to put it in his power to vex every tax-payer in the state who may be thought not to have had all his property assessed at its full value by a suit to collect the tax supposed to be due by reason of such under-valuation,—a result so astounding and so subversive of the existing order of the assessment and collection of taxes as to cause every thoughtful man to recoil from it. This suit is confessedly brought under section 1109, Code 1880, and is not maintainable. The action of the court below in taxing the state with the costs was error, and for this cause only the judgment of the court below will be reversed, and judgment entered here.

(68 Miss. 637)

CANTON COTTON WAREHOUSE CO. v. POTTS.

(*Supreme Court of Mississippi.* April Term, 1891.)

DECREE ON DEMURRER—RIGHT TO APPEAL.

A decree on a demurrer to a bill sustaining the demurrer on one of the grounds assigned, and giving time (how much is not specified) to complainant to amend her bill as to such ground, but overruling the demurrer as to all other grounds, and giving defendant 60 days in which to answer, in effect sustains the demurrer; and therefore defendant cannot appeal, but should await the amendment of the bill, and then plead, demur, or answer.

Appeal from chancery court, Madison county; H. C. CONN, Chancellor.

Suit by Rosanna Potts against Canton Cotton Warehouse Company. On a demurrer to the bill assigning several grounds of demurrer, a decree was rendered reciting that "the court sustained the fourth ground alleged, and gave time to complainant to amend her bill as to that ground, and overruled the demurrer as to all other grounds alleged in said demurrer, and leave to defendant is granted within sixty days of this time." Defendant appeals. Dismissed.

Robert Powell and *W. H. Powell*, for appellant. *E. E. Baldwin*, for appellee.

CAMPBELL, C. J. As we interpret the decree of the chancellor, he sustained the demurrer on the fourth cause or ground assigned, and gave leave to the complainant to amend his bill, and allowed time, (how much is not stated,) and then proceeded to overrule the demurrer as to all other grounds, with leave to answer. This presents the singular spectacle of a demurrer sustained and overruled both at the same time, and by the same decree, which is a new sort of practice to us. A demurrer, however numerous the causes or grounds specially set forth in it, is an entire thing,—a whole,—and is to be sustained or overruled. It is well for the court to indicate the ground on which it sustains a demurrer, for the guidance of counsel as to an amendable defect; but when a demurrer is sustained, no matter on what ground, the bill will be dismissed, unless leave is given to amend, and until the amendment allowed is made the de-

murrant may not be called on to further answer, and when the amendment is made the defendant may answer as at first. Davis v. Davis, 62 Miss. 818. The effect of the decree in this case was to sustain the demurrer, and the course for the defendant to pursue was, not to appeal from a decree sustaining its demurrer, but to wait the amendment of the bill made necessary by the view of the chancellor, and then, and not until then, to plead, demur, or answer to the amended bill. The demurrer was sustained, not overruled, and the appeal of the successful demurrant must be, and is now, dismissed.

(68 Miss. 639)

PURNELL *et al.* v. FRANK.

(*Supreme Court of Mississippi.* April Term, 1891.)

ATTACHMENT FOR RENT—DEATH OF TENANT.

In replevin for cotton levied on for rent under an attachment against "G. and his heirs," defendant's avowry alleged that it was the property of her tenant, G., deceased, at the time the attachment was sued out. *Held*, that the plea was bad, as it showed that the attachment was against a dead man, and therefore void.

Appeal from circuit court, Tallahatchie county; R. W. WILLIAMSON, Judge.

Replevin by E. V. Purnell against Mattie E. Frank for cotton levied on by defendant on an attachment for rent against "Hill Guy and his heirs." There was judgment for defendant against plaintiff and her sureties for a return of the cotton which had been delivered to her. Plaintiff and her sureties appeal. Reversed.

Defendant, by her avowry, pleaded that "the cotton attached for rent was the property of her tenant, Hill Guy, deceased, at the time the attachment for rent was sued out, and, being liable for rent due defendant, was lawfully levied on." Plaintiff's motion to strike out the plea was not allowed.

S. R. Coleman, for appellants. *Calhoon & Green*, for appellee.

CAMPBELL, C. J. The record before us very poorly presents the case, but enough appears to show that the attachment for rent was sued out against a dead man; and when one appeared and claimed a portion of the goods seized the landlord sought to justify the taking and detention of the goods by virtue of this attachment, which was plainly void. The avowry is bad, and should have been so held. Reversed and remanded.

(68 Miss. 643)

GEORGIA PAC. RY. CO. v. ROBINSON.

(*Supreme Court of Mississippi.* April Term, 1891.)

CARRIERS OF PASSENGERS — INJURY TO PERSON BOARDING TRAIN—COLLECTING FARE.

1. At a section-house on defendant's railroad plaintiff borrowed a lantern of the section-master, and signaled a train to stop. The train stopped with the engine nearly opposite him, and without telling any one that he wished to board the train, and, as far as appeared, without any one knowing it, he passed back to the coach he wished to enter, and, as he was stepping up, the train started, throwing him against the steps, and injuring his knee. Plaintiff testified that twice before he had signaled the train and taken passage at the section-house, but it was not shown that it was the custom to take on and let off passengers there, and defendant's testimony was that it was not a stopping place. *Held*, that plaintiff could not recover.

2. The fact that after plaintiff had entered the train the conductor treated him as a passenger, by collecting his fare from the next station, does not affect his relation to the company at the time of the injury.

Appeal from circuit court, Carroll county; C. H. CAMPBELL, Judge.

Action by William Robinson against the Georgia Pacific Railway Company for injuries received while boarding a train. Judgment for plaintiff, and defendant appeals. Reversed.

Defendant went to Malmaison, a flag station on defendant's road, intending to take the train there, but as it was rainy, and there was no shelter, he walked to a section-house about half a mile away, and there borrowed a lantern of the section-master, and signaled the train to stop when it came along. The train stopped with the engine about opposite him. Without notifying any one that he wished to board the train, and, as far as appeared, without any one knowing it, he passed back to the coach he wished to enter, and just as he was stepping up the train started, throwing him against the steps, and injuring his knee. Plaintiff testified that twice before he had signaled the train, and taken passage at the section-house, but it was not shown that it was the custom to take on or let off passengers at that point, and the testimony for defendant was that it was not a stopping place.

A. F. Fox, for appellant. *W. R. Harper* and *M. L. Southworth*, for appellee.

COOPER, J. The evidence of the plaintiff fails to establish that the "section-house" was either a depot or a place at which the appellant was accustomed to receive or discharge passengers, or at which any invitation had been given to the plaintiff or any one else to take passage on its trains. The plaintiff's case must therefore stand upon the facts disclosed, of an unlawful flagging of the train by him on a dark and rainy night, at a point on the road at which the servants of the company had no reason to expect a passenger, the stopping of the train because of the signals given by the plaintiff, his attempt to board it while so stopped, the movement of the train at the instant he attempted to enter it, and the consequent injury, together with the fact that after he had entered the train the conductor in charge collected the fare due for a passenger from Malmaison to Greenwood. Upon the plaintiff's own testimony, and drawing therefrom the inferences most favorable to him, no right of recovery is shown to exist. It does not appear that any servant of the company was informed that the plaintiff desired to take passage on the train, or that he was attempting, or intended to attempt, to get on it. After the injury had been sustained, the plaintiff went into the car, (the train having just passed a station,) and when the conductor came through paid him the fare to

his point of destination. But he himself states that he then for the first time saw the conductor, and there is nothing to show that the conductor had before seen him. The fact that fare was then collected throws no light upon the past occurrence from which the injury resulted. The conductor found plaintiff upon the car, and treating him then as a passenger, as he rightly might do, demanded and received the fare due from him as such. But this does not show that the conductor had invited him to enter the train at the point he did enter it as a passenger, or in fact knew that he had embarked there. We are not called upon, under the facts of this case, to determine whether it is within the scope of the authority of a conductor in charge of a train to bind the company by an attempt to enter into a contract of carriage with a person presenting himself at a place other than those provided for passengers, or outside of the usual course of business. It is sufficient for the decision of the present appeal to say that, under such circumstances, it is at least necessary that the servants of the company be informed that a person presenting himself, under the circumstances disclosed here, contemplates and offers to become a passenger, before they can be required to deal with him as such. No such fact appears in the present case, and the court should have given the peremptory instruction asked by the defendant. The judgment is reversed.

(68 Miss. 760)

ILLINOIS CENT. R. CO. v. MILLER.

(*Supreme Court of Mississippi.* April Term, 1891.)

SURFACE WATER—COLLECTION AND PRECIPITATION—DAMAGES.

1. Where a railroad company digs a ditch along its track, and thereby conducts the water collected therein onto low land at a distance from where the ditch commences, it is liable for the damage, whether the water be mere surface water or water diverted from natural water-courses by the construction of the road-bed.

2. In an action for damages for overflowing plaintiff's land he cannot, under a complaint alleging injury to the land and crops, recover more than the value of the land, where the evidence shows no direct injury to the crops, but merely that by reason of the injury to the land it was incapable of producing as large crops as before.

Appeal from circuit court, Panola county; JAMES T. FANT, Judge.

Action by W. J. Miller against the Illinois Central Railroad Company for the overflowing of plaintiff's land by reason of the construction of defendant's road. Judgment for plaintiff for $450. New trial denied, and defendant appeals. Reversed.

W. P. & J. B. Harris, for appellant. *Stone & Lowry*, for appellee.

COOPER, J. The condition of the record in this cause is such that on the main question involved we find ourselves unable to form any definite opinion upon the evidence on which the case was tried in the court below. By his declaration the plaintiff complains that the defendant in constructing or repairing its road-bed closed up the channels of certain natural water-courses, by reason of which the water flowing therein was caused to overflow his adjacent lands, to the great injury of the land and destruction of crops. A map of the road-bed and adjacent lands, which was used in the trial of the cause in the court below, is made part of the record, but nothing appears on it by which we are enabled to apply much of the evidence of the witnesses. The witnesses testifying before the jury and pointing out the localities to which they referred on the map were, we doubt not, enabled to give to the jury a clear understanding of the matters in issue; but we fail to learn anything from the testimony such as that given by the plaintiff, a part of which is as follows: "Here is my land in here. This part along here is a high place. The water did not damage that, but this in here, and this; and this is very fine bottom land. * * * On account of the railroad being here, it stops this water coming down these little ravines here, and turns it down the railroad; and when it gets here it goes through a cut here, where there is a lot of gravel," etc. It is evident that we cannot know what the witness meant or said, unless aided by some *indicia* on the map, locating the places spoken of. We gather from the record the general fact that the road-bed of the defendant crosses several little swales, or ravines, or small water-courses, in which, in periods of heavy rains, a considerable quantity of surface water is gathered. The road-bed prevents this water from flowing westward as it naturally would do, and a ditch cut by the company along the eastern line of its road gathers all this water, and conducts it some half mile to the land of the plaintiff, and, his land being lower than the bed of the ditch, is in times of excessive rainfall overflowed by the water running over the banks of the ditch. The contention of the plaintiff was that the defendant's road-bed intersected and obstructed natural water-courses and diverted water therefrom, and caused the same to overflow his land. On the other hand, the defendant contended that its road did not intersect any water-course, but that the water turned upon the land of the plaintiff was mere surface water, which, obstructed by the road-bed, turned aside, and, following the natural declivity to the north, flowed upon the adjoining land of the plaintiff. We are satisfied that whether the flow of water intersected and diverted by the road-bed was that of streams running in well-defined channels and having banks, or was mere surface water, coming from the adjacent hills, and flowing in sheets across the swales between the hills and the adjacent creek, the defendant is in either event responsible for the injury inflicted upon the plaintiff by the turning of the water upon his lands. If it be conceded that this was surface water, it has been so collected and discharged in injurious volumes upon the lands of plaintiff as to entitle him to compensation for the injury resulting to his property therefrom. The rules of the civil and of the common law in relation to surface water are directly contrary to

each other. Under the first, the lower of two adjacent estates owes a servitude to the other to receive the natural drainage, and the other estate cannot withhold from the lower the supply of water flowing naturally. Under the rule of the common law the owner of the upper estate may withhold, and the owner of the lower estate may repel, mere surface or superficially percolating water upon or from his estate. In the states of Pennsylvania, Illinois, North Carolina, California, and Louisiana, and probably Ohio and Missouri, the rule of the civil law is adopted, while in England, Massachusetts, Maine, Vermont, New York, New Hampshire, Rhode Island, New Jersey, and Wisconsin the rule of the common law prevails, at least as to rural estates. Gould, Waters, §§ 265, 266, and authorities in notes. But neither under the rule of the civil nor of the common law is one permitted to collect surface water falling upon his own land or that of another in artificial channels, and to discharge it in undue and unnatural quantities upon the land of another. Gould, Waters, § 271; Barkley v. Wilcox, 86 N. Y. 148. The defendant has, for the protection of its road-bed, dug a ditch along its eastern line, into which is collected surface water falling upon adjacent lands for a half mile along the ditch, and which, but for the ditch, would have flowed upon lands of other persons, and has discharged the water thus accumulated upon the lands of the plaintiff, which were free from the flow of the water in its natural course. Upon all the authorities this is an unlawful act, and for it the plaintiff is entitled to recover. But the damages awarded by the jury are manifestly excessive. The evidence shows that the extent of the injury is confined to 12 acres of land of the value of $25 per acre. If the land had been totally destroyed not more than $300 could have been recovered for the injury to the land. The declaration claims certain other damages for injury to crops upon the land, but the evidence discloses that this damage resulted, not to the crops directly, but that by reason of excessive water put upon the land it was rendered incapable of producing full crops, as it had done before. The plaintiff has, therefore, been awarded double damages for the injury. He has recovered damages for injury to the land, and damages because the land as injured failed to produce full crops. For this the judgment must be reversed. If the appellee desires so to do, he will be permitted to remit all save $250, for which judgment may then be rendered here.

(63 Miss. 529)

FOOT v. GOLDMAN.

(*Supreme Court of Mississippi.* April Term, 1891.)

PARTNERSHIP—ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHT OF INFANT PARTNER TO REVOKE.

1. An infant partner is not bound by an assignment of the partnership assets executed by his copartner.

2. It cannot be objected that the effect of a decree of court avoiding such an assignment would be to assist the infant to get possession of the firm assets, and convert them to his own use, without payment of the firm debts, because the court will so deal with the said assets as to protect all parties.

Appeal from chancery court, Madison county; H. C. CONN, Chancellor.

This was a bill by B. Goldman, an infant, against Lawrence Foot, to set aside an assignment of the partnership assets of B. Goldman & Co. The facts alleged were that the firm of Goldman & Co., of which complainant was a member, was largely indebted, but not insolvent; that, notwithstanding complainant's protest, his partner executed an assignment of the partnership assets to Foot for the benefit of creditors; and that Foot was sacrificing the goods. Complainant asks that the assignment be set aside on account of his infancy. From a decree overruling a demurrer to the bill, the assignee, Foot, appeals. Affirmed.

R. Powell and *W. H. Powell*, for appellant. *Calhoon & Green*, for appellee.

COOPER, J. The decided weight, in number at least, of the authorities, is that one partner has not, by virtue of the partnership contract alone, and in the absence of special circumstances, authority to convey the whole partnership property to a trustee for the payment of the partnership debts. 1 Lindl. Partn. 127, note; Burrell, Assignm. 126; 1 Amer. & Eng. Enc. Law, 847. The authority of one partner to act for all rests upon the agency created by the contract of partnership; and in no case can an agent perform an act which, if done by the principal, would be invalid, or bind the principal irrevocably, when, if the act had been done by the principal himself, it might have been revoked. If the appellee had himself joined in the assignment, it might have been annulled on his application. It is impossible that one claiming to act as his agent can bind him irrevocably.

The suggestion that the infant seeks to get possession of the firm assets, and convert them to his own use, without payment of the firm debts, and that the court will by its decree aid him in this purpose, is not well founded. The court, having avoided the assignment, will so deal with the property as to protect the rights of all parties. 10 Amer. & Eng. Enc. Law, 639. Decree affirmed.

(63 Miss. 564)

ALEXANDER v. CITY OF VICKSBURG.

(*Supreme Court of Mississippi.* April Term, 1891.)

NEGLIGENCE OF FIRE DEPARTMENT—LIABILITY OF CITY.

A city is not liable for the negligent driving of a member of its fire department in going to a fire, though the department be under its direct control, management, and operation, and the members of it be employed and paid by the city.

Appeal from circuit court, Warren county; J. D. GILLAND, Judge.

Action by W. C. Alexander against the city of Vicksburg for the value of a horse struck and killed by a hose-reel which was being rapidly driven to a fire within the city limits. Judgment for defendant, and plaintiff appeals. Affirmed.

It was admitted that the accident was the direct result of the negligence of the driver of the hose-reel; that he was in the employ of the city; that driving the hose-reel was his ordinary duty; that the fire department was under the direct control, management, and operation of the city; and that there was no contributory negligence.

Dabney & McCabe, for appellant.

Where a city manages and operates its own fire department, it is liable for the negligence of a driver while driving to a fire. Bish. Non-Cont. Law, § 762; Wheeler v. City of Cincinnati, 19 Ohio St. 19; Fisher v. City of Boston, 104 Mass. 87; Tainter v. City of Worcester, 123 Mass. 311; Greenwood v. Louisville, 13 Bush, 226; Burrill v. City of Augusta, 78 Me. 118, 3 Atl. Rep. 177; Grube v. City of St. Paul, 34 Minn. 402, 26 N. W. Rep. 228; Robinson v. City of Evansville, 87 Ind. 334; Wilcox v. City of Chicago, 107 Ill. 334; Barnes v. District of Columbia, 91 U. S. 540; Kittredge v. City of Milwaukee, 26 Wis. 46; Mulcairns v. City of Janesville, 67 Wis. 24, 29 N. W. Rep. 565; Goodfellow v. Mayor, etc., 100 N. Y. 15, 2 N. E. Rep. 462; Murtaugh v. City of St. Louis, 44 Mo. 479; Stebbins v. Keene Tp., 55 Mich. 552, 22 N. W. Rep. 37; Deane v. Inhabitants of Randolph, 132 Mass. 475; Semple v. Vicksburg, 62 Miss. 63; Mackey v. City of Vicksburg, 64 Miss. 777, 2 South. Rep. 178; City of Vicksburg v. McLain, 67 Miss. 4, 6 South. Rep. 774.

Henry & Thompson, for appellee.

A city is not liable for what it does as an arm of the government and for the public good. Bish. Non-Cont. Law, § 755. The work of a fire department is wholly gratuitous, and the city is not liable for injuries inflicted by it, although the firemen are employed and paid by the city. Hafford v. City of New Bedford, 16 Gray, 297; Wheeler v. City of Cincinnati, 2 Amer. Rep. 368; Jewett v. City of New Haven, 9 Amer. Rep. 382; Torbush v. City of Norwich, Id. 395; Hayes v. City of Oshkosh, 14 Amer. Rep. 760; Maxmilian v. Mayor, 20 Amer. Rep. 468; Grant v. City of Erie, 8 Amer. Rep. 272; Brinkmeyer v. City of Evansville, 29 Ind. 187; O'Meara v. Mayor, etc., 1 Daly, 425; Kelley v. City of Milwaukee, 18 Wis. 83; Weightman v. Washington Corp., 1 Black, 39; Smith v. City of Rochester, 76 N. Y. 506; Fisher v. City of Boston, 6 Amer. Rep. 196; Patch v. City of Covington, 17 B. Mon. 722; Shear. & R. Neg. § 139; 2 Dill. Mun. Corp. § 976.

CAMPBELL, J. It is held generally, if not universally, by the courts of this country, that, in cases of the class to which this belongs, the municipality is not liable, as is abundantly shown by the citations of counsel on both sides, which see. Affirmed.

(63 Miss. 566)

ALABAMA & V. R. CO. v. SUMMERS.

(*Supreme Court of Mississippi.* April Term, 1891.)

RAILROAD COMPANIES—FLYING SWITCHES—CONTRIBUTORY NEGLIGENCE.

1. It is negligence *per se* for a railroad company to make a flying switch across the streets of a town, along which people are constantly accustomed to travel.

2. A woman with a bundle on her head was walking south along a road across which a switch from a railroad track running parallel to the road was laid. She met a train, which passed her, going north, and, returning, threw some cars by a running switch onto a side track. The cars struck the woman when at the intersection of the street and the switch. The engineer attempted to warn the woman, but was unable to, on account of the bundle on her head. *Held*, the question of contributory negligence was for the jury.

Appeal from circuit court, Warren county; WARREN COWAN, Special Judge.

Action by James Summers against the Alabama & Vicksburg Railway Company for damages on account of the killing of plaintiff's wife. Judgment for plantiff, and defendant appeals. Affirmed.

Nugent & McWillie and *Birchett & Shelton*, for appellant. *Anderson & Russell*, for appellee.

COOPER, J. The appellee has recovered the judgment appealed from for the death of his wife, occasioned by a train of the appellant while making a "running" or "flying" switch in the city of Vicksburg. The main lines of appellant's road near the place of the injury lies nearly parallel to Water street, and some 25 feet to the east of a dummy line, which is either upon a part of Water street or a little east of it. At a point on the main line of defendant's road, stated by the witness to be from 120 to 165 feet north-east of the place where Mrs. Summers was killed, another line of defendant's road, known as the "River Line," intersects the main line. This river line leaves the main line on a curve towards the south-west, crosses the dummy line and Water street, and runs to the bank of the Mississippi river. On the day of the injury, the deceased, with a bundle of clothing on her head, was walking southward along the dummy line, (where many people were accustomed to walk,) and, while she was some distance north of the intersection of the river line of appellant with the dummy line, a train of the appellant, going north, met her, and passed on, she continuing to walk south. This train passed some distance north of the intersection of the main line and the river line, and then started south to make the switch, called by various witnesses a "flying," "running," "walking," or "dropped" switch. Whether it is one or the other seems to be determined by the rate of speed at which the train is running when the switch is made. The witnesses differ as to the rate of speed on this occasion, some saying the engine ran at a speed of 15 or 20 miles an hour, while others say it did not exceed 5 or 6 miles. However this may be, what was done was this: The train, having met deceased and proceeded north, started south, and, after momentum had been given to it, the two rear cars were detached. The speed of the engine and other cars was then accelerated, so that they should clear the switch at the intersection of the main and river lines before the detached cars reached that point. The engine and cars thereto attached proceeded down the main line, but the detached

cars, on reaching the intersection, were switched off on the river line, and, running thereon, struck the deceased just as she was passing across the same along the dummy line. The engineer and fireman, seeing and appreciating the danger, attempted to warn the deceased by blowing the whistle and ringing the bell and calling to her, but the brakeman on the detached cars seems not to have seen her until too late to apply his brakes and check the speed of his cars. At the instance of the plaintiff, the court instructed the jury that the act of the servants of the defendant in making the running or flying switch across Water street was negligence *per se*, and that, if the deceased was not guilty of contributory negligence, the plaintiff was entitled to recover, and refused a peremptory instruction, asked by the defendant, because of the contributory negligence of the deceased. We approve the action of the court in both respects. It is negligence for a railroad company to make a flying switch across the streets of a town, along which people are constantly accustomed to travel. Fulmer v. Railroad Co., 68 Miss. 355, 8 South. Rep. 517; French v. Railroad Co., 116 Mass. 537; Brown v. Railroad Co., 32 N. Y. 597; Railroad Co. v. Garvy, 58 Ill. 83; Beach, Contrib. Neg. 223. Whether the deceased exercised reasonable care and prudence under the circumstances in which she acted was also properly submitted to the jury. No trains were at the time of the injury being run on the dummy line, along which she was walking, that line being then in temporary disuse. Walking, as she was, towards the south, she could readily observe any train approaching from that direction. The train on appellant's main line had just met her and passed to the north, and, returning, the principal part of it, attached to the engine, had again passed along the main line going south. We cannot say, as matter of law, that it was contributory negligence on the part of the deceased not to foresee and guard against the unlawful and negligent act of the defendant in making the flying switch by which a part of the train was shifted to another track and sped along its dangerous course behind her. The question was fairly submitted to the jury, and we are not prepared to dissent from the conclusion it reached. French v. Railroad Co., 116 Mass. 537; Craig v. Railroad Co., 118 Mass. 431; Gaynor v. Railroad Co., 100 Mass. 208; Railroad Co. v. McGowan, 62 Miss. 682. The judgment is affirmed.

(68 Miss. 736)

DAVIS *et al.* v. SCHMIDT.

(*Supreme Court of Mississippi.* April Term, 1891.)

TAXATION—PREMATURE SALE.

A sale for delinquent taxes made on the first Monday in May, instead of the second, under Act Miss. Feb. 13, 1867, making liquidating levee taxes payable on the 1st day of May in each year, and directing that lands in default shall be sold on the second Monday in May, is invalid, since a tax-payer has a right to pay his taxes between the time they become delinquent and the day prescribed for the sale.

Appeal from chancery court, Washington county; W. R. TRIGG, Chancellor.

Bill by Theodore Schmidt against Charles L. Davis and others to confirm a tax-title. Decree for complainant. Defendants appeal. Reversed.

Wynn, Thomas & Griffin, for appellants. *Jayne & Watson*, for appellee.

WOODS, C. J. The appellee claims to derive title to the lands in controversy through a sale made on the 4th day of May, 1868, to the board of liquidating levee commissioners, for non-payment of liquidating levee taxes alleged to have been due thereon for the year 1867. The second section of the act of February 13, 1867, to provide for the payment of all debts and liabilities contracted or assumed, and all scrip or evidence of debt issued by the general board of levee commissioners, etc., makes the taxes levied by the act payable on the 1st day of May in each year; and the third section of the act directs the lands so in default to be sold on the second Monday in May of each year. The taxes were not paid on these lands on the 1st day of May, 1868, and the same were sold, not on the second Monday in May, but on the first Monday in that month. Thus the question is presented, did this sale, made confessedly one week in advance of the day fixed by law for the sale of lands delinquent for taxes, convey any valid title? The question involves the construction of the statute, and is one of legislative intention purely, and not one of legislative power.

By the second section of the act, payment of taxes is contemplated to be made on or before the 1st day of May; and by the third section a sale of the lands is directed, if there be default made in payment, on the second Monday in May. A literal adherence to the words of the second section will deprive the tax-payer of the privilege and power of paying after the 1st day of May. It is true, the taxes were due on May 1st; but it is not true in that sense which made them subject to sale for default in payment of taxes due thereon. Until the lands are directed to be sold, it cannot be reasonably affirmed that there has been that delinquency which authorizes and requires a sale. The general scheme of our tax laws does not contemplate any imposition of burdens upon others than delinquent tax-payers. If the tax-payer had paid, in accordance with law, or if his lands were sold while he yet had the right to pay, in accordance with law, he could not be said to be delinquent, and should not be subjected to the penalty visited upon delinquents. In the case at bar the tax-payer should have paid on or before the 1st day of May, but, if he did not, he might pay at any subsequent time prior to the day when his taxes were due, in such sense as made his lands liable to sale for final default in payment. The intervening period between the 1st day and the second Monday in the month were days of grace in which the tax-payer might still pay. This view meets the spirit of our scheme of taxation, and does no violence to its letter, taken as one harmonious whole. Nor is this view at all

at variance of this court in Nevin v. Bailey, 62 Miss. 433, and other later opinions on this general subject. In the first-named case the remarks of the court had reference to a sale made on final default in payment of taxes, and a sale after the days of grace had expired, on the day fixed by law when the lands were liable to sale for such final default. We find it unnecessary to consider the other question presented, as this opinion disposes of the case as it now stands. Reversed and remanded.

(68 Miss. 732)

ANDREWS v. SIMMONS *et al.*

(*Supreme Court of Mississippi.* April Term, 1891.)

MARRIAGE BETWEEN SLAVES—LEGITIMACY OF ISSUE.

1. Neither Acts Miss. 1865, c. 4, providing that "all freedmen, free negroes, and mulattoes who do now or have heretofore lived and cohabited together as husband and wife, shall be taken and held in law as legally married, and the issue shall be taken and held as legitimate, for all purposes," nor Const. Miss. 1869, art. 12, § 22, declaring that "all persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held, for all purposes in law, as married, and their children, whether born before or after the ratification of this constitution, shall be legitimate," validated a marriage between persons, one of whom was dead at the time the act was approved, or rendered the children of such persons legitimate.

2. Code Miss. 1871, § 1766, making legal and valid all marriages theretofore solemnized, not prohibited by the provisions of article 3, c. 23, of the new Revised Code, which section defined the degrees within which lawful marriage might take place, was intended only to validate marriages theretofore solemnized between parties within the forbidden degrees under former laws, and had no reference to slave marriages,—marriages not known to the law

Appeal from circuit court, Wilkinson county; W. P. CASSEDY, Judge.

Ejectment by Lizette Andrews against Leah Simmons and others. Plaintiff claimed title as the daughter and heir of one Barney, and offered evidence that said Barney was married to one Mary while they were slaves, and that she was the issue of that marriage; that her mother died a slave; and that her father never married again. The court excluded the evidence, and judgment was rendered for defendants. Plaintiff appeals. Affirmed.

H. C. Capell and *D. C. Bramlett*, for appellant. *T. McKnight*, for appellees.

WOODS, J. The only error assigned by counsel for appellant is the action of the trial court in excluding the evidence offered by plaintiff showing that she was the daughter of Ike and Mary Barney, who were slaves united in marriage according to the usages prevailing during the existence of slavery, and that Mary died in a state of slavery, after involuntary separation from her husband, and that Ike did not again remarry during the life-time of Mary. There being no marriages recognized in law among slaves, when this class of our population was enfranchised and elevated to citizenship the legislature promptly enacted laws applicable to the changed condition, so far as possible validating slave marriages, and legitimating the fruits of such marriages. Chapter 4, Act 1865, declares "that all freedmen, free negroes, and mulattoes who do now and have heretofore lived and cohabited together as husband and wife, shall be taken and held in law as legally married, and the issue shall be taken and held as legitimate, for all purposes." This perfectly met the requirements of the embarrassing situation, and was all that could be done to give validity to slave marriages, and to legitimate the issue of such marriages. That the legislature neither undertook to make, nor, indeed, could have made, valid marriages against the consent of those bound, or against their wish, is too plain for disputation. The act of 1865 undertook to validate marriages between former slaves who had theretofore been and then were living together as husband and wife, and to render legitimate the offspring of such marriages; and this would appear to have exhausted the legislative power. To further meet the necessities of the changed condition of those who had been in slavery formerly, a constitutional provision, in substantial agreement with the act of 1865, was inserted in the twenty-second section of the twelfth article of the constitution of 1869, by which it was declared that "all persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held, for all purposes in law, as married, and their children, whether born before or after the ratification of this constitution, shall be legitimate." It will be observed that the constitution went no further than to establish the relationship of marriage between persons who were then living together and cohabiting as husband and wife, and to render legitimate the children of such persons, whether born before or after the establishment, constitutionally, of such marriage relationship. Neither the act of 1865, nor the twenty-second section of the twelfth article of the constitution of 1869, can, by any ingenuity of construction, be held to validate marriage between persons after the death of one of them, and, necessarily, without the consent of either of them.

It is said, however, by counsel for appellant, that section 1766, Code 1871, validated the slave marriage of appellant's parents, and legitimated the issue of such marriage. This section declares "that all marriages heretofore solemnized in this state, not prohibited by the provisions of article 3, c. 23, of the new Revised Code, are hereby declared to be legal and valid." A glance at said article 3, c. 23, will show that it is designed to define the degrees within which lawful marriage may not take place, and that it has no reference to slave marriages,—marriages not known to law. The plain purpose of section 1766 was to validate certain marriages theretofore solemnized between parties within the forbidden degrees under former laws. The apparent hardship of the case of this plaintiff was provided for by section 525, Code 1871, and an adequate and simple method was afforded to appellant's father by which to have had his child born out

of lawful wedlock made legitimate. The father did not choose to have the appellant made legitimate, so far as the record in the cause discloses; and the courts cannot, at this late day, do what the father in his life-time did not wish done. Affirmed.

(68 Miss. 432)

BROOKHAVEN LUMBER & MANUF'G CO. v. ILLINOIS CENT. R. CO.

(*Supreme Court of Mississippi.* Oct. Term, 1890.)

NEGLIGENCE—INSTRUCTIONS.

1. In an action by a lumber company against a railroad company for the value of lumber destroyed by fire resulting from the derailment of defendant's engine it appeared that, through no negligence of defendant, a switch, opening from the main line to a side track in plaintiff's yard, had been adjusted for the side track, and another switch at a fork in the side track had been so adjusted that an engine passing over it would be derailed. The second switch was under the joint control of plaintiff and defendant, and was not visible from the main track. The engineer of a mail train running 35 miles an hour was about 300 feet from the first switch before he saw that it was adjusted for the side track. He applied the air-brakes, and almost immediately the engine ran off the track at the second switch, and collided with and ignited the lumber. The court charged that if the engine and machinery of defendant were in perfect working order, and the engineer was faithfully discharging his duties, and after discovering that the switch was open did everything which a skillful and cautious engineer could or would have done "under the circumstances" to prevent the accident, then plaintiff could not recover; that the proper inquiry was not whether the accident might have been avoided if the railroad company had anticipated it, but whether, "under the circumstances as they then existed," the company was negligent in failing to anticipate and avoid the occurrence; that, though the first switch was negligently left open by defendant's servant, yet if the use to which the second switch was ordinarily put by plaintiff's and defendant's servants was such that a train leaving the main line would take one or other of the forks of the side track, and if in either event the train could ordinarily be checked without injury to plaintiff's property, and if the injury to plaintiff's property would not have resulted but for the condition of the second switch, and that was not attributable to defendant's negligence, then plaintiff could not recover. *Held*, that these instructions stated the true rule, and an instruction that, if the engineer discovered that the switch was open while at a sufficient distance therefrom to have stopped the train before the collision, and failed to resort to such appliances as, if resorted to, would have prevented the collision, then defendant was liable, was properly refused; since it required, by necessary implication, that the engineer must have anticipated that the second switch, which he did not see, was open, and that the engine would collide with the lumber.

2. The mere fact that an old juror, habituated to drink, was, at the request of his friend, supplied with a single draught of liquor by an employe of a successful litigant, is insufficient ground for a new trial, where all the evidence taken before the trial court on motion for new trial shows that the liquor was not given with intent to influence the juror's mind, and did not have that effect.

3. Where evidence of the amount of insurance held by the lumber company on the burned property was admitted to show motive on its part to cause the fire, but the court refused to admit a plea, in which the insurance was sought to be availed of in reduction of damages, and charged that defendant could not escape liability for any damage caused by its negligence, because of insurance on the property, a refusal to charge that the evidence neither proved nor tended to prove motive will not be adjudged error.

Appeal from circuit court, Lincoln county; J. B. CHRISMAN, Judge.

Action by the Brookhaven Lumber & Manufacturing Company against the Illinois Central Railroad Company to recover damages caused by fire from an engine of defendant. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Following are the 2d, 3d, and 4th instructions, given for defendant, and referred to in the opinion: "(2) If the jury believe from the evidence that the engine, train, and machinery of the defendant, which constituted the wrecked train, were in good condition and perfect working order on the occasion of the accident, and that the engineer, Berry, was faithfully discharging his duties when he discovered the condition of the switch, and that, after discovering that the switch was open, he did everything which a skillful, prudent, and cautious engineer could or would have done under the circumstances and conditions which then surrounded him to prevent the accident, then the plaintiff cannot recover because of a failure to stop the train before it came in contact with the mill. (3) The proper inquiry is not whether the accident might have been avoided if the railroad company had anticipated the occurrence, but whether, under the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence. The law does not require of the defendant the use of every possible precaution to avoid injury to individuals or property, nor that the railroad should have employed any particular means which, it may appear after the accident, would have avoided the damage. The defendant was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. Therefore, if the jury believe from the evidence that the defendant took such care, and so conducted itself with reference to plaintiff's property as a person of ordinary prudence and caution would under like circumstances use if his own interest were to be affected, then defendant is not liable. (4) Even though the jury may believe from the evidence that the split switch was carelessly and negligently left open by defendant's servant, yet if they further believe from the evidence that the use of the stub switch to which it was ordinarily placed by plaintiff's and defendant's servants was such as would leave it so placed that a train leaving the main line at the split switch would take either the front switch or the horn switch, and that in either event the train could ordinarily be checked without injury to plaintiff's property, and that the injury complained of in this instance would not have occurred but for the condition of the stub switch at the time of the accident, and that such condition was not attributable to the defendant's negligence, then plaintiff cannot recover."

H. Cassedy and *Miller, Smith & Hirsh*, for appellant. *W. P. & J. B. Harris*, for appellee.

Woods, C. J. This action was brought by the appellant in the court below for the recovery of $30,000 damages for injuries alleged to have been sustained by the appellant in the destruction by fire of its mills near Brookhaven by reason of the negligent conduct of the appellee or its servants. It is shown with reasonable certainty that the large property of appellant was destroyed by fire communicated by a wrecked engine of the appellee, and it is shown that the destruction and loss occurred in this manner: Appellant was the owner of certain lumber-mills, situated on the Illinois Central Railroad about one mile north of the town of Brookhaven, said mills and lumber sheds and yards being situated adjacent to the right of way of said railroad company, and to a small extent actually upon such right of way. A side track, for the convenience and accommodation of the business of these mills, was laid from the main line of the railroad out to and through one side of the mill property, being connected, at its north end, with the main line by a switch of that character known as a "split switch," which was provided with the usual and proper appliances for moving and using and handling this switch in putting in upon and taking out cars from this side track; and this side track did not again return to the main line, and had its southern terminus in the lumber-yards of appellant. About 100 feet from the intersection of the side track with the main line at the split switch an interior yard track sprang out from the first side track, already mentioned, and ran around for a considerable distance on the eastern side of the mill property, and, like the main side track, did not return again to the main line, or to the original side track, but terminated in the mill-yards on the eastern border of that property, and this additional and interior side track was connected at its point of departure with the main side track by a switch of that character known as a "stub switch." The split switch connecting the first side track with the main line of appellee's railway was under the control and in the charge of the servants of the railroad, and was kept securely locked when not in actual use in the shifting of cars from the main line to the side track, and *vice versa*. The stub switch was in the joint control of the servants of appellant and appellee, and was handled at will, in the shifting of cars, as occasion demanded, by the servants of both parties, and was never locked, being left movable for the convenience of appellant's servants in handling cars in their employer's lumber-yards. The stub switch could be set so as to throw cars on either the main side track or upon the interior one, and, unless set for the one or the other of these side tracks, any train of cars coming in upon the side track from the main line would be necessarily and assuredly derailed at the stub switch. The split switch, connecting the original side track with the main line, could be set for the main line or the original side track, at the pleasure of the switchman, and it could only be so set, for no derailment of moving cars would naturally occur at the split switch, no matter how it might be set; and the main line of railway of appellee, at and for some distance north of this mill, has a sharp down grade southward. It appears clearly, also, that on the evening of the accident which resulted in the destruction by fire of the mills the south-bound mail train of appellee was nearly an hour behind its schedule time, and was running at the rate of 35 miles an hour when it reached the mills in question, after 7 o'clock P. M., in the night-time at that season of the year; that when about the distance of 300 feet from the split switch, the engineer of the swiftly rushing train discovered to his surprise and alarm that this switch had been and then was set for the side track leading into the mill-yard, instead of for the main line, as it should have been, and as it had always theretofore been at the hour for the passing of his train, as must be assumed from all the evidence in the case; that the surprised and imperiled engineer, confronted with the dangers of an unexpected and unforeseen condition, not resolvable with confidence or with absolute safety, but demanding instant resolution and action, as quickly as possible applied his air-brakes, and before he could do more found himself hurled into the jaws of the yawning switch, and almost as quick as thought, afterwards, felt his engine pounding over the cross-ties, and then plowing through the bare earth, and speedily thereafter was hurled from his place among the scattered lumber in which his engine had buried itself, and from which his fireman was taken, a few moments later, a bleeding and lifeless body; and that the fire and loss immediately followed, and were produced by this frightful accident.

In exoneration of itself from the charge of negligence, the appellee showed these facts: (*a*) That the conductor and brakeman of the north-bound midday local train of that day, after doing some switching at the mill, (taking out and putting in cars,) closed the split switch against the first side track, and set the same for the main line, and did all necessary to be done to keep the switch so set, except to lock it, and, after so setting the switch, backed the train down south over it, and picked up the caboose or rear car of the train, and then safely carried the train north over the switch so set for the main line, having also left the stub switch set for the mill-yard. (*b*) That this train met the south-bound freight at Wesson, a point about 10 miles north of the mills, and, remembering the failure to lock the switch, the upward conductor notified the down-train men of the condition of the unlocked switch, and requested them to check up at the mills and rectify the error the careless brakeman had committed in failing to lock, and that the south-bound conductor, being advised and on the lookout, when his train reached the mills, found the switch properly and securely set for the main line, and ran his train by the switch and mills down to Brookhaven, a mile below, when he obtained the promise of the conductor of a wrecking train, then lying at that station, to go up with his engine

and lock the switch. (c) That the conductor of the wrecking train, accompanied by the fireman of that train and a young man who lived at Brookhaven, immediately went up on his train's engine, ran it over and north of the split switch, then stopped, got off, went back, and finding the switch-target upright, and set for the main line, picked up the switch lock from the block, inserted it in its appropriate place, and locked the same, and then backed the engine down over the locked switch to the Brookhaven depot; and this wrecking train conductor observed, as did his fireman likewise, when he locked the split switch, that the inner or stub switch was not displaced, but was set for the additional or supplemental side track running into the eastern side of the mill-yards, and it is shown that this wrecking conductor's visit to and examination of the switches was about 4:30 P. M. of the day the fire occurred. (d) That no other train passed over the road at the mill, or came near the mill switch, until the down mail train reached that point, shortly after dark, and met death and destruction there awaiting it; and it is nowhere intimated that any employe of appellee was ever near the mill after the wrecking conductor locked the split switch, and before the luckless mail train arrived. (e) That Pfeiffer, a superior servant of appellant, and its witness, testifies that he saw the wrecking engineer come up on the engine, between 4 and 5 P. M., and work at or handle the switch lock, and that the target on the lever was upright, and showed the switch set for the main line, and that he did not see it moved by the wrecking conductor. (f) That almost immediately after the train had been wrecked an examination showed the split switch set for the side track, and the same, in all its parts, entire and unbroken, while the interior or stub switch was seen to have been misplaced, and set for neither side track, and that the engine left the rails at this stub switch. In opposition to these facts disclosed in evidence by the appellee, the appellant introduced Pfeiffer (the person just hereinbefore named) and two other servants of appellant, employes at the mills, who testified that the wrecking engine which came up to the split switch from Brookhaven did not run north of this switch, but stopped south of it; and, furthermore, the evidence of one Caroline Jones was put in to discredit the exonerating evidence of appellee, which we have set out herein with some fullness; and this evidence of Caroline Jones was to the effect that she saw this switch target, after the wrecking engine had gone back to Brookhaven, and that it was standing at an angle of about 45 degrees, showing it was set for the mill side track. To impair the weight of Caroline Jones' evidence, appellee showed that, though she was examined, soon after the destruction of the mills, at an inquest held over the body of the fireman of the wrecked train, who was killed in that accident, she had wholly failed to refer to this fact of the target being seen by her inclined, and showing the switch was set for the mill side track. With this comprehensive and careful summary of the important points of the controlling evidence borne in mind, the questions necessary to be considered in the determination of the cause will be made so clear that their real character, and their relations to the issue joined, and to each other, will readily appear. On the trial below, the jury found for the defendant, and, the court declining to disturb the verdict on motion of plaintiff for a new trial, the cause has been brought before us by appeal.

1. The action of the court in refusing the instruction on page 31 of the record, asked by plaintiff on trial below, and in giving the 2d, 3d, and 4th instructions prayed by defendant, is assigned for error. The refused instruction of the appellant is in these words: "The court instructs the jury that, although they may believe from the evidence that the switch was open through no negligence of the railroad company, yet if they believe further from the evidence that the engineer discovered that the switch was open while at a sufficient distance therefrom to have stopped the train before its collision with the lumber-shed, and that, though discovering the danger, he failed to resort to such appliances as, if resorted to, would have prevented such collision and consequent fire, (if the jury believe from the evidence the fire was a consequence,) then the failure to stop the train was such negligence as to render the defendant railroad liable for any injury to plaintiff's property that so resulted." The instructions given for appellee on this branch of the case required the jury to put itself in the engineer's place—in his position—when he suddenly and unexpectedly found himself called to face unforeseen difficulty, and to act on a fearful complication not anticipated, and to judge of his conduct by the baleful light of the perplexing surroundings into which he found himself inextricably thrust in the twinkling of an eye. These instructions for the appellee propounded the just rule, the fair rule, the true rule, and there was no error in the court's action in giving them. The refused instruction of appellant not only contained no recognition of this rule, but it laid down for the guidance of the jury in examining into and passing upon the conduct of the engineer a proposition which fixed liability upon the appellee because of the want of foreknowledge in that servant. The instruction, by necessary implication, condemns the engineer because he did not foresee that the stub switch (which he did not see with fleshly eyes) was open, and, because of this lack of prescience, he did not guard against the derailment of his locomotive at the stub switch, and its subsequent plunge into the lumber-shed; for, unless he could foresee that the stub switch was open, he cannot be held to have anticipated the derailment of his engine at that point, and the subsequent collision with the lumber-shed. The engineer's failure to act with the coolness, the self-possession, and the unerring wisdom which should characterize his conduct in handling and controlling his engine under the ordinary and anticipated and favorably concurring con-

ditions of his accustomed daily task is, by necessary implication, deducible from the refused instruction: but, far more, and far worse, such failure is put for the proximate cause of the injuries complained of, while the unseen open stub switch, the efficient cause, is overlooked and disregarded. The open split switch was a *causa sine qua non* to the catastrophe, but the *causa causans* was the open stub switch, by which the engine was thrown from the rails and turned loose, unmanageable, upon its destructive work. Of course, if the engineer had reasonable time and fit opportunity to prevent the impending calamity, and failed to do so, the appellee is liable; but in the case at bar, with its facts finally resolved, if liability is to be raised, about six seconds must be held reasonable time in which to make ready to use the various appliances for stopping a train, and in which to actually put into effective operation such appliances, (for the train would be in the very jaws of the open switch in about six seconds from the time of its discovery by the surprised engineer;) and, moreover, the unhappy engineer must be held to have naturally anticipated that the stub switch would be open, and that his train would be derailed at that point, and that it would, consequently, collide with a lumber-shed about 200 feet distant, and not anywhere touched by either side track, —a prescience involving the preternatural. But we forbear to press remark further on this point, and content ourselves by saying that the engineer was only required to act in view of what he then saw, situated as he was, and that, suddenly and unexpectedly confronted with a complicated difficulty impossible to have been foreseen, he is not to be held accountable for failure to exercise that cool and unembarrassed and unerring judgment which we, freed from sudden surprise and danger, could now form and execute. He appears to have done the best he could, situated as he was, and nothing more could reasonably be required of him.

2. The ruling of the court upon the motion to set aside the verdict because of the alleged misconduct of the juror Dixon is also assigned for error. While it cannot be too strongly insisted that the stream of justice shall be kept pure,—so pure as to afford no suspicion of corrupt or improper intermingling of any foreign or hurtful matter,—yet it must not be forgotten that no mere irregularities of behavior, in this day of greater and wiser freedom for jurors, at least in civil trials, will be permitted to disturb the stability of judicial proceedings. While it is yet the settled law that bribery and embracery and misconduct in the jury, purposely brought about by a successful litigant, will require the arbitrary setting aside of the verdict thus obtained, both as promotive of the course of public justice and as a punishment upon the offender, yet it must be taken as equally well-settled that in other cases, where only irregularities have occurred that do not necessarily or naturally involve suspicion of improper influence in the finding of the verdict, the approved course is, upon proper presentation of a complaint, for the trial court to examine witnesses and take testimony with the view to ascertaining whether any improper influences have been put in operation to control the mind of any or all of the jurors, and, after ascertainment of the facts, with the further view of sustaining or setting aside the verdict, as the facts disclosed upon such examination may demand. This was the course pursued by the able judge who presided in the court below, and we have no hesitation in concurring in his judgment that the evidence submitted upon the motion failed to make out a case requiring a setting aside of the verdict as a punishment to be imposed upon the successful party. It is the case of an old man who was infirm, and who had been habituated to drink, weakly and unwisely seeking a glass from his neighbor and friend, and whose want, in the absence of means to meet it by his friend, was supplied, to the extent of a single draught, by an employe of the appellee, at the request of the juror's friend. That the act of supplying the drink to the juror was not done with any purpose to affect the juror's mind touching the case being then tried, and that it did not so affect it, was so found by the trial judge in denying the motion, and in this action of the court we see no error. It is to be regretted that the weakness of the juror in this case subjected a verdict, reached only after laborious and protracted effort, to any imputation of fraud, but, without disregarding the evidence of all the witnesses, including the offending juror himself, we cannot say that the verdict rests under any suspicion of having been obtained by any improper influence.

3. Complaint is made because of the admission of evidence showing the amount of insurance held by appellant upon the burned property, and because of the refusal by the court to instruct the jury to disregard that evidence, and the evidence tending to show motive and purpose on the part of one Allen to injure appellee's property. It seems to be conceded that the evidence was competent as tending to show motive. The evidence showing insurance clearly was not admitted to reduce the amount of any damages that might be awarded. The court refused to permit appellee's fifth plea, in which the insurance was sought to be availed of as a matter in mitigation or reduction of damages, to be filed at all; and, that the jury might certainly not consider that defense, the court charged the jury, at appellant's request, that the appellee could not escape liability for any part of the damage caused by its negligence, because of such insurance on the property. That the court below erred in declining to instruct the jury that one piece of evidence, dissociated from all the other evidence in the case, neither proved nor tended to prove motive, we are not prepared to say. To our minds the evidence as to Allen and as to appellant, offered as tending to show motive, is inconclusive, wholly unsatisfactory, and utterly empty. The evidence in the case, taken altogether, leaves no room to doubt that the fire and consequent loss were the result of the de-

railment of appellee's engine and its collision with the lumber-shed. Freely and fully conceding this, the verdict is so manifestly in agreement with the great facts in proof, so consonant with reason and right, that we do not feel authorized to disturb it on any ground.

(68 Miss. 773)

OTT *et al.* v. SMITH *et al.*

(*Supreme Court of Mississippi.* April Term, 1891.)

ATTACHMENT—JUDGMENT—CLAIM OF THIRD PARTY—EVIDENCE.

A judgment by default against defendants in an attachment suit, on the ground of fraudulent disposition of property, is not, as against persons claiming to have bought the goods from them, *prima facie* evidence that the sale to claimants was fraudulent.

Appeal from circuit court, Amite county; D. C. BRAMLETT, Special Judge.

Smith Bros. & Co. attached goods on a writ against Porter & Webb. The goods were claimed by A. E. & E. W. Orr. On claimants' issue there was judgment for plaintiffs in attachment, and claimants appeal. Reversed.

Price & Sternberger and *H. Cassedy*, for appellants. *E. H. Ratcliff*, for appellees.

COOPER, J. Appellees sued out an attachment against Porter & Webb upon the following grounds: (1) That they had property or rights in action which they concealed and refused to apply to the payment of their debts; (2) that they had assigned or disposed of, or were about to assign or dispose of, their property or rights in action, or some part thereof, with intent to defraud their creditors; (3) that they had converted, or were about to convert, their property into money or evidences of debt, with intent to place it beyond the reach of their creditors; (4) that they had fraudulently contracted the debt sued for. The attachment was levied upon certain goods, which appellants claimed to have bought from the defendants in attachment. Judgment by default against the defendants in attachment was recovered, and upon the trial of the claimants' issue this judgment in attachment was introduced in evidence At the instance of the plaintiffs, the court charged the jury that this judgment was *prima facie* evidence that the sale to the claimants of the goods attached was fraudulent, and devolved upon them the burden of showing that they were purchasers in good faith for value. This was error. The attachment, for aught that appears in the record, may have been rightly sued out upon the ground that the defendants therein had fraudulently contracted the debt sued for, or because they had property which they concealed and unjustly refused to apply to the payment of their debts. We have been referred to no authority supporting the instruction in any view which may be taken of it. Certainly there is nothing in the case of Richards v. Vaccaro, 67 Miss. 516, 7 South. Rep. 506, which warranted the present instruction. In that case the fraud of the seller in the particular sale under which the claimant claimed was abundantly shown by competent testimony, and under these circumstances we held that it devolved upon the claimant to establish his own good faith and payment of the purchase price, which, being shown, would protect his title notwithstanding the fraud of the seller. We have not held that the judgment against the defendant is evidence, as against the claimant, of the facts on which it rests.

The judgment is reversed.

(68 Miss. 478)

DAVIS v. DAVIS *et al.*

(*Supreme Court of Mississippi.* April Term, 1891.)

EJECTMENT—PAROL GIFT—ADVERSE POSSESSION—BURDEN OF PROOF.

1. Code Miss. 1880, § 1188, providing that "no estate of inheritance or freehold, or for a term of more than one year, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, signed and delivered," does not prevent one entering and claiming under a parol gift from acquiring title by adverse possession.

2. Adverse possession under a parol gift extends to the whole tract given, though only a part is actually occupied.

3. In ejectment, where defendants recognize the title to have been originally in plaintiff, and claim the land only by virtue of a parol gift followed by adverse possession, the only issue is the character of the possession, and the burden of proof is on defendants.

Appeal from circuit court, Attla county; C. H. CAMPBELL, Judge.

Ejectment by Simon Davis against Frank Davis and others for 40 acres of land. Judgment for defendants, a new trial denied, and plaintiff appeals. Reversed.

Defendants claimed under a parol gift from plaintiff, entry thereunder, and continuous adverse possession for the statutory period of 10 years next preceding the commencement of the action. The fifth instruction for defendants was that the burden of proof was on plaintiff to satisfy the jury by the preponderance of evidence that he was entitled to recover. The tenth instruction asked by plaintiff was that the only question to be determined was that of the character of defendants' possession, and that the burden of proof to establish their title, growing out of possession, was on defendants.

Anderson & Davis and *Brantley & Smith*, for appellant. *S. L. Dodd*, for appellees.

COOPER, J. It is too well settled by decisions of this court, and by innumerable authorities in other states, that a claim of title under a parol gift or purchase, accompanied by entry and adverse holding, may ripen into an indefeasible title by the lapse of statutory period of limitation, to admit of present argument or contention. Magee v. Magee, 37 Miss. 138; Davis v. Bowmar, 55 Miss. 671; Niles v. Davis, 60 Miss. 750; Geohegan v. Marshall, 66 Miss. 676, 6 South. Rep. 502; Campbell v. Braden, 96 Pa. St. 388; Clark v. Gilbert, 39 Conn. 94; Steel v. Johnson, 4 Allen, 425; Outcalt v. Ludlow, 32 N. J. Law, 239; Bartlett v. Secor, 56 Wis. 520, 14 N. W. Rep. 714; Potts v. Coleman, 67 Ala. 222; Collins v. Johnson, 57 Ala. 304. The suggestion of counsel that section 1188, Code 1880, which

declares that "no estate of inheritance or freehold, or for a term of more than one year, in lands or tenements, shall be conveyed from one to another unless the conveyance be declared by writing, signed and delivered," prevents the title from vesting in the occupant under such circumstances, is met by the reply that title does not pass by the parol gift or sale, but by the lapse of time operating under the law upon the adverse possession. In Niles v. Davis, 60 Miss. 750, it was held that a parol vendee entering under his purchase was, as against his vendor and those claiming under him, in possession of the whole land, though only a portion should be actually occupied. This rule, though announced in that case for the first time in this state, had been silently recognized in Davis v. Bowmar, 55 Miss. 671, and has been distinctly formulated and applied in other states. In Bell v. Longworth, 6 Ind. 273, the court said: "When a party is in possession of land, claiming an adverse title, the question must always arise, to what extent does his claim reach, what land does his claim of title cover? And where there is nothing but naked possession to evidence it, his title must, from necessity, be limited to the lands over which he has exercised a visible authority, known to others as owner; to those, in short, from which he has excluded the former owner and others. A man cannot go, solitary and alone, to the prairies or forests of the west, set himself down in the middle thereof, and claim that he possesses all, to an undefined extent, not then actually possessed by some one else. He must be limited to that portion over which he exercises palpable and continuous acts of ownership, as being the quantity which he claims as his own, there being no other evidence in such case to enable us to determine the quantity. But where a party is in possession under and pursuant to a state of facts which, of themselves, show the character and extent of his entry and claim, the case is entirely different, and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and extent of the claim, and no colorable title does more, for such colorable title alone does not give right." In Rannels v. Rannels, 52 Mo. 112, a parol gift of the land had been made, the donee entered thereunder, and remained in possession for the statutory period. It was held that her possession was of the whole tract, though only a part was actually occupied. In Hughes v. Israel, 73 Mo. 538, the parties to a deed undertook by verbal contract to rescind the deed, and the grantor thereafter remained in the actual possession of a part of the land, claiming title under the oral rescission. It was held that his possession extended to the whole tract described in the deed. We find nothing in the facts of this case, as developed on behalf of the defendant, withdrawing it from the operation of the principle of the decision in Niles v. Davis. That these facts are controverted by the plaintiff is immaterial, since the jury must determine by its verdict what the truth is, and, this being done, all opposing evidence is unavailing.

But the court below erred in refusing the tenth instruction asked by the plaintiff, and in giving the fifth instruction for the defendant. It is true the burden of proof on the whole case was upon the plaintiff, but the defendant by his evidence, and by his whole defense, recognized the title to have been originally in the plaintiff, and claimed the land only by virtue of the parol gift or sale, followed by his adverse occupancy for the period of limitation. The real question was whether by reason of this affirmative defense the right of the defendant had become perfect against the otherwise confessed legal title of the plaintiff. On this, the only issue, the burden was upon the defendant, and not upon the plaintiff, and the court should so have instructed. Geohegan v. Marshall, 66 Miss. 676, 6 South. Rep. 502; 1 Amer. & Eng. Enc. Law, 803. The judgment is reversed.

(68 Miss. 473)

GAINES *et al.* v. KEETON.

(*Supreme Court of Mississippi.* April Term, 1891.)

LANDLORD'S LIEN ON CROP — WAIVER BY INCONSISTENT SECURITY.

Where a landlord's agent, not content with the statutory lien for supplies, takes, in his own name, a trust deed on a crop to be raised by the tenant on the leased premises as security for supplies to be furnished, the landlord, as against third persons, must confine himself to the security afforded by the deed of trust, and cannot recover from a purchaser in good faith the value of crops sold to him and raised by subtenants; since the principal tenant could not, by the deed of trust, incumber the crops of others, even though grown on the leased premises.

Appeal from chancery court, Lauderdale county; SYLVANUS EVANS, Chancellor.

Bill by J. W. Gaines and others against A. J. Keeton, to recover the value of crops grown on premises leased by complainants to John Witherspoon, and on which crops complainants alleged they had a landlord's lien. On a final hearing the bill was dismissed, and complainants appeal. Affirmed.

On the trial it appeared that J. W. Fewell had for some years acted as plaintiffs' agent, and had advanced supplies to the tenant. In December, 1885, Fewell sold to Witherspoon, the tenant, a team of horses, wagon, etc., for $355. To secure this sum, together with advances to be made during the year, Fewell took a trust-deed on the horses, wagon, etc., as well as on other personal property, and on the crops to be raised by Witherspoon on the leased premises during the year 1886. The advances made by Fewell during that year amounted to $406.88. Witherspoon made default in payment, and the personal property covered by the trust-deed was sold, leaving a balance of $724.32 due on the purchase price and on the advances. Complainants then filed this bill, alleging that defendant had purchased a large portion of the crops with knowledge of their rights, asking for a recovery of its value, and praying discovery. Defendant was a merchant, and he ad-

mitted that he knew that Witherspoon was complainants' tenant, and that he had purchased a portion of the crop grown on the leased premises, but denied all knowledge as to anything being due complainants for supplies. He also alleged, and it was proven at the trial, that he had advanced supplies to Henry Brown and others, who were subtenants of Witherspoon; that these subtenants delivered to him a portion of the crops raised by them in payment for such advances; and that defendant received no other products raised on the leased premises, and none whatever raised by Witherspoon.

Miller & Baskin, for appellants.

The statutory lien for supplies is superior to all others, and a purchaser of the crop, with knowledge of the existence of a landlord's lien at one time, must see that it is discharged; and he must, at his peril, inform himself of the tenant's contract. Buck v. Paine, 50 Miss. 648, 52 Miss. 277, Fitzgerald v. Fowlkes, 60 Miss. 270; Dunn v. Kelly, 57 Miss. 825; Cohn v. Smith, 64 Miss. 816, 2 South. Rep. 244; Newman v. Bank, 66 Miss. 323, 5 South. Rep. 753.

Witherspoon & Witherspoon, for appellee.

COOPER, J. If the correctness of the propositions of law argued by counsel for complainants be conceded, we think the decree of the chancellor should nevertheless be affirmed. Not content to rest the security of their demand against their tenant upon the provisions of law by which a lien was given,[1] they carved out and required another and apparently inconsistent security, which, on its face, secured a debt to a third person, whose agency for the landlords was not disclosed by the instrument. It is not necessary for the decision of the present controversy to hold, as do some courts, that the mere taking of other security is a waiver of the statutory lien. We confine our decision to the reason that the parties have so dealt in reference to the subject-matter of the lien that they ought not, as against third persons who have purchased the property in good faith, to be permitted to repudiate the security selected by their agent to secure a debt professedly due to him, and resort to the lien secured by law to themselves as landlords. As against third persons, at least, we think complainants must be confined to the security of the deed of trust. Goble v. Gale, 41 Amer. Dec. 219. As between complainants claiming under the deed of trust, executed by the principal tenant, and the defendant claiming by purchase from the subtenants, owners of the property, the defendant's right is superior. The tenants of complainants could not, by mortgage, incumber the crop of others, even though grown upon the leased lands. The decree is affirmed.

[1] Code Miss. 1880, § 1301, provides: "Every lessor of land shall have a lien on all the agricultural products of the leased premises, however and by whomsoever produced, to secure the payment of the rent, and the fair market value of all advances made by him to his tenant, for supplies for the tenant and others for whom he may contract, and for his business carried on upon the leased premises, and this lien shall be paramount to all other liens, claims, or demands of any kind upon such products; and the claim of the lessor for supplies furnished may be enforced in the same manner, and under the same circumstances, as his claim for rent may be; and all the provisions of law, as to attachment for rent, and proceedings under it, shall be applicable to a claim for supplies furnished."

(68 Miss. 810)

MORTON *et al.* v. MCCANLESS.

(*Supreme Court of Mississippi.* April Term, 1891.)

DESCENT OF HOMESTEAD—SALE BY GUARDIAN.

Under Act Miss. Nov. 28, 1865, (Acts, p. 137,) providing that all property exempted thereby shall, on the death of the husband, descend to the widow as the head of the family, during her widowhood, for the use and benefit of herself and children, the children, on the death of their father, become co-tenants with their mother in his homestead, and their interest is, during her widowhood, subject to be sold by their guardian under an order of probate court, the same as any other property derived from their father.

Appeal from circuit court, Lee county; LOCK E. HOUSTON, Judge.

Ejectment by Julia A. Morton and others against W. A. McCanless for lands sold by their guardian under an order of the probate court made in 1870. Judgment for defendant, and plaintiffs appeal. Affirmed.

The property was the homestead of plaintiffs' father, who died in 1869. Act Miss. Nov. 28, 1865, (Acts p. 137,) provides "that all the property, real and personal, exempted by the provisions of this act, upon the death of the husband, shall descend to the widow as the head of the family, during her widowhood, for the use and benefit of herself and children, and, in the event of her marriage or death, to descend in like manner as other property descends by the laws of this state." It was claimed that the children, on the death of their father, acquired no interest in the property which could be sold while their mother was living and still a widow. The order of sale was procured, and the sale made, by their mother, who was their guardian. She testified that she supposed, as advised by counsel, that the sale would be void as to the interest of the children, and that they, on arriving at age, could avoid the sale.

Clayton & Anderson and *Clarke & Clarke*, for appellants. *Blair & Stribling*, for appellee.

CAMPBELL, C. J. The only question in this case different from those decided in Morton v. Carroll, 68 Miss. 699, 9 South. Rep. 896, is as to the validity of an order of the probate court to sell what is alleged and proved to have been the exempt property of the father of the plaintiffs, held under the act entitled "An act to amend the exemption laws of this state," approved November 28, 1865, (Acts, p. 137.) The children and their mother were cotenants of this land, the mother having an interest terminable by her marriage or death, and the children having the fee. Hardin v. Osborne, 43 Miss. 532. The interest of the children was subject to sale as any other land owned by them. Mc-

Caleb v. Burnett, 55 Miss. 83; Code 1857, art. 151, p. 463. The whole object of the exemption law of 1865 was to preserve the property from creditors, and not to affect the power of the courts to deal with the property as that of the children and heirs of the exemptionist. In the probate court proceedings resulting in the sale of the lands sued for here, there was no mention of the land being homestead or exempt property. The contrary is rather suggested by treating the land as subject to the widow's dower, but the blundering ignorance on this subject did not affect the power of the court to deal with it, and fortunately the proceeding was so conducted as to result in a valid order of sale, whereby the wicked and shameful scheme which the then guardian now swears she had in view was effectually defeated. We are constrained to believe that her memory is at fault, and that she does great injustice to honorable counselors when she states that this scheme was with the knowledge and advice of her lawyers. The result in this case was right. Affirmed.

(63 Miss. 598)

GREAVES *et al.* v. ATKINSON.

(*Supreme Court of Mississippi.* April Term, 1891.)

RESULTING TRUSTS — HUSBAND AND WIFE — PURCHASE FROM TRUSTEE — BONA FIDES — PLEADING.

1. Prior to the adoption of Code Miss. 1857, on the purchase of lands by the husband in his own name with funds of the wife, a resulting trust arose in her favor to the same extent, and under the same circumstances, that it would have arisen in favor of any other person furnishing the purchase money.

2. Where a bill to establish a resulting trust in lands purchased from the trustee fails to state the facts and circumstances bearing on the question of the *bona fides* of the purchases under the trustee, the defense must be raised by plea or answer, and not by demurrer.

Appeal from chancery court, Madison county; H. C. CONN, Chancellor.

Suit by S. A. D. Greaves and others to establish a resulting trust in certain lands. A demurrer to the bill was sustained, and complainants appeal. Reversed.

The bill alleged that in 1853 complainants' father purchased the land in his own name with funds belonging to his wife; that he was adjudged a bankrupt, and the land was sold by order of the bankrupt court; that defendant, with notice of complainants' equity, purchased the land from the vendee of the purchaser at the bankrupt sale. The bill also alleged the death of complainants' mother and father. It, however, contained no statement of the facts and circumstances bearing on the *bona fides* of the purchases under the bankrupt, and stated nothing as to notice to the purchaser at the bankrupt sale or to his vendee, defendant's grantor. The demurrer was on the ground that prior to the Code of 1857 a wife acquired no resulting trust in lands purchased by her husband in his name with her funds; and on the further ground that the bill did not negative the *bona fides* of the purchasers under the bankrupt.

F. B. Pratt and *H. B. Greaves*, for appellants. *W. H. Powell*, for appellee.

COOPER, J. Prior to the adoption of the Code of 1857 a resulting trust arose in favor of the wife when her money was used in the purchase of lands in his own name by the husband, under the same circumstances and to the same extent that such trust would have resulted to any other person supplying the purchase money. 1 Perry, Trusts, 137, and note; 1 Pom. Eq. Jur. 422. When all the facts and circumstances of a purchase from a trustee in a resulting trust are shown, and it thereby appears that a person is a purchaser for value and entitled to protection as such, he may raise the defense by demurrer to a bill exhibited against him to subject the lands to the trust. Story, Eq. Pl. 603. But when they do not so appear, the defense, being an affirmative one, must be raised by plea or answer. Id. 604, 605; 1 Daniell, Ch. Pl. 677, 698. The facts disclosing the *bona fides* of the purchases under S. A. D. Greaves do not appear in the bill in this cause, and the demurrer should have been overruled. Decree reversed, demurrer overruled, and cause remanded.

(63 Miss. 596)

WILCZINSKI *et al.* v. LICK.

(*Supreme Court of Mississippi.* April Term, 1891.)

LANDLORD'S LIEN—TRUST-DEED—PRIORITIES.

Where one in possession of land under a contract of purchase executes a trust-deed on his crops, he cannot, by surrendering the contract, and agreeing to pay rent for that year, create a landlord's lien superior to the trust-deed.

Appeal from circuit court, Washington county; R. W. WILLIAMSON, Judge.

Action by D. J. W. Lick, as trustee of Ring Land & Mercantile Company, against L. and N. Wilczinski to recover the value of certain coton. There was a verdict and judgment on a peremptory instruction for plaintiff, and defendants appeal. Affirmed.

Helm and Wilczinski, the owners of certain land, put one Showers in possession under a contract bearing date of November, 1887, providing for the sale to him of the land on annual payments to be made on the first day of each of the four succeeding years, the contract to be void unless payments were promptly made. Showers failed to make any payment, and in 1889 made an agreement with defendants, the successors in interest of Helm and Wilczinski, whereby the contract of purchase was abandoned, and Showers took a lease, and agreed to pay rent for the year 1889. Prior to this Showers had executed the trust-deed to plaintiff on the crops of 1889. The cotton in controversy was part of the crop of that year raised by Showers, which defendants had taken and applied on their claim for rent and supplies.

C. P. Neilson and *I. Schlesinger*, for appellants. *Wynn, Thomas & Griffin* and *Calhoon & Green*, for appellee.

CAMPBELL, C. J. "It is not allowable by a subsequent agreement to convert the re-

lation of vendor and vendee into that of landlord and tenant, so as to defeat supervening rights." Nobles v. McCarty, 61 Miss. 456. The evidence in this case shows that that was done, and the instruction for the plaintiff was properly given, and the verdict is supported by evidence. Affirmed.

(68 Miss. 806)

LOUISVILLE, N. O. & T. RY. CO. v. POSTAL TELEGRAPH CABLE CO.

(*Supreme Court of Mississippi.* April Term, 1891.)

TELEGRAPH COMPANIES—RIGHT OF WAY—CONDEMNATION — QUALIFICATIONS OF COMMISSIONERS—NEW AWARD.

1. Under Act Miss. March 16, 1886, § 3, (Laws, p. 93,) providing that where a telegraph company shall not agree with the owner of land for a right of way over the same, then condemnation may be had, a telegraph company, after making efforts to get a right of way by contract, without receiving any reply to its proposition within a reasonable time, may resort to condemnation proceedings.

2. The fact that the record of the condemnation proceedings which section 9 of the act requires the clerk to keep, shows that the commissioners summoned by the sheriff were "good and lawful men, citizens of the county," is sufficient, though the sheriff's return does not show that they possessed those qualifications, as required by the precept under which they are summoned.

3. Under the provision of the statute that, on petition for a new award, "if the judge shall be of opinion that the commissioners acted upon testimony that was irrelevant or incompetent, and that their award was contrary to the law, and such evidence as was competent and relevant, and that injustice has been done, a new inquest and assessment shall be ordered by him," a new inquest does not follow as a matter of course, either from the fact that illegal testimony was heard by the commissioners, or that a party was wrongfully denied the right to open and conclude the argument.

Appeal from circuit court, Claiborne county; J. D. GILLAND, Judge.

Proceeding by the Postal Telegraph Cable Company to condemn for a right of way for its telegraph line a part of the right of way of the Louisville, New Orleans & Texas Railway Company. The commissioners awarded the railway company $2,500 damages, but it applied to the circuit judge for a new inquest, which he denied, and it appeals. Affirmed.

W. P. & J. B. Harris, for appellant. *McIntosh, Williams & Russell*, for appellee.

COOPER, J. No error is shown in the proceedings of the commissioners to award damages for which a new inquest should have been directed by the judge of the circuit court. The proceedings were had under the provisions of an act approved March 16, 1886, (Laws, 93) by the third section of which it is provided that condemnation may be made of any land in cases where the telegraph company shall not agree with the owner or owners, etc., for a right of way over the same. That the company had not agreed with the railway company for an easement is manifest, and under the strict letter of the law the condition existed on which resort might be had to the right of condemnation. If we should apply the rule *strictissimi juris*, appealed to by the railway company, it would be fatal to its contention; but we think the record does show an effort upon the part of the telegraph company to adjust the matter by contract, and that the proposition so to do was to "be considered of" by the railway company, and that, no reply being made by that company within a reasonable time, the telegraph company might lawfully proceed in condemnation under the statute.

The second objection taken by appellant to the award is not supported by the record. That objection is that the record does not show that the commissioners summoned by the sheriff under the precept from the clerk were "good and lawful men, citizens of the county" of Claiborne, as required by the sixth section of the act. In this, counsel are mistaken. The precept commanded the sheriff to summon such men, and, though his return does not show that they were possessed of the qualifications required, that fact is shown in the record of the proceedings kept by the clerk, which record, by the ninth section of the act, he is required to keep.

If it be conceded that the commissioners should have permitted counsel for the railway company to open and conclude the argument, and that illegal testimony was heard by them, it would not follow that a new inquest should have been awarded. The statute declares that upon a petition for a new award, "if the judge shall be of the opinion that the commissioners acted upon testimony that was irrelevant or incompetent, and that their award was contrary to the law, and such evidence as was competent and relevant, and that injustice has been done, a new inquest and assessment shall be ordered by him." As was said in Postal Telegraph Cable Co. v. Alabama & V. R. Co., 68 Miss. 314, 8 South. Rep. 375: "In such cases as this much must be left to the determination of the commissioners, for it is often extremely difficult to arrive at even approximate justice where questions of value are to be determined. Scarcely anything is so variable, according to circumstances, as value."

The judgment is affirmed.

(68 Miss. 527)

HALL v. MOORE.

(*Supreme Court of Mississippi.* April Term, 1891.)

EXECUTION—SETTING ASIDE SALE—RETURN-TERM.

The power of a circuit court to set aside an execution sale on account of fraud is confined to the return-term of the execution, after which relief can be had only in a court of equity. Hopton v. Swan, 50 Miss. 545, followed.

Appeal from circuit court, Holmes county; C. H. CAMPBELL, Judge.

Motion by E. J. Hall in the circuit court to set aside on account of fraud a sale of land made to D. W. Moore under an execution issued on a judgment rendered in that court. There was an objection to the motion on the ground that it was not filed at the return-term of the execution. The objection was sustained, and the motion denied. The judgment debtor, E. J. Hall, appeals. Affirmed.

Hooker & Wilson, for appellant. *Noel & Tuckett*, for appellee.

CAMPBELL, J. We regret that the state of the law is such as to deny relief to the appellant, who seems to have been greatly wronged; but it was decided in Hopton v. Swan, 50 Miss. 545, that the power of a circuit court to afford such relief is confined to the return-term of the execution, after which relief can be had only in a court of chancery. We do not see why this should be so, but, unable to find anything satisfactory on the subject in the books we have carefully searched for the purpose, we do not feel disposed to depart from the rule announced in the case cited. As long as two sets of courts are maintained to do what one might do as well, the established rules as to the line of division between them, where happily they can be traced, as in this case, must be respected. Affirmed.

(68 Miss. 590)

SMEDES v. ILSLEY *et al.*

(*Supreme Court of Mississippi.* April Term, 1891.)

JUDGMENT OF ANOTHER STATE — RES JUDICATA — ASSIGNMENT OF NOTE—DEFENSES.

1. A judgment of another state in favor of an assignee of a note in an action in which the maker appeared and defended is a conclusive adjudication that the assignee became the owner of the note, and therefore an action on the judgment will not be enjoined on the allegations of a bill that the assignee had falsely sworn that he was the owner of the note; that he, the payee, and a third person had entered into a conspiracy to defraud the maker; and that, as the maker learned after the rendition of the judgment, when another note given by him to the same payee became due, the collateral given as security for both notes, and which was to have been surrendered when the second became due, had been fraudulently disposed of by the payee, who was insolvent.

2. The judgment being the property of the assignee of the note, he can maintain an action on it for the benefit of whomsoever he pleases, and it is therefore no ground for an injunction that he is maintaining it for the benefit of the payee.

Appeal from chancery court, Warren county; CLAUDE PINTARD, Chancellor.

Suit by T. M. Smedes against Ilsley, Doubleday & Co. and others to restrain an action by Ilsley, Doubleday & Co. against T. M. Smedes on a judgment obtained on a note given by complainant to B. F. Watkins, one of the other defendants, and by Watkins assigned to Ilsley, Doubleday & Co. On motion of defendants Ilsley, Doubleday & Co. a temporary injunction of the action on the judgment was dissolved, and on their demurrer the bill was dismissed; both the motion and the demurrer being on the ground that complainant was concluded by the judgment on the note. Complainant appeals. Affirmed.

The judgment on the note was obtained in New York, in an action in which Smedes, a resident of Mississippi, summoned by publication, appeared, and defended on the grounds that Ilsley, Doubleday & Co. were not lawful holders of the note; that they had obtained it by fraud of Watkins, in violation of a written agreement made by him with Smedes; and that Ilsley, Doubleday & Co. had entered into a scheme with Watkins and one Harrison to unlawfully obtain payment of the note from Smedes. The parties, other than Ilsley, Doubleday & Co., made defendants to the injunction suit, were Watkins and Harrison. The bill as amended alleged that at the time Smedes executed the note on which the judgment was obtained he gave two other notes to Watkins, payable nine and fifteen months after the first became due; that he gave certain collateral security, part of which was to be surrendered by Watkins when the second note became due; that when the first note became due he refused to pay it because he was informed that Watkins had fraudulently transferred the collaterals to Harrison, who fraudulently claimed to have purchased them; that Ilsley, Doubleday & Co. fraudulently claimed to have purchased the note, and in the action thereon falsely swore that they owned it; that Ilsley, Doubleday & Co. and Watkins and Harrison entered into a conspiracy to defraud and cheat Smedes; that it was not until after the judgment, when the second note became due, and Watkins refused to surrender the collaterals therewith, that Smedes definitely ascertained and was able to prove that Watkins intended to defraud him of the collaterals. The bill further alleged that Watkins was insolvent, and that the action on the judgment in the name of Ilsley, Doubleday & Co. was in reality for the benefit of Watkins.

Miller, Smith & Hirsh, for appellant. *R. V. Booth* and *Warren Cowan*, for appellees.

CAMPBELL, C. J. Upon the facts stated in the bill and the amendment proposed the appellant could not successfully defend an action upon the note itself if it appeared that the appellees became owners of it, as conclusively adjudicated in their favor by the judgment recovered in New York. If theirs, they may maintain an action for whomsoever they please, and the averment of the bill on that subject constitutes no ground for injunction. Affirmed.

(68 Miss. 787)

YATES *et al.* v. MEAD *et al.*

(*Supreme Court of Mississippi.* June 8, 1891.)

SUBROGATION OF INDORSER OF NOTE — CANCELLATION OF JUDGMENT — EVIDENCE OF PAYMENT — MORTGAGES — CONVEYANCE OF LEGAL TITLE TO MORTGAGEE—JUNIOR LIENS.

1. Code Miss. 1880, § 998, subrogating a surety who pays a judgment against the principal debtor to all the rights of the judgment creditor, including the right of enforcing all the liens which the latter had by virtue of such judgment, and section 1140, extending the benefits of section 998 to any party to an execution who shall pay it, against any other party who is liable to him for the sum paid, extend the right of subrogation to an indorser of a draft, on which judgment is rendered against him and the principal debtor, immediately upon his payment of the said judgment.

2. No entry on the judgment of such payment is required, and an entry of satisfaction, made by plaintiff without the authority of the indorser, will not defeat the latter's right to enforce the judgment in his own favor against the land of the principal debtor, even though a third person has bought the land meanwhile without notice,

and in reliance upon the said entry of satisfaction.

3. Where a mortgagee takes the property under an absolute conveyance in satisfaction of his mortgage debt, and there are at the same time junior liens against it, the burden of proof is on the mortgagee to show that his debt was equal to the value of the property, and that, the equity of redemption being worthless, no harm had resulted to the holders of such liens.

Appeal from chancery court, Jackson county; S. EVANS, Chancellor.

This was a bill by W. K. Mead and others against Mrs. M. L. Yates, M. A. Dees, and J. C. Strong, assignee, etc., asking an injunction against the sale of complainants' land under execution, and an adjustment of the conflicting claims of the parties to the unpaid purchase money. Judgments were recovered in November, 1880, and May, 1881, in favor of John I. Adams & Co. against G. M. Dees and M. A. Dees upon certain drafts, of which G. M. Dees was drawer and M. A. Dees was indorser. The executions issued thereon were settled by M. A. Dees. Plaintiff's attorney entered satisfaction upon the docket by writing the word "Settled," and signing his name thereto. Afterwards, in 1886, M. A. Dees assigned the judgments to Mrs. Yates, and directed that executions issue in his name as surety for her benefit. The executions so issued were levied upon complainants' land, which at the time of the rendition of the judgments belonged to G. M. Dees. In February, 1880, G. M. Dees had executed a mortgage on the land to Danner & Co. to secure an indebtedness of $10,000. In July, 1881, he conveyed the land to Danner & Co. by absolute deed in satisfaction of the mortgage and of other advances, the amounts of which were not named. Danner & Co. leased the land to W. K. and J. W. Mead, with privilege of purchase, and the latter conveyed it to the Danner Land & Lumber Company, which afterwards made an assignment, including this land, to J. C. Strong, for the benefit of creditors. Afterwards W. K. and J. W. Mead bought the land from the assignee, as allowed by the terms of their lease. Before it was fully paid for, the executions in favor of Mrs. Yates were levied. Mrs. Yates contended that M. A. Dees, upon satisfying the judgments of Adams & Co. against himself and G. M. Dees, the principal debtor, was subrogated to all the rights of the judgment creditors; that she acquired this right by assignment; that the deed conveying the legal title to Danner & Co. operated as a merger of the mortgage lien; and that Danner & Co. took with notice of the judgments, and subject to the lien of the same. J. C. Strong, the assignee, contended that the right of subrogation did not extend to one who was a party to the execution, and liable as an indorser of the drafts upon which the judgments were rendered; that at the time of the conveyances under which he claimed the record showed that the judgments were satisfied, and that there was nothing, therefore, to notify purchasers of the continued existence of the said judgments. The court decreed that the assignee, Strong, was entitled to the balance of the purchase money due by W. K. and J. W. Mead. Mrs. Yates appeals. Reversed.

T. W. Brame, for appellants. *C. H. Wood* and *H. Bloomfield*, for appellees.

WOODS, J. Section 998, Code 1880, by its terms subrogates a surety paying a judgment against the principal debtor to all the rights of the judgment creditor, including that of enforcing all the liens which the judgment creditor had by virtue of such judgment. It was intimated in Dibrell v. Dandridge, 51 Miss. 55, that a similar statute in the Code of 1871 did not cover cases in which indorsers had made payment for the principal debtor of a judgment jointly rendered against the debtor and the indorser. But, as we suppose, to meet this opinion of the court in Dibrell v. Dandridge, section 1140 of the Code of 1880 extends the benefits of section 998, Code 1880, to any party to an execution who shall pay it, against any other party to it who is liable to such party for the sum paid. It seems clear, therefore, that M. A. Dees, by operation of law, immediately upon paying and satisfying the judgments of John I. Adams & Co. against G. M. Dees, the principal debtor, was subrogated to all the rights of the judgment creditors. This subrogation took place, as we have said, immediately on payment by the indorser, and by operation of law. No entry of record of the fact of payment by the indorser was required to be made; and the entry of satisfaction on the execution docket and judgment roll by simply writing the word "Settled" is not ground for refusing subrogation to the indorser, M. A. Dees, who is clearly shown to have satisfied the judgments; such entry not having been made at the instance or under the direction of the indorser. The fact of payment by the indorser was not a matter requiring to be put to record, and the failure of the record to show this fact does not affect the rights of the indorser who paid the judgment. It is insisted, however, by counsel for appellees, that any judgment lien which M. A. Dees acquired by his subrogation to the rights of the judgment creditors on the lands embraced in this controversy cannot be enforced by sale under execution, because the deed of conveyance of July 14, 1881, was taken by Danner & Co. (through whom appellees trace title) in payment and satisfaction of a pre-existing lien created by a mortgage from G. M. Dees to Danner & Co., made in February, 1880, and that the mortgagees had the right to take the mortgaged estate in good faith, in satisfaction and settlement of the pre-existing debt secured by the mortgage. Granting the correctness of the general proposition, it is true, nevertheless, that in the present litigation it was incumbent upon those asserting this right in Danner & Co. to show that they so dealt with the mortgaged estate, in taking to themselves absolute title to the same, as not to injure or destroy rights of junior lienors. In other words, the burden was upon Danner & Co., or, more properly speaking, upon those claiming under them, to show the amount due

upon the mortgage debt at the time of taking an absolute conveyance to the property, to show the value of the property at the time; to show that the debt was equal in amount to the value of the mortgaged estate; that the equity of redemption was valueless, and hence that no harm came from such acquisition of absolute title to the junior judgment creditors. This burden the appellees have not successfully borne. Moreover, the absolute conveyance of July 14, 1881, on its face, the antecedent agreement between Danner & Co. and G. M. Dees of July 9, 1881, and the evidence generally, demonstrate that the conveyance of the absolute title was not made solely to pay and satisfy the mortgage debt, but that it was made in pursuance of a plan to settle all indebtedness of every character due from G. M. Dees to Danner & Co. in consideration of the surrender and extinguishment of such indebtedness by Danner & Co., and the payment of an unknown sum of money by Danner & Co. for G. M. Dees to certain named and unnamed creditors of Dees. The decree of the court below is reversed, and a decree will be entered here in favor of M. L. Yates.

(68 Miss. 739)

PAXTON v. VALLEY LAND CO.

(*Supreme Court of Mississippi.* April Term, 1891.)

TAX-TITLES—LEVEE BOARD—ADVERSE POSSESSION—DEED FROM STATE.

1. Act Miss. March 1, 1875, known as the "Abatement Act," allowing delinquent owners of land sold for taxes to pay one year's taxes for 1874 as the price of relinquishment of all the state's claim on the land for the past, failing in which the land was to be sold as prescribed, did not, by its mere approval, divest the title of the state or levee board; but if the owner did not pay the taxes for 1874, and the land was not sold under the act, it remained unaffected by the act, and continued to be held as before.

2. Land in Mississippi was sold for taxes in 1870, and conveyed to the levee board. Afterwards, in 1881, under the decree of the chancery court of Hinds county in the suit of Gibbs v. Green, 54 Miss. 592, it was sold to one G., who conveyed to E. Upon the latter's failure to pay taxes it was, in 1883, sold to the state. In 1884, under Act March 14, 1884, (Acts, p. 182,) authorizing and directing the auditor of public accounts to deliver to all purchasers of lands in the liquidating levee district sold under the decree in Gibbs v. Green, and to all persons claiming under them, a quitclaim deed of the title of the state to such lands, upon payment of taxes up to the date of the deed, the land was conveyed by quitclaim deed by the auditor to E. In 1888, under Act March 2, 1888, (Acts, p. 40,) authorizing a similar conveyance by the auditor, a quitclaim deed was made by him to E.'s grantee. *Held* that, even though the sale in 1883, on E.'s failure to pay the taxes, was void, the deeds by the auditor, in 1884 and 1888, gave the grantees therein a perfect title, and divested any title the former delinquent owner may have had.

3. One claiming title to land which has been sold for taxes cannot invoke the statute of limitations, unless he has been in possession of the land for the statutory period.

4. Code Miss. 1880, § 562, requiring the auditor to make a statement, on each conveyance by him to a person redeeming or purchasing land sold for taxes, of the amount of taxes and damages, and the amount of his fee and commissions, does not apply to quitclaim deeds from the auditor under the acts of March 14, 1884, and March 2, 1888, authorizing and directing the auditor to execute and deliver to all purchasers of lands in the liquidating levee district, sold under the decree of the chancery court of Hind's county in the suit of Gibbs v. Green, 54 Miss. 592, and to all persons claiming under them, a quitclaim deed of the title of the state to such lands, upon the payment of the taxes up to the date of the deed.

Appeal from chancery court, Sunflower county; W. R. GRIGG, Chancellor.

Bill by the Valley Land Company against A. J. Paxton to quiet its title to certain land. Judgment for complainant. Defendant appeals. Affirmed.

Chapman & Paxton and *Calhoon & Green*, for appellant. *Nugent & McWillie* and *Frank Johnston*, for appellee.

CAMPBELL, J. Sections 5 and 6, the subject of this suit, were acquired in fee-simple by the appellant in 1846, and belong to him now, if his title has not been divested. The lands were in their natural state, undisturbed by man, without any sort of occupancy, until 1888. Because of their liability to inundation from the Mississippi river annually, they were esteemed of little value, comparatively, and unsuited to cultivation, until the past few years, during which the levees have given promise of protection; and because of this they were not settled upon, and during all these years the taxes on them were not paid. In the early part of the year 1888 the appellant made an actual entry upon the land, and commenced to improve it, by clearing and building; and about that time A. G. Paxton, son of the appellant, applied to the auditor of public accounts to purchase or redeem the land, offering to pay any dues, in order to effect this; and he was informed that the state did not claim the land, and thereupon he petitioned for a *mandamus* to compel a conveyance by the auditor, which proceeding, having begun, is still pending, not having been actively prosecuted. Because of the non-payment of taxes, in 1859, section 5 was sold for taxes, and conveyed to Whitehead; and in 1860 part of section 6 was sold and conveyed to the treasurer of the levee board; and on July 1, 1867, both sections were sold for taxes, and conveyed to the state of Mississippi; and on May 11, 1870, both sections were sold for taxes, and conveyed to the levee board; and October 3, 1881, they were sold and conveyed by the commissioners invested with the title of the levee board, and acting in accordance with a decree of the chancery court of Hinds county, in the case of Joshua Green and others against Hemingway and Gibbs, to E. C. Gordon, who conveyed them to Evers, who conveyed to Burroughs, who conveyed to Prentiss, who conveyed to Mrs. Prentiss, who conveyed to the appellee. In March, 1883, these lands were sold for taxes delinquent for 1882, and conveyed to the state of Mississippi; and in May, 1884, the auditor of public accounts executed a quitclaim of the title of the state to these sections of land to Evers, in pursuance of an act of the legislature of Mississippi entitled "An act for the benefit of purchasers of levee lands," etc., approved March 14, 1884,

(Acts, p. 182;)[1] and in August, 1888, the auditor, acting in obedience to an act entitled "An act to quiet and settle the title to certain lands," etc., approved March 2, 1888, (Acts, p. 40,)[2] executed a deed conveying to George Prentiss (named above) the state's title to the above described lands. On March 1, 1875, was approved an act, familiar to the bench and bar of this state, by the name of the "Abatement Act," (Acts 1875, p. 11.) The two sections involved in this suit, being held by the state for taxes by its purchase July 1, 1867, were subject to the provisions of that act, and liable to be sold under it, but were not sold.

The appellee (complainant in the suit) has vested in it whatever title the commissioners of the levee board or the state of Mississippi could convey by their several conveyances; and the important question is whether either had a title to transmit. The tax-deeds of 1859 and 1860 may be dismissed from consideration. If those sales were void, as claimed by Paxton, as probably they were, that disposes of them; but, if valid, the subsequent sale to the state, July 1, 1867, renders their further consideration unnecessary. The title acquired by the state by the sale, July 1, 1867, was perfected by the lapse of five years from the date of the sale, by virtue of the act entitled "An act to provide for the better security of titles to lands held and claimed under tax-sale and tax-titles," approved February 10, 1860, (Acts 1859–60, p. 213, § 8.) Sigman v. Lundy, 66 Miss. 522, 6 South. Rep. 245. The sale for taxes in 1870 to the levee board need not be further considered. If void, as affirmed by the appellant, that disposes of it; and if valid, or if the perfecting effect of five years after the sale, by virtue of the act of February 10, 1860, be ascribed to it, or if the completion of the five years, whereby the state's title acquired July 1, 1867, was rendered unassailable, operated as a merger of the claim of the levee board by its purchase May 11, 1870, the result is the same. If the levee board had title, or if the state had, the appellee acquired it. The abatement act did not, by its mere approval, divest the title of the state or levee board. It does not release title. It abates or remits all taxes for years prior to 1874, and, where land was dealt with and disposed of under it, any former title of the state or levee board was gone; but, if from any cause land held and subject to disposition under this act was not disposed of, it was unaffected, and continued to be held as before. The purpose of the act was to induce delinquent owners to pay one year's taxes as the price of relinquishment of all claim on the land for the past, failing in which the land was to be sold as prescribed; but the state did not, by this act of grace, renounce its title or reinvest the delinquent owner with it. It sought to induce him, by liberal terms, to come forward and pay the small part due for years of delinquency, and declared a purpose to sell the land and acquire a new title, if he did not pay, as proposed, but he could not claim anything, by virtue of the act, except by compliance with its terms. The title of sections 5 and 6 was not affected by the abatement act, and remained as before.

The liquidating levee commissioners, exercising their power under the law, and with the sanction of the chancery court, which had intervened, in the interest of creditors, in Gibbs v. Green, 54 Miss. 592, sold and conveyed the two sections on October 3, 1881, to Gordon, as stated above, and he conveyed to Evers, who failed to pay taxes for 1882, and the lands were sold to the state for this delinquency March 5, 1883, and were afterwards, in 1884 and in 1888, severally conveyed by the state, through its auditor of public accounts, for the purpose, plainly declared by the acts authorizing the conveyances, of perfecting the title acquired by the conveyance of the levee commissioners. The tax-sale of March 5, 1883, was void according to the averment of the appellant, and the purchase by Evers, and the conveyance to him by the auditor, the appellant claims, was a redemption of the land. Accepting these views, it follows that the tax-sale of 1883 may be put entirely out of view, and that by the combined operation of the conveyances of the levee commissioners and the auditor of public accounts the appellee got a perfect title to these lands, which were lost to their former owner, the appellant, by his delinquency in not paying the taxes on them.

The defense of the statute of limitations of 10 years, invoked by the appellant, is effectually disposed of by the fact that until 1888 he had no such possession of the land or any part of it as to set the statute in motion. Tush-Ho-Yo-Tubby v. Barr, 41 Miss. 52. The conveyance by the auditor, under the act of 1884, was not invalid for failure to collect taxes for 1881 on the land, for none were due; and section 562 of the Code of 1880[3] has no application to the deeds by the auditor under the acts of 1884 and 1888. It applies to conveyances contemplated by section 561. We fail to discover how the several decisions of this court, set forth in the answer of the appellant to the bill, can avail anything in his behalf in this case. It is his misfortune not to have anticipated the announcement in Sigman v. Lundy, plainly foreshadowed by earlier decisions, in time to have prevented the bar of five years, by paying what was required to clear his title; but this court was not precluded from applying a statute de-

[1] Act Miss. March 14, 1884, (Acts, p. 182,) authorized and directed the auditor of public accounts to execute and deliver to all purchasers of lands in the liquidating levee district under the decree of the chancery court of Hinds county in the suit of Gibbs v. Green, and to those claiming under them, a quitclaim deed of the title of the state to such lands, upon payment of all state, county, and levee taxes up to the date of execution of the deed.

[2] Act March 2, 1888, (Acts, p. 40,) authorized a similar conveyance by the auditor.

[3] Code Miss. 1880, § 562, requires the auditor to make a statement, on each conveyance by him to a person redeeming or purchasing land sold for taxes, of the amount of taxes, and damages thereon, and the amount of his fee and commissions.

signed for the purpose of curing irregularities in a tax-sale, because of the fatal effects on delinquent land-owners who for years experimented as to the value of tax-sales. Sigman v. Lundy is new in the instance merely, not in principle. It did not overrule any former decision, or announce any new principle, or contravene any judicial utterance. It, for the first time, declared the effect of the act of February 10, 1860, and applied it, because never before had the court been called on to do so. We regret that during the many years elapsed, and the many opportunities afforded, the owner did not free his lands from all claim except his own; but the title, lost by delinquency and neglect, has been securely vested in another, and it must be upheld. Affirmed.

(68 Miss. 794)

ROBINSON v. JONES.

(*Supreme Court of Mississippi.* April Term, 1891.)

PARTITION — MISTAKE — REFORMATION OF DEED — BONA FIDE PURCHASERS — ESTOPPEL — RENTS — ACCOUNTING.

1. The heirs of R., who died intestate leaving lands in Mississippi and Alabama, partitioned the lands, but by mistake omitted all mention of 80 acres which by the agreement were allotted to complainant. The writing was not recorded. All the lands allotted to complainant were in Mississippi, and all of those allotted to J., one of the heirs, were in Alabama. Another of the heirs sold to J. the lands which had been allotted him in Mississippi, but included in the deed the 80 acres allotted to complainant. J. then, by a conveyance in severalty, deeded to defendant, as security, both the lands which had been allotted and deeded to him. Thereafter J. conveyed the Mississippi lands to defendant in payment of the debt thereby secured. Subsequently, in a suit in Alabama over the lands in that state conveyed by J. to defendant, to which suit defendant and all the heirs of R. were parties, the partition proceedings were shown, and the mistake therein relative to the 80 acres. The court then subjected the whole interest in the Alabama lands to the payment of J.'s debt to defendant, and decreed that the 80 acres in Mississippi should be assured to complainant. *Held*, that defendant, by taking a decree for the entire interest in the Alabama land, knowing that complainant had an interest therein unless it passed to J. by the act of partition, ratified the partition, and could not resist complainant's suit to have the mistake corrected.

2. Where the owner of land takes on himself the burden of proving exactly what sums have been received therefrom by one who, without title, but in good faith, has occupied it, he is entitled to recover such sums in discharge of his claim for rents.

Cross-appeals from chancery court, Noxubee county; T. B. GRAHAM, Chancellor.

Suit by William Robinson, *non compos mentis*, by his guardian, against Winston Jones, to correct a mistake in a written agreement of partition, to remove clouds from complainant's title to land, to obtain possession, and for an account of the money received for rent. There was a decree for complainant, but from so much of it as related to the manner of accounting for the rents complainant appealed. Defendant took a cross-appeal. Affirmed except as to rents.

Complainant, by his guardian, James P. Robinson together with the other heirs of William Robinson, Sr., who died intestate leaving lands in Alabama and Mississippi, entered into an agreement for the partition of the lands. By mistake 40 acres of the land intended to be allotted to complainant were omitted from the preliminary agreement furnished the scrivener, and by his mistake another 40 acres, which should have been allotted complainant, were omitted from the final articles of agreement, and no mention of either 40 acres was made therein. The agreement, moreover, was not recorded. All the lands allotted to and intended to be allotted to complainant were in Mississippi, while those allotted to his guardian, James P. Robinson, individually, were in Alabama. Charles T. Robinson, another heir, to whom lands in Mississippi had been allotted, sold them to James, and included in the conveyance the 80 acres intended to have been allotted to complainant. James then conveyed the lands allotted to him, together with those deeded to him by Charles, to Jones & Co. as security. Thereafter he deeded to Jones & Co. the Mississippi lands in payment of the debt they secured. Subsequently Jones & Co. began foreclosure proceedings in Alabama against the land in that state conveyed them as security. In connection therewith all of the heirs of William Robinson, Sr., filed a bill in equity, claiming that on account of inequalities in the partition they had a prior lien on the lands for such excess. After allowance of this, the balance was decreed to Jones & Co. The decree also attempted to correct the mistake made in the partition of the Mississippi lands. The defendant claims through Jones & Co. For former opinion on demurrer, see Robinson v Jones, 65 Miss. 520, 5 South. Rep. 102.

Rives & Rives and *George G. Dillard*, for appellant. *A. C. Bogle* and *W. H. Bogle*, for appellee and cross-appellant Jones.

COOPER, J. We concur with the chancellor in his finding that the facts in evidence establish the mistake arising in the agreement for partition of the lands of William Robinson, deceased, and that the lands in controversy were, and were intended to be, allotted to the appellant, but that a mistake was made in preparing the written agreement, by reason of which these lands were not described among those allotted to him. This being true, it follows that the writing should be corrected, so that it may express the true agreement, unless the present holder is a *bona fide* purchaser of the land. Without reference to that portion of the testimony which consists of evidence of notice *in pais* to Jones, we are of opinion that he cannot sustain the position of a *bona fide* purchaser for this reason: He accepted from James P. Robinson, who was his debtor, and who was one of the heirs at law of William Robinson, deceased, a conveyance in severalty in fee of certain lands in this state, (including the lands now in controversy,) and of others in the state of Alabama, in trust, to secure certain debts then due him by the said James P. Robinson. The Mississippi lands were aft-

erwards conveyed by said Robinson to Jones in payment of the debt they secured, and a litigation arose over the lands in Alabama. In that suit all the heirs at law of William Robinson, deceased, were parties, and it was there made to appear that the whole estate had been divided, and that only by virtue of the partition could Jones claim the entire interest in the lands mortgaged to him by J. P. Robinson. Aside from the partition, James P. Robinson was only a tenant in common with the other heirs, in consequence of which Jones found himself in such position that he must either claim the whole interest in the lands under the partition, or only the undivided one-fifth interest which descended to his debtor as heir at law. Before final decree he was informed by the pleadings and proof that the mistake to correct which the present bill is exhibited had been made in the act of partition. In truth, the court in Alabama, by its decree subjecting the whole interest in the lands mortgaged to the payment of Jones' debt, also decreed that the lands now claimed by the *non compos mentis* in this state should be assured to him. It is insisted for Jones that the court in Alabama had no power to make any decree in reference to lands in Mississippi, and also that it was not sought by that proceeding to correct any error in the act of partition. However this may be, it yet remains true that Jones has secured in Alabama a decree against the whole interest in the lands in that state mortgaged to him by J. P. Robinson, with full knowledge of the fact that the one-fifth interest therein belonged to the present complainant, unless it passed to James P. Robinson by the act of partition, and he also knew that in the partition a mistake had occurred as to the Mississippi lands, the result of which would be, if uncorrected, that the *non compos mentis* would fail to get a part of the lands for which he had yielded his interest in those in Alabama. It would be contrary to the plainest principles of justice to permit Jones, with full knowledge of the facts, to take, because of the partition, the interest in the Alabama lands which had descended to the present complainant, and then hold the lands in this state against the partition. Having acted in reference to a part of the subject of the partition, and derived advantage from it to the detriment of the *non compos*, he must be held as ratifying the whole act, and can occupy no better relation to the land here than could James P. Robinson if the title yet remained in him.

The court erred in applying the rule announced in Staton v. Bryant, 55 Miss. 261, for the measurement of rents to be decreed against the defendant in possession. The rule there announced was for the protection of one who, without title, occupied in good faith the lands of another, believing himself to be the owner, and against whom the plaintiff seeks to recover the reasonable rental value of the property. The manifest hardship of compelling a defendant in such attitude to respond for what the lands might have rented for, in the absence of evidence as to what they were actually rented for, led the court to announce the rule there formulated, the justice of which commends it for application in all similar cases. But the rule is applicable only where the demand for rents is in the nature of a *quantum meruit*. It has no place where, as here, the complainant takes upon himself the burden of showing exactly what sums have been received by the defendant, and is content to receive them in discharge of his claim. It cannot be unjust to compel restoration of what has been actually received, for the defendant is but restoring to the complainant his own, and this is the end and purpose of remedial justice. Decree affirmed, except as to rents, on which it is reversed and remanded, to be further proceeded with in the court below.

(94 Ala. 116)

GOLDSMITH v. EICHOLD *et al.*

(*Supreme Court of Alabama.* Nov. 4, 1891.)

LIMITATIONS—ACTIONS AGAINST DISSOLVED PARTNERSHIP—APPLICATION OF ASSETS—PAYMENT OF DEBTS—WAIVER OF RIGHT.

1. A partner made a will, which, after providing for the payment of all the testator's debts, gave the entire residue of the property to his copartner. The will contained no provision authorizing the continuance of the business after the testator's death, nor any express waiver of the testator's right to have the partnership effects applied to the payment of the partnership debts. *Held* not a waiver of the said right.

2. Code Ala. 1886, § 2604, makes the obligation of a judgment against two or more persons, or of any joint promise in writing, several as well as joint. Section 2605 provides that one of several partners may be sued for the obligation of all. *Held* that, where one partner dies, and suit is brought by a creditor against the survivor as an individual, this does not preclude him from afterwards asserting his claim against the partnership, on the theory of his having elected to treat the said claim as an individual indebtedness; and the fact that another claim was joined in the action, for which the deceased partner was not liable, can make no difference.

3. Code Ala. 1886, § 2632, provides that the time between the death of a person and the grant of letters testamentary, not exceeding six months, is not to be taken as any part of the time limited for the commencement of actions by or against his executor. Section 2268 provides that no suit shall be commenced against an executor as such until six months after the grant of letters testamentary. *Held*, in an action by a creditor against a surviving partner to subject land to the payment of partnership debts, that, inasmuch as the right of creditors to sue is the same as that of the survivors or executors of the deceased partners to compel a settlement, the right is not barred by lapse of time until the said right of the partners would be barred; and that, inasmuch as the estate of a deceased partner must be represented, the case is within section 2633, which provides that the six months during which an executor is exempt from suit after the grant of letters is not to be taken as any part of the time limited for the commencement of an action against him.

Appeal from chancery court, Mobile county; W. H. TAYLOE, Chancellor.

This was a bill by Meyer I. Goldsmith against Eichold Bros. & Weiss and others to subject land, which had been used and occupied by the firm of A. & B. Moog, to the payment of the debts of said firm. From an order sustaining a demurrer to the bill, plaintiff appeals. Reversed.

Chamberlain & Richardson, for appellant. *Pillans, Torrey & Hannaw*, for appellees.

STONE, C. J. In the authorized American edition of Lindley on Partnership (volume 1, p. 2) are many definitions of the term "partnership." Perhaps none of them will be found more precisely and comprehensively accurate than that of Chancellor Kent: "A contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." 3 Kent, Comm. 23. To constitute the relation *inter sese* the contract must extend beyond a common agreement to share in the profits. It must equally bind the parties to bear the burden of the losses. McCrary v. Slaughter, 58 Ala. 230; Couch v. Woodruff, 63 Ala. 466; Mayraut v. Marston, 67 Ala. 453. Partnership is not necessarily an entire merger of the individual, his labor, energy, or estate in the firm. The extent of the merger is determined by the agreement entered into, and the purpose the partners have in view. Anything left out of the partnership agreement and its views, whether it be money, property, labor, or skill, pertains to the individual in as absolute right as if there had been no contract of partnership. The merger of the individual into the firm or company extends to and includes everything embraced, expressly or impliedly, in the terms of the agreement, and to that extent changes the character of his ownership. The individual parts with the separate right and power to manage, direct, and control that of which, before that time, he had been supreme arbiter. His dominion was an integer. It becomes a fraction. He surrenders to the partnership an interest in his property, labor, skill, energy, one or more, as the agreement may bind him, by express or implied stipulations, in consideration of a corresponding surrender, to like extent and for like purposes, by his copartners. The agreement consummated, each partner becomes seised and rightfully possessed of the same interest in and power over whatever has been contributed to the firm by his copartners as he retains in that contributed by himself. This, and no more. These properties of partnership render it eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly-created entity,—the partnership,—and for each member of the firm, who thus becomes a beneficiary under the trust. He is more; he is a trustee and a *cestui que trust*,—a trustee, so far as his own duties bind him; a *cestui que trust*, so far as duties rest on his copartners. And it is sometimes said that each partner is both a principal and an agent,—a principal, to the extent he represents his own interest, but an agent only so far as he represents his copartners. The first duty devolved by this trust on each of the partners is to apply the partnership effects to the payment of the debts of the partnership, and not to pervert them to individual uses or wants, without the consent of the copartners. Any attempt to so pervert them, whether by private arrangement or under judicial proceedings, can be intercepted by the nonconsenting partners. This on the plain principle that, being beneficiaries under the trust, they have a clear right to prevent its breach. The trust goes further. After discharging all the partnership liabilities, the residuum is still held in trust for partition or distribution among the several partners, according to their several interests; and the same rights and remedies exist to preserve, protect, and secure the proper administration of the trust fund to this end as are given in enforcing the payment of debts. In administering the two remedies noted above, the court simply enforces a trust against property held in trust, and at the suit of one in whose favor the trust is declared to exist. It is only carrying out the intention which influenced the formation of the partnership. Each partner has the right to have the partnership debts paid with partnership effects, so as to relieve his individual property of the burden; and each partner has a clear right to his share of any surplus that may be left after paying the partnership debts. All men will assent to the soundness and justice of the principles stated above.

Partnerships are dissolved in various ways; sometimes by voluntary agreement, and sometimes by a sale from one or more partners to others, or by a sale to strangers. In cases falling under either of these classes there is generally no trust relation preserved, unless it is provided for in the terms of the dissolution or sale. The wants of this case do not require us to discuss this question.

Dissolution takes place also by the death of a member, and by bankruptcy or insolvency. In cases falling within either of these classes the affairs of the partnership are frequently wound up and the effects and estates administered in the courts of justice. Courts always have respect to the fiduciary rights and duties which subsist between partners, and, in the absence of special circumstances to vary the rule, will apply partnership effects primarily to partnership debts. This, because of the trust which subsisted between the parties. Hence, if the death of a member caused the dissolution, the representative or succession to his estate has the clear right to have the partnership effects applied to the payment of partnership debts in preference to the debts of the survivor, and in like preference of any right he may assert to reembark them in trade; and the insolvency of the deceased member does not vary the question. In the administration and settlement of a firm thus dissolved the court will enforce the trust in favor of the deceased or bankrupt member's estate, and apply the assets first to the payment of the partnership debts. Not because of any lien or right the creditor or creditors can assert. They have no such lien or right. It is their debtor's right to have the assets thus applied; and in enforcing that clear right the benefit and preference accrue to the partnership creditor. It is thus that the court of equity, by a pro-

cess of its own, works out the partnership debtor's *quasi* lien in the prior payment of the partnership creditor's demand, while he himself has no lien, and can assert no claim to be a beneficiary under the trust. The preferred payment being the result of the copartner's lien, and not of the creditor's, it follows that, if the partner has done any act by which he surrenders his lien, or estops himself from asserting it, the creditor is equally barred or estopped. His *quasi* lien being, at best, only the resultant of his debtor's lien, of course it cannot exist after the debtor has ceased to have any lien from which it could result. This is axiomatic.

The questions we have been considering have been often and learnedly discussed by courts and by text-writers. Possibly no clearer enunciation of the principles can be found than is shown in the opinion of Justice MATTHEWS in Fitzpatrick v. Flannagan, 106 U. S. 648, 1 Sup. Ct. Rep. 369. We cite many authorities bearing on the question, without attempting to collate or classify them. Pierce v. Pass, 1 Port. (Ala.) 232; Reese v. Bradford, 13 Ala. 837; Burwell v. Springfield, 15 Ala. 273; Halstead v. Shepard, 23 Ala. 558; Lang v. Waring, 25 Ala. 625; Offutt v. Scott, 47 Ala. 104; Little v. Snedecor, 52 Ala. 167; Farley v. Moog, 79 Ala. 148; Levy v. Williams, Id. 171; Evans v. Winston, 74 Ala. 349; Espy v. Comer, 76 Ala. 501, 80 Ala. 338; Fancher v. Furnace Co., 80 Ala. 481; Cannon v. Lindsey, 85 Ala. 198, 3 South. Rep. 676; Story, Partn. §§ 97, 326, 360; T. Pars. Partn. p. *113; Lindl. Partn. pp. *334, *351, et seq.; Id. *548 et seq.; Rogers v. Batchelor, 12 Pet. 221; Case v. Beauregard, 99 U. S. 119; Wilson v. Soper, 13 B. Mon. 411, 56 Amer. Dec. 573, and note; Menagh v. Whitwell, 52 N. Y. 146; Schmidlapp v. Currie, 55 Miss. 597, 30 Amer. Rep. 530, and note; Dob v. Halsey, 16 Johns. 34; Gram v. Cadwell, 5 Cow. 489; Everenghim v. Ensworth, 7 Wend. 326; Hutchinson v. Smith, 7 Paige, 26; Bank v. Sprague, 20 N. J. Eq. 13.

The firm of A. & B. Moog was composed of Abraham Moog and Bernard Moog. They were engaged in a mercantile business. They incurred a debt to Meyer I. Goldsmith, January 12, 1884, of $12,500. Abraham Moog died February 23, 1884, having made a will, which, after his death, was probated and established. Bernard Moog was named executor in the will, and relieved of the duty of giving bond as such. He qualified soon after his brother's death. The will contains this clause: "After payment of all my debts, as above provided, I give and devise to my brother, Bernard Moog, all my property of every kind and description, real or personal and mixed," etc., "to have and to hold to him and his heirs, in fee-simple forever." The will contains no authority or power to continue the mercantile business after the death of Abraham Moog. Bernard Moog did continue the business, employing therein the assets of the late firm of A. & B. Moog, until his business was broken up by attachments issued and levied January 12, 1885. In the mean time, on July 1, 1884, he incurred an additional debt to Meyer I. Goldsmith of $6,000. Abraham and Bernard Moog owned valuable real estate, which they used in connection with their business. The titles were made to Abraham Moog and Bernard Moog, their heirs and assigns, without any reference to their partnership name. In September, 1884, B. Moog executed 20 notes, payable to his own order at the Savings Bank of Mobile, each for the sum of $1,250; the first due October 25, 1884, and the others in regular order at intervals of 10 days, the last being due May 4, 1885. Contemporaneously with these notes he executed a deed of trust, conveying said real property to a trustee to secure the payment of said 20 notes. This property was finally disposed of in payment of said notes, and is now held and occupied in part by Eichold Bros. & Weiss, as derivative purchasers under said trust-deed. In January, 1885, Meyer I. Goldsmith instituted suit by original attachment against Bernard Moog for the recovery of his combined claim of $12,500 and of $6,000, and in May, 1885, he received judgment for the amount of the two claims and interest. Out of the property attached, which was personal chattels, he realized less than $500. The residue of the judgment remains wholly unsatisfied, and Bernard Moog is insolvent. The present bill was filed July 9, 1890. It seeks to subject the said real estate which had been used and occupied in the business of A. & B. Moog to the payment of said partnership debt of $12,500. It charges that the said 20 notes, given, as they were, after the firm had been dissolved by the death of Abraham Moog, were the individual debt of Bernard Moog, and hence could not be paid with partnership effects until partnership debts were first paid. There was a demurrer to the bill, which the chancellor sustained, and from that ruling the present appeal is prosecuted.

The defense takes many forms. One contention is that, by giving and devising all his estate and effects to Bernard, the survivor, Abraham clothed him with the individual right and title to all the property of every kind which had belonged to the partnership, and thereby surrendered any lien he may have had to have the partnership effects applied to the payment of partnership debts. We will not say this could not have been done. Possibly a will, containing an express waiver, would have cut off the lien; and possibly, if it had directed or authorized a continuance of the business with the firm effects, and it had been so continued, this would have worked a surrender of the lien by necessary implication; but we need not decide this, as the will contains no such provision. On the contrary, it first directs the payment of all of testator's debts, and gives and devises to Bernard only the residue after the payment of the debts. There is nothing in this contention. It is further contended that by suing Bernard Moog as an individual, and obtaining judgment against him as an individual,—particularly by joining an individual debt of Bernard Moog in the same suit,—Goldsmith has elected to treat his claim as an individual demand, and cannot now be permitted to assert it is a partnership debt. There is nothing in this. After the

dissolution of the partnership by the death of Abraham Moog a joint action at law could not be prosecuted against them. Bernard, if sued at all, must needs be sued alone. It cannot make any difference in principle that another claim is joined in the action, for which his deceased partner is not liable. Code 1886, §§ 2604, 2605,[1] and notes.

The defense relies on the statute of limitations of six years. According to the averments of the bill, Bernard Moog qualified as his executor March 22, 1884. This suit was brought July 9, 1890, more than six years after he so qualified. The suit being against the living survivor, it is contended that it was barred under section 2632[2] of the Code. Such it surely would be, if that presented the whole merits of the contention. Bradford v. Spyker, 32 Ala. 134; Brewer v. Browne, 68 Ala. 210; Wells v. Brown, 83 Ala. 161, 3 South. Rep. 439. But it does not. It must be borne in mind that the rights of creditors to sue in a case like this are precisely the right of the survivor, or of the representative of the deceased copartner, to compel a settlement of the copartnership accounts and assets. Till that right is barred by lapse of time the right of creditors is not barred. A suit, then, for the purpose of settling the partnership accounts, must be brought either by the personal representative of the deceased partner against the survivor, or by the survivor against the personal representative of the deceased partner. Instituted in either form, it is necessary that Abraham Moog's estate be represented by a personal representative. This, then, brings the case within section 2633 of the present Code, which provides that "the six months during which an executor or administrator is exempt from suit after the grant of letters is not to be taken as any part of the time limited for the commencement of an action against him." In section 2263 it is provided that "no suit must be commenced against an executor or administrator, as such, until six months * * * after the grant of letters testamentary or of administration." If Bernard Moog were to sue as surviving partner to have an account and settlement, Abraham Moog's estate must be represented; and, being himself the qualified executor, the appointment of an administrator *ad litem* for and in the interest of the estate would become a necessity. So, if Bernard Moog were to sue as executor, the same necessity would arise for an administrator *ad litem*, for Bernard Moog could not represent the two antagonistic interests which would be presented. In either form the six months' exemption from suit must be accorded to the representative of Abraham Moog's estate, and this brings the time less than six years from the death of Abraham Moog. The statute of limitations is no bar to the present action. Steele v. Steele, 67 Ala. 438; Allen v. Elliott, 63 Ala. 432; Espy v. Comer, 76 Ala. 501.

The purpose of this suit being to subject lands to the payment of a partnership liability, it would seem the legal title must be brought before the court. According to the averments of the bill, the undivided half interest in the land is in the heirs at law of Abraham Moog, unless his will in favor of B. Moog changes the rule. We make this suggestion without intending to decide anything in regard to it.

Reversed and remanded.

[1] Section 2604 provides that when two or more persons are jointly bound by judgment, bond, covenant, or promise in writing of any description whatsoever, the obligation or promise is in law several as well as joint, and suit may be instituted thereon against the legal representatives of such as are dead. Section 2605 provides that any one of several partners, or his legal representative, may be sued for the obligation of all.

[2] Section 2632 provides that the time between the death of a person and the grant of letters testamentary or of administration, not exceeding six months, is not to be taken as any part of the time limited for the commencement of actions by or against his executors or administrators.

(94 Ala. 463)

LOUISVILLE & N. R. CO. v. PHILYAW *et al.*

(*Supreme Court of Alabama.* Nov. 8, 1891.)

PRELIMINARY INJUNCTION—DISSOLUTION—VERBAL SALE OF LAND — PAYMENT OF PURCHASE PRICE —STALE CLAIMS.

1. In a suit for specific performance of a verbal contract of sale of land, and to enjoin actions arising out of a judgment against complainant in ejectment for the same land, complainant based his rights on possession granted under the verbal contract and on the payment of the price, which he alleged was paid to defendant, P., and that P. executed a receipt therefor. The receipt was made part of the bill, and purported to be signed by P. *Held*, that a preliminary injunction was properly dissolved on the filing of answer denying that P. executed the receipt, and denying the payment of the price, or any part thereof, as the answer could not be considered evasive by reason of its failure to negative the execution of the receipt by some one authorized to execute it for P.

2. Under Code Ala. § 1782, making verbal contracts for the sale of land void unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession by the seller, payment after the giving of possession brings it within the exception.

3. A bill for specific performance filed March 24, 1890, is not open to the objection of staleness, which alleges a contract of sale by P. in 1872; possession taken under it, and full payment of the price; actual possession by the vendee for six or seven years, until his removal from the state; his continued claim of the land and payment of the taxes thereon till 1885; his sale of it at that time to the grantor of complainant's lessor, no one in the mean time having been in actual possession; the immediate sale to complainant's lessor, possession being taken at the same time by complainant as lessee, and retained until ousted under judgment in ejectment in favor of P., on March 5, 1890; no adverse claim having been advanced by P. prior to March 4, 1887, from which time complainant was in good faith, as alleged by the bill, asserting its rights in a court of law.

Appeal from chancery court, Escambia county; JOHN A. FOSTER, Chancellor.

Suit by the Louisville & Nashville Railroad Company against J. D. Philyaw and M. F. Brooks for specific performance and an injunction. From a decree dissolving a preliminary injunction complainant appeals. Affirmed.

The bill sought the specific performance of a verbal contract of sale of certain de-

scribed lands, and to enjoin the prosecution of a suit in the circuit court against the complainant to recover damages for the entry upon and use of the said lands, and an action on the *supersedeas* bond in an ejectment suit against the Louisville & Nashville Railroad Company for said land by J. D. Philyaw. The bill alleged that the said Philyaw was the owner of the land in controversy, and that in 1872 he made a verbal contract to sell the land to one George B. Milstead; that he put him in possession, but did not deliver to him any deed, the agreement being that upon the payment of the purchase money a deed should be made to said Milstead; that in 1873 said Milstead paid the purchase money, as is evidenced by a receipt set out in the bill, alleged to have been signed by J. D. Philyaw; that Milstead remained in possession of the land for seven or eight years, and then moved to Florida; that in 1885, while said Milstead still claimed said land, but was not in possession of the same, and had no written title thereto, he sold it by deed to one Barrett, and on the same day said Barrett conveyed it by deed to the Mobile & Montgomery Railroad Company, which company took possession, and put the complainant, the Louisville & Nashville Railroad Company, into possession; that complainant occupied said land as tenant of the Mobile & Montgomery Railroad Company until August 13, 1888, when the said Philyaw brought an action of ejectment against the complainant for the recovery of said land; that said railroad company, in defense of said suit in ejectment, relied upon adverse possession, but said suit resulted in a judgment in favor of Philyaw, which judgment was afterwards affirmed by this court on appeal in December, 1889. Thereafter, on January 8, 1890, Philyaw brought suit against the Louisville & Nashville Railroad Company, to recover damages for the entry upon and use of said land; and on January 2, 1890, M. F. Brooks, for the use of said Philyaw, brought suit against said company and its sureties on the *supersedeas* bond given by said company, to secure the appeal in the ejectment case. The bill then prayed that the said J. D. Philyaw be enjoined from prosecuting his said suit to recover damages against the railroad company for said land, and also that the said M. F. Brooks be enjoined from further prosecuting the suit brought by him for use of said Philyaw, to recover damages upon the *supersedeas* bond; and that the said J. D. Philyaw be ordered to make a deed conveying the said lands to the Mobile & Montgomery Railroad Company. Both the respondents filed answers to the bill, and denied all the material allegations as averred therein. The said J. D. Philyaw denied that Milstead had ever paid the purchase money for the land, or that he had ever given him a receipt therefor, and stated positively that he did not sign the receipt set out in the bill. Upon the denials to the answer, the respondents moved to dissolve the injunction; and also demurred to the bill on the ground of laches on the part of the complainant, and those through whom it claimed title, and for the want of equity. The respondents also moved to dismiss the bill for the want of equity.

Jones & Falkner, for appellant. *Watts & Son* and *J. W. Posey*, for appellees.

MCCLELLAN, J. This cause was submitted for decree below on demurrers to the bill, motion to dismiss for want of equity, and motion to dissolve the injunction. Something is said in the opinion of the chancellor upon the matters involved in the demurrers, and also upon the general sufficiency of the bill; but no decree was passed either upon the demurrers or upon the motion to dismiss the bill. The only decree rendered went solely upon the motion to dissolve, and dissolving, the injunction, and the chancellor's conclusion and action in that regard alone can be reviewed on this appeal.

We think the injunction was properly dissolved on the denials of the answer of Philyaw. The case made by the bill depended upon the fact of payment, as therein alleged, of the purchase money of the land, the subject-matter of the litigation, by Milstead to Philyaw. This is the pivotal fact in the complainant's right; and this fact, as we read the answer, is, over and over again, denied circumstantially and directly, and without, to our minds, any evasion or equivocation. The receipt made a part of the bill purports to be signed by Philyaw in person, and to evidence the payment of purchase money for land by Milstead to him. The averment is that its execution was by Philyaw. The answer roundly denies that he executed it, and, further, as we have seen, sets forth that Milstead had not paid the purchase money or any part of it. We cannot concur with counsel, in view of all these denials, that Philyaw's failure to negative the execution of the receipt by another, authorized thereto for him, excites suspicion, and stamps his answer as evasive. He met and denied the averment as made, and he alleged the fact of non-payment throughout in such way as to preclude the idea, not only that payment had been made to him personally, but also that payment had been made by Milstead to another for him.

The contract between Milstead and Philyaw, as laid in the bill, is brought within the exception to the statute of frauds, with respect to the sale of land, by the averments that Milstead was let into possession at the time of the sale, and soon afterwards paid the purchase money in full. We do not understand that the statutory exception contemplates or requires a payment of purchase money contemporaneous with the letting into possession. Code, § 1732; Powell v. Higley, 90 Ala. 103, 7 South. Rep. 440.

The bill, in our opinion, was not open to the objection of staleness, as seems to have been supposed by the chancellor. It alleges a contract of sale in 1872, possession taken under it, and full payment of the purchase money; that the vendee remained in actual possession for six or seven years, and then removed from the state, and continued to claim the land and to pay taxes on it until 1885, when he sold and conveyed it to a third party, no one

in the mean time being in actual possession of the land; that his vendee at once sold and conveyed the land to the Mobile & Montgomery Railroad Company, and that complainant, as the tenant of said company, immediately took possession of it, and retained it until ousted under judgment in ejectment in favor of Philyaw on March 5, 1890. This bill was filed March 24, 1890. It appears that no claim adverse to the equitable title of complainant and those through whom it claims was advanced by Philyaw prior to March 4, 1887. Until such claim was made no laches short of a delay of 20 years can be imputed to the vendee or those succeeding to his equity. The delay subsequent to the assertion of the claim by Philyaw was only for about three years; and during all this time the complainant was in good faith, it is alleged, asserting its rights in a court of law. We are clear to the conclusion that the bill is not open to the objection of staleness. This and the preceding point have been considered because the conclusion of the chancellor on the motion to dissolve the injunction appears to be rested upon them as well as upon the denials of the answer. The decree can be supported only on the last consideration. The objections to the bill are without merit. Affirmed.

(94 Ala. 166)

HAWES v. RUCKER.

(*Supreme Court of Alabama.* Nov. 3, 1891.)

EXECUTION SALE — EJECTMENT — DEFENSES — INSTRUCTIONS—RES JUDICATA.

1. A sheriff's deed of land sold on execution after the return-day of the execution under which the levy was made is void.

2. The evidence for defendant in ejectment showed that the land was bought in 1857, and occupied up to 1867 by defendant's grandmother, when his father went into possession under direction of the grandmother, who claimed and exercised acts of ownership over it; that she afterwards put defendant in possession, and in 1888 conveyed the same to his father. *Held* that, as the plaintiff must recover on the strength of his own title, defendant's request for a general affirmative charge in his behalf should have been granted.

3. A judgment of ejectment in a prior action against defendant's father while holding under direction of the grandmother would not estop defendant from claiming title, where neither he nor his grandmother was a party to such prior action.

Appeal from circuit court, Jackson county; JOHN B. TALLEY, Judge.

Action of ejectment by Thomas G. Rucker against Monroe Hawes. Verdict and judgment for plaintiff. Defendant appeals. Reversed and remanded.

The evidence for the defendant tended to show that the land sued for was purchased from one Monday about the year 1856 or 1857, and was thereafter occupied by Jefferson Hawes, the grandfather of defendant, and his wife, Mary Hawes, who was afterwards Mrs. Marshall; that they occupied the land "off and on" from the time of the alleged purchase up to the time of Mrs. Marshall's death; that about the year 1867, under the direction of Mrs. Marshall, George W. Hawes went into the possession of the property, but that Mrs. Marshall still claimed and exercised acts of ownership over the property, and that a short time before her death Mrs. Marshall moved back upon the land, and remained in possession until she was dispossessed by the writ of possession at the instance of the plaintiff in this suit; that, after being so dispossessed of the land, she again moved back upon the premises, and placed the defendant to this suit in possession, and that the defendant remained in possession under her until June, 1888, when she executed a deed of gift of the property to George W. Hawes; and that the defendant, at the time the present suit was instituted, held possession under G. W. Hawes.

Martin & Bouldin, for appellant. *J. E. Brown*, for appellee.

CLOPTON, J. Plaintiff, who is appellee, derives title to the land sued for by purchase at a sale made by the sheriff under execution issued on a judgment rendered in his favor against George W. Hawes in March, 1879. The execution under which the sale was made was issued April 5, 1884, and levied on the 16th of July thereafter, on the land in controversy by Thomas Robinson, then sheriff of Jackson county. His term of office having expired, the execution came to the hands of his successor, by whom the land was sold, and deed made to plaintiff. The only evidence of the sale consists of the recitals in the sheriff's deed. From these recitals it appears that the land was sold under the execution November 3, 1884, at which sale plaintiff became the purchaser, to whom the sheriff executed a conveyance on the same day. The sale was made after the return-day of the execution. If conceded that when an execution is levied on real estate by a sheriff whose term of office expires before a sale of the property the sale may be legally made by his successor, such sale must be made before the return-day of the writ. It is well settled in this state that a sheriff has no power to sell land under an execution after the return-day of the writ. If he makes a sale afterwards, without a revival of his authority by some new process, such sale passes no title to the purchaser. Whatever may be the rule as to the authority of the sheriff to sell personal property after the return-day of the execution which he had levied when it was in force, in respect to real estate the rule above stated has been too firmly established to be controverted or doubted. Morgan v. Ramsey, 15 Ala. 190; Smith v. Mundy, 18 Ala. 182. This rule has become a rule of property in this state, from which it would be unwise to depart.

Plaintiff also offered in evidence the record of an action instituted by him against George W. Hawes and others in the circuit court of Jackson county to recover the land sued for, in which action he recovered judgment against the defendants therein, and was put in possession under a writ of possession issued on the judgment. Plaintiff contends that these proceedings and the judgment estop defendant, who is the son of George W. Hawes, from setting up title to the lands in suit. Neither defendant nor his grandmother, Mary Marshall, under whom he claims to hold possession,

was a party to this suit. The settled rule at common law is that a judgment in ejectment does not confer title upon the party in whose favor it is given, and is not evidence in a subsequent action even between the same parties. Camp v. Forrest, 13 Ala. 114. Section 2714 of the Code provides: "Two judgments in favor of the defendant in an action of ejectment or in the nature of an action of ejectment between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the land, or any part thereof, between the same parties or their privies, founded on the same title." Except as thus changed by statute, the common-law rule prevails. A judgment in ejectment against a tenant is not evidence against the landlord, unless he was admitted to defend, or joined with the tenant in making defense, notwithstanding he may be subject to be dispossessed by the writ of possession against the tenant if he receives possession from the tenant *pendente lite*. Smith v. Gayle, 58 Ala. 600. Neither the sale of the land under the execution and the sheriff's deed nor the recovery in the former action of ejectment conferred or passed any title to plaintiff. As in ejectment, or in the corresponding statutory real action, the plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's, when no relation exists creating an estoppel of defendant's denial of plaintiff's title, the affirmative charge requested by defendant, on the undisputed evidence, should have been given. This conclusion renders unnecessary consideration of the other questions involved. Reversed and remanded.

(94 Ala. 456)

COLLIER *et al.* v. DAVIS *et al.*

(*Supreme Court of Alabama.* Nov. 3, 1891.)

FOREIGN CORPORATIONS—APPOINTMENT OF AGENTS—RIGHT TO COMMISSIONS.

1. Act Ala. Feb. 28, 1887, provides that no foreign corporation shall do business within the state unless it has a known place of business therein, and an agent thereat, and makes it a penal offense for any agent of such corporation, which has not complied with the act, to act as agent for such corporation. *Held*, that to bring an agent within the inhibition of the statute the act of agency must be done within the state.

2. Plaintiffs sought to recover for services rendered in negotiating a loan for defendants. The complaint did not show where the agreement with defendants was made, nor from whom the money was to be obtained. Defendants pleaded that the loan and contract of borrowing were to be made with a foreign corporation, which had no known place of business within the state, with an agent thereat, and that plaintiffs were the agents of such corporation. *Held*, that the plea was bad in not averring that the contract with plaintiffs was made in Alabama. Dudley v. Collier, 87 Ala. 431, 6 South. Rep. 304, distinguished.

Appeal from circuit court, Lowndes county; JOHN MOORE, Judge.

Action by Collier & Pinckard against Davis Bros. to recover on a contract for services in negotiating a loan. Verdict and judgment for defendants. Plaintiffs appeal. Reversed and remanded.

Roquemore, White & McKenzie and *W. R. Houghton*, for appellants. *Watts & Son*, for appellees.

STONE, C. J. On February 28, 1887, the act was approved "to give force and effect to section four of article fourteen of the constitution of the state of Alabama." Sess. Acts, 102. Under that statute it is required that "every company, corporation, or association now organized under the laws of Alabama," before engaging in any business in this state, shall have at least one known place of business, and an agent thereat. The statute prescribes in what manner the place of business and the name of the agent shall be made known. The statute then makes it a penal offense for any agent of a foreign corporation, which has not complied with this constitutional and statutory provision, to do any act of agency for such corporation. Of course, to fall within this statutory inhibition, the act of agency must be done within the state of Alabama, for otherwise neither the corporation, nor the agent, nor any act done by either, could be amenable to our laws. The complaint in this case, while it sets forth that the agreement sued on was entered into after February 28, 1887,—the date of the statute,—does not state where the alleged agreement was made; nor does it show from whom they undertook to obtain the money which Davis Bros. engaged them to borrow for them. Neither does it show from whom or where they succeeded in obtaining the promised loan. There is nothing in the complaint which gives notice that the constitutional provision and statute referred to above exert any influence in the decision of the questions presented in this record. Plea marked "K," interposed by Davis Bros., and demurrers to it, interposed by Collier & Pinckard, raise the only question presented. The circuit court overruled the demurrer. Plea K sets up in bar of the action that the loan and contract of borrowing were to be made with a foreign corporation; that such corporation had no known place of business in Alabama, with an agent thereat; that the corporation from which the money was to be obtained was "The American Freehold Mortgage Company of London, Limited," and that Collier & Pinckard were in fact the agents of the corporation. If the complaint or plea had averred or shown that the agreement between Collier & Pinckard, on the one side, and Davis Bros., on the other, was entered into in Alabama, then it would have been shown that a foreign corporation, through its agent, or the agent of a foreign corporation, had engaged in business, or transacted business, in Alabama, without a compliance with our constitution and statute. This would have made the agreement illegal and non-enforceable. There is nothing, however, to show that such was the case. It is perfectly consistent with every averment of the pleadings that the agreement declared on was executed outside of the state of Alabama; and if Collier & Pinckard were not agents of the corporation, then there is nothing stated that is incompatible with the idea that the loan

was to be negotiated outside of Alabama's limits. The *situs* of the security offered is not necessarily determinative of that inquiry, although it may be a factor to be considered. We are referred to the fact that the plea we have pronounced faulty is a copy of the one decided by this court to be sufficient in Dudley v. Collier, 87 Ala. 431, 6 South. Rep. 304. That suit was on a contract similar to the one declared on in this case. The report of that case does not inform us what were the averments of the complaint. It may have shown on its face that the agreement declared on was executed in Alabama. If it did, the ruling was clearly correct. With the exception of what we have stated, we reaffirm all that was said in Dudley v. Collier. Reversed and remanded.

(94 Ala. 142)

SEABOARD MANUF'G CO. v. WOODSON.

(*Supreme Court of Alabama.* Nov. 8, 1891.)

MASTER AND SERVANT — NEGLIGENCE OF MASTER —PLEADING—INSTRUCTIONS.

1. Under Code Ala. § 2590, subd. 1, which makes a master liable for an injury to a servant occasioned by defective machinery, provided that such defect arose from or was not discovered by reason of the master's negligence, a complaint which alleges that plaintiff's injury was occasioned by a defect which was "known" to the defendant, or which could have been known by the exercise of reasonable diligence, is not sufficient, in the absence of any further allegation of negligence, for the reason that the defendant, after discovering the defect, must have had a reasonable time to remedy it before it could be said to be negligent.

2. Under said section 2590, subd. 2, which makes the master liable when the injury is occasioned by reason of the negligence of any other servant who has any superintendence intrusted to him, a complaint which alleges that the plaintiff, while engaged as a fireman on one of defendant's engines, was injured by reason of the negligence of the foreman, who was intrusted with superintendence over the plaintiff and over the said engine, in allowing it to be and remain in the defective condition therein described, is sufficient.

3. Plaintiff, a railway fireman, alleged, in an action against the company for personal injuries, that the engine on which he was engaged was in a defective condition, and that D. was defendant's foreman, having charge and control thereof. Defendant denied the allegations. *Held*, that an instruction that "if the foreman, D., knew the engine was out of order as shown in the complaint, then the plaintiff would not be required to inform the defendant, if the jury believe that D. was a foreman," was not objectionable in assuming the existence of the said facts.

Appeal from circuit court, Mobile county; W. E. CLARKE, Judge.

Action by Abe Woodson against the Seaboard Manufacturing Company to recover for personal injuries. There was judgment for plaintiff, and defendant appeals. Reversed.

This action was brought by the appellee, Abe Woodson, against the appellant corporation, and sought to recover damages for personal injuries. The plaintiff was fireman on the engine operated by the defendant at the time of the accident. The engine was stopped, the brakes put on, and a chock put under the wheels of a car attached to it, and the engineer went off to assist some construction hands working on the road. The plaintiff, while left alone with the engine, went under it to clean it, and while under the engine it, in some way, moved backward, and mashed and mangled plaintiff's arm so badly that it was necessary to amputate it. The complaint contained six counts, but the assignments of error in this case make it necessary to notice only the rulings of the court upon the first and second counts. The first count alleges that the appellant was operating a railroad, and appellee was a fireman in its employment, and was run over while obeying and observing the rules and regulations of appellant; that his injuries were caused by defects in the engine, "known to the superior officers of plaintiff, and known to defendant, *or it might have known of said defects by the exercise of ordinary and reasonable diligence.*" The language in italics was inserted by amendment. There was no allegation (either of fact or conclusion) that defendant, or any of its officers or employes, were guilty of any negligence. This count was demurred to on two grounds: (1) Because there was no sufficient allegations of negligence on the part of defendant; (2) because it is not alleged that the defect in said count mentioned arose from or had not been remedied owing to the negligence of the defendant, or of some person in the service of the defendant, intrusted with the duty of seeing that the machinery was in a proper condition. The second count recites the employment of appellee, substantially as in the first count, and then alleges that the injury was caused "by reason of the negligence of the foreman of the defendant, which said foreman was intrusted by the defendant with the exercise of superintendence over the plaintiff and said railroad, and its engines and cars; and plaintiff avers that the negligence of said foreman consisted in this: that he knowingly allowed a certain engine to be and remain in a defective condition." This count was demurred to on the grounds: (1) Because it is not alleged that the defect complained of in said engine mentioned in said count arose from or had not been remedied owing to the negligence of the foreman; (2) because it is not alleged that the defect complained of had existed prior to the accident; (3) because there is no allegation showing that the defect complained of had existed long enough to have allowed the foreman a reasonable opportunity to have remedied the same. The court overruled these demurrers to the first and second counts. The plaintiff's evidence tended to show that the lever of the engine was left in a backward position, and that the effect of a leak in the throttle valve, combined with the lever being in a back motion, might have been to move the engine backward. His evidence further tended to show that this leak had existed for some time, and this fact was known to the engineer in charge, and to a Mr. Du Mont, and that Mr. Du Mont was called a foreman, and had charge and control of the engine and cars of the defendant. The defendant's evidence tended to show that the throttle-valve of the engine did not leak; that the

engineer left the lever in a forward position; and that, even if the throttle-valve had leaked, it would not, while the lever was in a forward position, have made the engine move backward. It further tended to show that, while the engineer was gone and plaintiff was in sole charge of the engine, the lever was moved from a forward to a backward position. Defendant's evidence further tended to show that Du Mont was not called a foreman at all, but was a train dispatcher, and that a Mr. Spootswood was the general foreman. The complaint alleges, as a defect in the engine, "that the throttle-valve leaked, and allowed the steam to pass through into the cylinder of the engine, and caused the engine to move off." At the plaintiff's request, the court charged the jury, in writing, that "if the foreman, Du Mont, knew the engine was out of order, as shown in the complaint, then the plaintiff would not be required to inform the defendant, if the jury believe that Du Mont was a foreman in charge and control of the locomotive, engine, and cars of the defendant." There was judgment for the plaintiff for $775 damages, as assessed by the verdict of the jury. The defendant prosecutes this appeal, and assigns as error the rulings of the court in overruling its demurrers to the first and second counts of the complaint, and in giving the charge requested by the appellee.

Gregory L. & H. T. Smith, for appellant.
B. B. Boone, for appellee.

WALKER, J. 1. The first count of the complaint alleges that the injury to the plaintiff was caused by reason of defects in the condition of the locomotive engine upon which he was serving as fireman, and the defect mentioned was that the throttle-valve leaked and allowed the steam to pass through into the cylinders of the engine, and caused the engine to move off without warning to the plaintiff, while he was under the same, oiling and wiping it off. The original first count alleged "that said defects were known to the superior officers of plaintiff, and known to the defendant." The manifest purpose of this count is to show such a state of facts as to render the defendant liable under subdivision 1 of section 2590 of the Code of 1886; the injury being attributed to a defect in machinery, and to no other cause. The demurrer raised the question of the sufficiency of the averments to charge the defendant with liability under that clause of the statute. The statute does not impose a liability upon the employer for an injury to an employe caused by reason of a defect in machinery connected with or used in the business of the employer or master, unless such defect "arose from or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." The description of the defect to which the injury is imputed must come within the specific limitations of the proviso just quoted. Liability is not imposed unless the defect has one or more of the features there particularly mentioned. A statement of a defect which does not come within the qualifying language of the proviso falls short of what is necessary to be shown. The allegations must state a case so as to bring it within the description of one of the particular phases of negligence for which a liability is imposed upon the employer by the terms of the statute. When the claim is made under the first subdivision of the section, it is incumbent upon the plaintiff to show by his complaint and by his proof that the injury resulted from a defect which either arose from, or had not been discovered, or had not been remedied, owing to such negligence as is specified by the statute. Railway Co. v. Bradford, 86 Ala. 574, 6 South. Rep. 90; Railroad Co. v. Davis, (Ala.) 8 South. Rep. 552. It is plain that the first count of the complaint in this case does not allege that the specified defect arose from the negligence of the defendant, or of any employe intrusted with a duty in that regard. There is no averment as to how the defect arose. Nor can it be claimed that this count shows that the injury was caused by the negligent failure to discover the defect, for the averment that the defect was known to the superior officers of plaintiff and to the defendant shows that it had been discovered prior to the injury. The inquiry, then, is narrowed to this question, does the complaint show that the defect had not been remedied owing to the negligence of the defendant, or of some person in its service, who was intrusted with the duty of seeing that the engine was in proper condition? There is no specific averment of any negligence. No more is shown than that the defect was known. The averment of the complaint in this regard would have been supported by proof that the defect in question was known to plaintiff's superior officers and to the defendant for any length of time prior to the injury, though such knowledge had been acquired so recently that it was impossible that it could have been availed of for the purpose of remedying the defect before the injury befell the plaintiff. Unless there had been a reasonable opportunity to effect a remedy, it could not be said that the failure to do so was negligent. The defendant must have had sufficient time to remedy the defect after its discovery before it could be chargeable with negligence in failing to effect such remedy. Mere knowledge, without the opportunity to act on it, would not constitute negligence. Wilson v. Railroad Co., 85 Ala. 273, 4 South. Rep. 701; Railway Co. v. Holborn, 84 Ala. 133, 4 South. Rep. 146. The insufficiency of the first count of the complaint is disclosed by the application of the test which is afforded by ascertaining what proof would suffice to support its averments. The proof required for this purpose does not necessarily involve any showing that the alleged defect arose from or had not been discovered or remedied owing to the negligence of the defendant, or of some person in its service, and intrusted by it with the duty of seeing that the engine was in proper condition. The demurrer was addressed to the insufficiency of the allegation of

negligence, and should have been sustained. The defendant did not by pleading over waive the privilege of assigning the error in the judgment overruling his demurrer. Code 1886, § 2692. The count, as amended by the insertion of the alternative averment that the defect could have been known to the defendant, was capable of being supported by the same proof which would have sufficed for the original count, so that the defect in the pleading was not cured by the amendment.

2. The second count of the complaint is drawn under the second subdivision of section 2590 of the Code.[1] It alleges, in substance, that the plaintiff, while engaged as a fireman, was injured by reason of the negligence of the foreman of the defendant, who was intrusted by it with the exercise of superintendence over the plaintiff, and over defendant's railroad, and its engines and cars; that said negligence consisted in said foreman knowingly allowing a certain engine to be and remain in a defective condition; and that by reason of such defective condition of the engine the plaintiff was injured while in the performance of his duty as fireman. The particular defect is described as in the first count. Here there is an explicit averment of the negligence of a person intrusted with a superintendence by the employer. It is shown that he was guilty of such negligence while in the exercise of such superintendence, and that the injury was caused by reason of the omission of duty which was described as negligent. These averments brought the charge within the terms of the statute, and were sufficiently explicit. Railway Co. v. Lazarus, 88 Ala. 453, 6 South. Rep. 877; Hall v. Posey, 79 Ala. 84; Railroad Co. v. Coulton, 86 Ala. 129, 5 South. Rep. 458; Railroad Co. v. Propst, 85 Ala. 203, 4 South. Rep. 711. There was no error in overruling the demurrer to the second count.

3. Error is imputed to the charge given by the court at the request of the plaintiff, on the ground that it assumed the existence of the disputed facts as to Du Mont being the defendant's foreman and as to the engine being out of order, as shown in the complaint. We are not satisfied that the charge is fairly susceptible of this construction. When disputed facts are enumerated in a charge, they should be stated hypothetically, so that the jury may clearly understand that it is for them to determine from the evidence whether or not such facts are established. We are not prepared to say that this rule was not conformed to in the framing of the charge in question. It is the safe course, however, to avoid the possibility of the jury understanding from any instruction given them by the court that any disputed fact is assumed to be established. The possibility of any such misunderstanding may be removed on another trial by reframing the charge so that the facts, hypothetically stated, may be more clearly and distinctly left to the determination of the jury from the evidence. Reversed and remanded.

[1] This section makes a master liable for an injury to a servant occasioned by any defect in the machinery used in the business of the master, when the injury is occasioned by reason of the negligence of any other servant who has any superintendence intrusted to him.

(94 Ala. 443)

ALABAMA M. RY. CO. v. NEWTON.

(*Supreme Court of Alabama.* Nov. 8, 1891.)

CONDEMNATION PROCEEDINGS — RES JUDICATA — APPEAL.

1. Under Code Ala. § 3216, relative to condemnation proceedings, providing that the order of condemnation, on payment of the sum assessed by the jury, shall vest in the applicant the easement proposed to be acquired; and Acts Ala. 1890-91, p. 1134, providing that the payment of the sum assessed shall be a condition precedent to the vesting of the easement; and section 3218 of the Code, providing that applicant may pay the damages and compensation assessed at any time within six months after the assessment thereof, but, if he fails to pay the same within such time, such assessment shall cease to be binding on the owner of the lands, and the rights of the applicant thereunder shall determine,—proceedings in which the damages assessed were not paid cannot be interposed in bar of new proceedings, commenced more than six months after the order of condemnation in the first.

2. Code Ala. §§ 3619, 3640, allow an appeal to the circuit or supreme court from any final decree of the probate court within one year from the rendition thereof. Section 3210, as amended by Act Gen. Assem. Feb. 28, 1889, provides that compensation for lands taken by eminent domain may be ascertained by a jury of six men in proceedings in the probate court. Section 3215 provides that in such cases either party may appeal by bill of exceptions to the supreme court within three months. Const. Ala. art. 14, § 7, entitles either party appealing from a preliminary assessment of compensation for condemned lands to have the damages "determined by a jury according to law." *Held* that, since a "jury according to law" is a jury of 12 men, section 3215 is unconstitutional, since, if an appeal by bill of exceptions were taken by either party directly to the supreme court, the other would be deprived of right to trial by such a jury. Postal Tel. Cable Co. v. Alabama G. S. R. Co., (Ala.) 9 South. Rep. 555, followed.

Appeal from probate court, Montgomery county; F. C. RANDOLPH, Judge.

Condemnation proceedings by the Alabama Midland Railway Company against Nancy Newton. A demurrer to defendant's plea of *res judicata* was overruled, and petitioner appeals. Appeal dismissed.

A. A. Wiley and *Tompkins & Troy*, for appellant.

COLEMAN, J. The pleadings show that prior to December 16, 1889, appellant began in the probate court of Montgomery county *ad quod damnum* proceedings to condemn certain lands of appellee to be used as a right of way; and on the 16th December, 1889, the day to which the hearing had been continued, the damages were assessed by a jury at $560, and the order of condemnation regularly entered by the court. Appellant did not pay the damages found by the jury, or take possession of the land condemned, or prosecute the condemnation proceedings further. In December, 1890, more than six months after the order of condemnation was made, appellant began the present proceedings in the same court against the same party for the condemnation of the identical lands, less 10 feet on the south

side of the lot. The appellee interposed the former proceedings and order of condemnation in bar of the present petition. The court overruled the demurrer to the pleas of appellee, and held that the question was *res adjudicata*, and dismissed the petition of appellant. The question is a new one in this state, but the principle involved has been adjudicated by the supreme courts of several of the states of the Union. Appellee principally relies upon the authorities furnished by the court of appeals and supreme court of Missouri. In the case of Leisse v. Railroad Co., 2 Mo. App. 105, it was held that, when proceedings instituted to condemn private property for public use for railroad purposes are abandoned by the railroad corporation because it is dissatisfied with the price fixed by inquest, it will be liable to the owner of the property for all damages sustained in consequence of such proceedings. This principle was reaffirmed in 5 Mo. App. 585, and affirmed by the supreme court of the state in 72 Mo. 562. The rights of the parties in *ad quod damnum* proceedings of this nature must depend upon the constitution and statutes of the state under which they are instituted. The case cited and principally relied upon from Missouri does not quote or refer to the statute under which the decision was rendered. It does refer to and cite in support of the conclusion of the court the case of Railroad Co. v. Lackland, 25 Mo. 515, where the statute is set out under which the proceedings in that case were instituted. The language of the act as there stated is: "The court shall enter judgment in favor of such owner against such company for the amount of damages assessed, and shall make an order vesting in said company the fee-simple title to the land." The question before the court was to determine at what period of time the right to compensation became vested and the title to the land transferred; and it was held that no order transferring the title could be made until all the preliminary steps pointed out in the act had been taken, and until this was done, and the judgment of the court rendered, the company had the right to discontinue their condemnation proceedings. The statute of this state is in some respects very dissimilar to that of the Missouri statute. Code, § 3216, provides that "the order of condemnation, upon the payment of the sum ascertained and assessed by the verdict of the jury, shall vest in the applicant the easement proposed to be acquired," etc. The amendment to this section, found in Acts 1890-91, p. 1134, in no way affects the principle of law under consideration. The effect of the act is to provide that the payment of the sum ascertained and assessed by the verdict of the jury shall be made a condition precedent to the vesting of the easement under the order of condemnation; and, under the principle of law declared in the Missouri authority, until this was complied with the petitioner had the right to discontinue his proceedings.

Section 3218 of the Code further provides that "the applicant may pay the damages and compensation assessed at any time within six months after the assessment thereof," etc.; "but, if he fails to pay the same within such time, such assessment shall cease to be binding on the owner of the lands, and the rights of the applicant thereunder shall determine; and, upon such failure, the applicant shall be liable to the owner for all damages the latter may have sustained by the institution of such proceedings, and including a reasonable attorney's fee," etc. Under our system, not only must the compensation be paid as a condition precedent to the vesting of the title, but a time is fixed within which it must be paid, or the rights of the applicant will determine. It seems clear from the statute that its purpose was not to give to the verdict of the jury and the order of condemnation the force and effect of an absolute judgment, conclusive for all purposes and time upon the parties. It is conclusive for a period of six months, in so far as it adjudicates the amount of compensation to be paid by the applicant, and his right to the land condemned, upon its payment. It is also conclusive upon the land-owner for the same period of time, in so far as it fixes his compensation, and estops him from exercising any rights over or making any disposition of the property in conflict with the order of condemnation. It is the payment of the compensation, as provided by the statute, which transfers the property and gives the order of condemnation the attribute of a final and absolute judgment, conclusive upon the parties, and which may be pleaded as *res adjudicata*. The statute of Illinois provides that "the judge or court, upon such report, [the report of the jury,] shall proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property, and the use of the same, upon payment of full compensation as aforesaid," etc. It was held under this statute that, until compensation was paid, there is no right to enter upon the premises; and that until that time the company seeking condemnation had the right to abandon the location, and adopt another; and that, until the selection became binding on the company, the owner of the land could do any act that an owner may do with his own, not materially interfering with the condemnation proceedings, and the object sought to be accomplished thereby. Schreiber v. Railroad Co., 115 Ill. 340, 3 N. E. Rep. 427. The case of Stacey v. Railroad Co., 27 Vt. 44, is very full to the point that, until payment was made, no right to the land vested in the company; and, if the company had no vested rights, the land-owner had none to the compensation awarded. As holding the same doctrine, see Graff v. Mayor, etc., 10 Md. 544; Hayes v. Railroad Co., 17 Ohio St. 103. In the case of Railway Co. v. Haas, 42 Ohio St. 239, it was held that the failure of the corporation to pay for and take possession of the land within six months (similar provision to our statute) after the assessment of compensation shall have been made is no bar to a new proceeding under the statute by the same corporation, after the expiration of the six months, for the appropriation of

the same property for the same public use. We cite, as a further authority on this point, the case of Corbin v. Railway Co., 66 Iowa, 73, 23 N. W. Rep. 270. It is certain that appellant cannot enter upon and take possession of the land under the first condemnation proceedings, more than six months having elapsed since the rendition of the condemnation order; and, if the land cannot be condemned by proceeding *de novo*, then the land is forever released from liability to public use, however great a necessity may arise. Appellee may have sustained damage in consequence of the former proceedings, but the statute affords a remedy in behalf of the "owner for all damages the owner may have sustained by the institution of such proceeding, including a reasonable attorney's fee for defending the same." The court erred in overruling the demurrer of appellant to the defendant's plea of *res adjudicata*. In the case of Postal Tel. Cable Co. v. Alabama G. S. R. Co., (Ala.) 9 South. Rep. 555, construing section 3210 of the Code, as amended by the act of February 28, 1889, (Acts 1888–89, p. 113,) and as further amended by act of February 18, 1891, (Acts 1890–91, p. 1131,) it was held that an appeal did not lie in condemnation proceedings from the probate court to the supreme court, but only to the circuit court. In the case of Iron Co. v. Cabaniss, 87 Ala. 328, 6 South. Rep. 300, construing section 3210 of the Code, as amended by the act of February 28, 1889, supra, in order to preserve the constitutional right of trial by a lawful jury, it was declared that an appeal would lie under section 3640 of the Code to the circuit court. We deem it unnecessary to repeat the argument, or fortify the conclusion reached in these cases by additional argument. The conclusion is that no appeal lies in *ad quod damnum* proceedings to the supreme court, and the appeal must be dismissed. We have considered this case upon its merits, and adjudicated the questions raised by the assignments of error and argued in briefs. We have done this merely to aid the lower court, if the parties see proper to prosecute the case by appeal to the circuit court. Our conclusion is, this court has no jurisdiction of the case, and the appeal must be dismissed.

(28 Fla. 597)

KEECH *et al.* v. ENRIQUEZ *et al.*

(*Supreme Court of Florida.* Oct. 31, 1891.)

EJECTMENT—EVIDENCE OF PEDIGREE—DESCENT—LIMITATIONS—BEYOND SEAS—SPANISH GRANTS—BURDEN OF PROOF.

1. Where an instruction, as far as it goes, states a correct proposition of law, but is defective because it fails to qualify or explain the proposition it lays down in consonance with the facts of the case, such defect is cured if subsequent instructions are given, containing the required qualifications or explanation.

2. Where the exception in favor of persons "beyond seas" is made in a statute of limitation, the law is well-settled that such term is equivalent to "without the limits of the state;" and the exception inures to the benefit of foreigners who constantly reside abroad as well as to citizens who temporarily leave the state to return again.

3. The special limitation of one year within which to assail the validity of tax-titles acquired under the provisions of chapter 1865, Laws 1872, entitled "An act to quiet tax-titles to lands," is operative only upon, and applies only to, tax-deeds acquired under said act "that have been recorded."

4. A deed or any other instrument, though actually transcribed upon the public records, is not "recorded," within the legal acceptation of that word, where there has been no proper proof of its execution, as required by law, authorizing a record thereof.

5. Said chapter 1865, Laws 1872, requires the deeds thereunder made by the commissioner of lands and immigration to be witnessed by two subscribing witnesses. Any such deed not so witnessed is properly excluded from evidence, except for its value as color of title upon which to predicate an adversary possession.

6. Under the statute in this state limiting the time within which possessory actions shall be brought for the recovery of land, an adverse possession, in any case, to bar a person having the legal title, must be continuous and uninterrupted for the entire period of seven years.

7. An illegitimate child, under the statute here, inherits property through the mother the same as though such child were legitimate.

8. Instructions in a cause must be predicated upon some testimony adduced at the trial, and must be pertinent to the facts; otherwise they are abstract propositions, and there is no error in a refusal to give them, no matter how correctly stated the propositions therein may be.

9. The operation of the eighth article of the treaty of February 22, 1819, between the United States and Spain, for the cession of the Floridas, was to confirm as grants or purchases *in præsenti* all grants or purchases made of lands in Florida by or of the Spanish government anterior to the date fixed in said treaty, without further action on the part of the United States through its congress. Magee v. Alba, 9 Fla. 382, and Magruder v. Roe, 13 Fla. 602, cited and approved.

10. Where the plaintiffs in an action of ejectment predicate their claim to the land in dispute upon their inheritance therof as heirs at law of the original and last grantee thereof, and when a *prima facie* case of their relationship to the original grantee is established by proper proof, the *onus probandi* is thrown upon the defendant to disprove their identity as such heirs; and, if the defense shall fail in this, the fact of their identity must be held to have been established.

(*Syllabus by the Court.*)

Error to circuit court, Clay county; JAMES M. BAKER, Judge.

Ejectment by Isabel Costa y Maestre de Enriquez and others against Henry Keech and T. A. MacDonell. Judgment for plaintiffs. Defendants bring error. Affirmed.

T. A. & B. B. MacDonell, for plaintiffs in error. *C. M. Cooper*, for defendants in error.

TAYLOR, J. On the 21st of June, 1884, the defendants in error, Isabel Costa y Maestre de Enriquez and Carlos Enriquez y Lopez, her husband, Dolores Cortina y Maestre de Oruna, and Margarita Cortina y Maestre de Rufin, instituted their action of ejectment in the circuit court of St. Johns county against the plaintiffs in error, Henry Keech and T. A. MacDonell, for the recovery of possession of the following described land in St. Johns county, viz.: Section 39, township 9 S., of range 30 E.; being the grant of land confirmed by the United States to Bartolo M. Maestre, containing 597.30 acres. After issue joined upon a plea of the general issue, one of the defendants, Henry Keech, filed his petition in the circuit court of St.

Johns county for a change of venue of said cause, on the ground that the plaintiffs had an undue influence over the minds of the inhabitants of St. Johns county. On the 11th of March, 1886, the petition for change of venue was granted, and the cause removed for trial to Clay county, in the fourth judicial circuit. On the 24th of March, 1886, the cause was tried in Clay county before a jury, and resulted in a verdict and judgment for the plaintiffs. Motion for a new trial was made upon the following grounds: (1) That the verdict of the jury was not sustained by the evidence adduced on the part of the plaintiffs; (2) that the verdict of the jury is contrary to the charges of the court; (3) that the court erred, in charging the jury, in giving the instructions asked by the attorney for plaintiffs, including 1, 2, 3, 4, 5, and 6; (4) that the court erred in refusing defendant's instructions 1 and 2 and 7, as requested; (5) that the verdict of the jury is against the evidence. This motion was denied, and from this judgment the defendants in the court below have taken their writ of error to this court.

The errors assigned are: (1) The court below rejected proper evidence on the part of defendants; (2) the court below erred in giving improper instructions on behalf of plaintiffs; (3) the court erred in refusing to give proper instructions on behalf of defendants, (4) the court erred in overruling the motion of defendants to set aside the verdict of the jury and for a new trial, (5) the court erred in rendering a judgment in favor of the plaintiffs, and against the defendants. We will consider these assignments of error in the order in which they come.

After a careful scrutiny of the record, we are unable to discover where any evidence of any character was offered by the defendants at the trial below and rejected by the court. Neither can we find that any exception was taken or noted to any refusal of the court below to admit any evidence offered by the defense; consequently the first assignment fails for want of facts to constitute its subject-matter.

The second assignment of error is that the court erred in giving improper instructions on behalf of plaintiffs. This assignment we will consider in connection with the third ground of the motion for new trial, which, in substance, asserts the error of the court below to be in giving the 1st, 2d, 3d, 4th, 5th, and 6th instructions. These instructions, that we find from the bill of exceptions were excepted to in their entirety, are as follows: "(1) That if the jury believe from the evidence that the plaintiffs have proved the title to the land in question to be in them, they are entitled to recover it, (2) that if the jury find from the evidence that the plaintiffs have been beyond seas during adverse possession under color of title of a deed, under chapter 1865, Laws Fla., the plaintiffs have the right to appear and contest the title within any time before coming to Florida, or within a year after coming to Florida; (3) possession of land is presumed to be in the legal owner at all times, when there is not actual adverse possession in some one else; (4) adverse possession, in any case, to bar a person having the title, must be continuous and uninterrupted for the entire time required by law, which, in actions for the recovery of real property or possession thereof, is seven years; whenever adverse possession is interrupted, the time must begin anew; (5) an illegitimate child can inherit on the mother's side as well as though legitimate; (6) if the jury find from the evidence that the plaintiffs, their agent or tenant, were in the possession of the land in question at any time within seven years before the bringing of this suit, the statute of limitations will not run against them."

The first of these instructions, although stating a correct proposition of law, might have been confusing to the jury because of its failure to inform the jury that, although the legal right to the land might be in the plaintiffs, yet their remedy to secure that right might have been forfeited by lapse of time and an adverse possession by the defendant; but we think this defect in the first instruction was subsequently supplied by the first instruction asked for by the defendant and given by the court, so that no harm could have resulted from the broadness of this first instruction.

The second instruction above is predicated upon section 6, c. 1865, Laws 1872, entitled "An act to quiet tax-titles to lands," which statute provides, in brief, for the sale and conveyance, by the commissioner of lands and immigration, of all lands, after the expiration of six months after publication of lists thereof, that have accrued to the state by virtue of any tax-deed made or executed for the non-payment of any taxes due the state. Section 6 of said act provides that any deed made in conformity with its provisions, which shall have been recorded for one year, in the county where the land is situated, shall operate as a complete bar against all persons who might thereafter claim title to said land, in consequence of any informality or illegality of the taxes or proceedings, etc.; but provides that infants, persons of unsound mind, imprisoned or "beyond the seas," shall have the right to appear and contest such title to said lands within one year after their disabilities are removed. This charge, confined, as it was, to the special title acquired by the defendants under the provisions of this statute, we think was proper, as the title or color of title offered by the defendants in support of their claim was acquired under the provisions of this special law; and the plaintiffs, according to the proofs, being residents continually in the island of Cuba, which, according to the settled doctrine upon the subject, brings them within the meaning of the term "beyond seas;" the now well-settled meaning of that term in statutes of limitation being held to be equivalent to "without the limits of the state." Ang. Lim. § 200; Murray's Lessee v Baker, 3 Wheat. 541; Bank v. Dyer, 14 Pet. 141. The plaintiffs here were not only out of the limits of the state of Florida, but were beyond the limits of the United States, in a foreign territory. And it is further well settled that the ex-

ception in favor of "persons beyond seas" is not to be confined to subjects who may occasionally leave the country and return, but it is general, and extends to foreigners who are constantly resident abroad, as in the case of the plaintiffs here. Ang. Lim. § 204, and authorities there cited. We think, however, that this second instruction was unnecessary in the case from the fact that the special limitation provided in section 6 of said chapter 1865, for the institution of actions to assail titles acquired under said act, is operative only upon deeds acquired under said act "that have been recorded." The deed acquired by the defendants under this act, although appearing to have been spread upon the records of St. Johns county, has never yet been "recorded," in the legal acceptation of that word, because there has never been any proof of its execution authorizing a record thereof. Edwards v. Thom, 25 Fla. 222, 5 South Rep. 707; Hope v. Johnston, 27 Fla. —, 9 South. Rep. 830, (decided June term, 1891.) The special limitation provided for in chapter 1865 could not apply in this case, because there has been no record of the defendants' deed acquired under that act. We think, too, that the court below ruled properly in excluding the defendants' deed acquired from the commissioner of lands and immigration under said chapter 1865, except for the purpose of showing color of title, because of the fact that said deed has no witnesses. This act, like all other statutes that undertake to confiscate the property of the citizen through the medium of sales thereof for taxes, must be strictly construed. Section 4 of this act provides with great particularity a set form for the deeds to be made under its provisions, and this prescribed form requires two subscribing witnesses. The deed offered by the defendants has none, and was properly confined to its value in evidence as color of title only. Paul v. Fries, 18 Fla. 573. The third instruction above is a correct proposition of law, and only needs for its support a reference to section 4, c. 1869, Laws 1872.

The fourth instruction above also states the law correctly. Not only is it the well-settled common law of this country, but section 5, c. 1869, providing periods of limitation of all kinds of actions, expressly provides that there shall be a continued adverse occupation and possession for seven years of premises included in any instrument held as a claim of title, in order to bar the true owner from its recovery. Tyler, Ej. p. 910 et seq., and authorities cited.

The fifth instruction above is also a correct statement of the law as contained in our statute, (section 8, p. 470, McClel. Dig.) which provides that illegitimate children shall inherit property in this state through the mother equally with legitimates.

We think the sixth instruction above did not state the law accurately or correctly. Though the plaintiffs may have acquired possession of the land at some time within seven years prior to the institution of their suit, still that possession may have been an unlawful one; and the statute of limitation may have already ripened the defendants' claim into a perfect possessory title prior to such unlawful interruption of his possession by the plaintiffs; but as there is no proof to show that the defendants had acquired a perfect title by possession anterior to the interruption thereof by the plaintiffs, and no proof to show when that interruption took place, the giving of this charge is error without injury.

The third assignment of error, to the effect that the court erred in refusing instructions asked on behalf of defendants, must be confined to the refusal of the court to give the third, eighth, and ninth instructions requested by the defendants, as these are the only ones refused to be given by the court, and the only ones to the discarding of which exceptions were in any manner taken by defendants at the trial below; though the fourth ground of the motion for new trial erroneously cites the first, second, and seventh instructions as being the ones refused. The instructions refused, numbered here as in the record, are as follows: (3) "In considering the time against the plaintiffs, you will put all the possessions together that were hostile to the plaintiffs that were in privity to the defendants, and through which they claim, and then ascertain if they make more than seven years' hostile adverse possession, and, if you ascertain that fact, the defendants are entitled to a verdict." (8) "If the jury find from the evidence that Keech, one of the defendants, entered upon the land in dispute under color of title, and held possession thereof adversely to the claim of the plaintiffs, seven years before the interruption of possession by plaintiffs, then such adverse possession comes within the statute of limitations, and the plaintiffs are therefore barred from re-entering, and you should find for the defendants." (9) "If the jury find from the evidence that Bartolo M. Maestre filed his claim to the Maestre grant in 1820, and that in 1824 the said Bartolo M. Maestre died, and that the claim of the said Bartolo M. Maestre was not confirmed until 1827, after his death, then the plaintiffs cannot recover, there being no one living by the name of Bartolo M. Maestre, to whom said grant could have been confirmed."

The third instruction, above asked for and refused, was not at all applicable to the facts in this case, as there was no attempt, even, by the defendants to prove that any one else, except Keech, the defendant, ever occupied or possessed this land, that were in privity with him in any other capacity than as his agent or tenant. The only possession attempted to be proved was by him or by his agents or tenants, whose possession was, of course, his. There were therefore no facts upon which to construct the theory of the "tacking of possessions" by different persons at different times in privity of title with each other, as is contemplated by this instruction, and there was no error in its refusal. Instructions in a cause must be predicated upon some testimony adduced at the trial, and must be pertinent to the facts; otherwise they are abstract propositions. Jacksonville, T. & K. W. Ry. Co. v. Penin-

sular Land Transp. & Manuf'g Co., 27 Fla. —, 9 South. Rep. 661; Robinson v. Barnett, 19 Fla. 670.

There was no error in the refusal to give the eighth instruction above asked by the defendant, as we do not think it was warranted by the evidence in the cause. There was no proof as to what years Keech, the defendant, had held possession of the land, nor for how long a time he had possession of it; nor was it shown when his possession, if he ever had any, was interrupted by the plaintiffs. Neither was there any evidence to show that his right to the land had ripened into a complete possessory title by seven years' adverse occupancy thereof anterior to the interruption of that possession by the plaintiffs.

There was no error in the refusal of the court to give the ninth instruction above asked for by the defendants. The enunciation, as law, therein proposed, is directly in conflict with the decisions of this court in Magee v. Alba, 9 Fla. 382, and in Magruder v. Roe, 13 Fla. 602, in which it is properly held that the operation of the eighth article of the treaty of February 22, 1819, between the United States and Spain, for the cession of the Floridas, was to confirm as grants or purchases *in præsenti* all grants or purchases made by or of the Spanish government anterior to the date fixed in said treaty, without further action on the part of the United States through its congress. Under the law as announced in said two decisions, Bartolo M. Maestre, in 1820, when his grant was made to him by the Spanish authorities, became then vested with the title to the land embraced in said grant, *in præsenti*, without any further action on the part of this government.

The fourth and fifth assignments of error, the refusal of the court to grant a new trial, and the entry by the court of the judgment in the cause, we consider together. Without commenting at length or in detail upon the evidence in the cause, after careful consideration thereof, our conclusion is that the plaintiffs have established the fact by proper evidence that they are the sole heirs at law to the land in dispute of the original grantee from the Spanish government, Bartolo M. Maestre. They have, by proper evidence, at least, made out a strong *prima facie* case that they are such heirs at law, and entitled as such to the land in question; and, having done so, the burden was then thrown upon the defendants to prove the contrary. The defense having made no effort to break down the *prima facie* case thus made by the plaintiffs, the fact of their identity as such heirs must be held to have been established. Tyler, Ej. p. 488 et seq. to page 495, and authorities cited. Our conclusion, for the reasons heretofore given in commenting on the deed from the commissioner of lands and immigration to the defendant Keech, is that such deed was not sufficient to vest the title in Keech; and we conclude, further, that the evidence adduced by the defense as to adverse possession of the land was not sufficient to justify any other verdict than the one found by the jury in favor of the plaintiffs.

Discovering no errors in the record sufficient to disturb the judgment of the court below, the same is hereby affirmed.

(23 Fla. 617)

MOULIE v. HUGHES *et al.*

(*Supreme Court of Florida.* Oct. 22, 1891.)

REVIEW ON APPEAL—FINDINGS OF REFEREE—BREACH OF CONTRACT—SET-OFF.

1. In an action on a contract in which defendants agreed to take and pay for all the perfumes and beverages of plaintiff's manufacture during the period of one year, the breaches alleged were that defendants, after part performance of said contract, refused to take and pay for goods as therein provided; and defendants pleaded that they had kept and performed all matters and things specified in said contract to be kept and performed on their part. The findings of a referee on the issues of fact thus tendered accorded the same consideration as the verdict of a jury.

2. The acceptance of the finding of the referee as correct that defendants had not violated their contract with plaintiff, renders it unnecessary to inquire into the extent and measure of plaintiff's rights in the uncompleted portion of such a contract.

3. All debts and demands mutually existing between the parties at the commencement of suit are proper subjects of set-off, but the terms "debts and demands" refer to matters arising out of contract, express or implied.

(*Syllabus by the Court.*)

Error to circuit court, Duval county; JAMES M. BAKER, Judge.

Action on a contract by E. Moulie against George Hughes and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Fletcher & Wurts, for plaintiff in error. *John E. Hartridge*, for defendants in error.

MABRY, J. The plaintiff in error was plaintiff in the court below. The action he brings is trespass on the case on promises, based upon a written contract, a copy of which is filed with the declaration. There are three counts in the declaration. In the first count it is alleged that defendants agreed to take and pay for, cash upon delivery, and at the prices mentioned in the contract, all the perfumes and beverages which plaintiff should produce of his own manufacture during the period of one year, beginning February 6, A. D. 1884. In consideration of this agreement on the part of defendants, plaintiff agreed not to sell his said goods to any other person or persons during said time, (with two exceptions mentioned;) and also agreed that defendants should have the privilege of extending said contract for the period of five years from the 6th day of February, A. D. 1885.

It is also alleged that the prices of a portion of the goods mentioned in the contract were reduced in consideration of an advance of $500 from defendant to plaintiff, said money to be repaid on the 21st day of April, A. D. 1885. That in pursuance of said contract, and with such facilities as plaintiff then had, and on the order of defendants, plaintiff manufactured and shipped to defendants goods, which were accepted and paid for by defendants according to contract.

Plaintiff further avers that thereupon defendants, saying that they desired a

larger amount of said goods than the facilities of plaintiff enabled him to manufacture, urged him to increase his capacities for making such goods; and on the 21st day of April, A. D. 1884, advanced him money for the period of one year from said date, without interest, to enable him to produce a larger amount of such goods, and promised to take all that plaintiff would manufacture for one year at the prices stated and agreed upon between them.

Plaintiff further alleges that at great cost and expense to himself, to-wit, the sum of $1,500, he extended his facilities for manufacturing said goods; and on the 9th day of June, A. D. 1884, in pursuance of said contract, made defendants a further shipment of said goods to the amount of $265.26; and shortly thereafter defendants notified plaintiff that they would take no more goods, and declined to pay for the goods already shipped according to the terms of the contract.

It is further averred that with the facilities plaintiff then had for manufacturing said goods he could and was ready to produce, if defendants had continued to comply with their contract, goods to the amount of $20,082.50 during the year mentioned in said contract; and that the profits thereon to plaintiff, if said goods had been taken and paid for by defendants according to contract, would have amounted to the sum of $5,020.62.

Plaintiff further averred that the refusal of defendants to take and pay for any more of his said goods entailed further loss and damage on him, inasmuch as on account of the contract with defendants plaintiff neglected other means of disposing of such goods as he was manufacturing, and was obliged to dispose of at great loss the materials and appliances then on hand for manufacturing said goods, and also to suffer to decay plants, shrubs, and flowers used in the production of such goods, all to the great loss and damage of plaintiff in this respect, to-wit, the sum of $1,200, and plaintiff claims $8,000 damage.

In the second count it is averred that defendants owe plaintiff $8,000 for goods bargained and sold by plaintiff to defendants.

And in the third count it is alleged that defendants owe plaintiff $8,000 for work done and material provided for the defendants at their request.

To the first count in the declaration defendants pleaded that they had kept and performed all matters and things in said contract specified to be kept and performed on their part.

To the second and third counts in the declaration defendants pleaded that they never were indebted as therein alleged.

For a third plea to the declaration, defendants filed a plea of set-off, and alleged that plaintiff was at the commencement of the suit indebted to defendants in the sum of $1,500 for money advanced and goods sold and delivered, which sum defendants are willing to set off against the claim of plaintiff. This cause was then referred to J. C. Cooper, an attorney at law, as referee, for decision. By leave of the court the plea of set-off was withdrawn, and two additional pleas were filed. The first additional plea was a plea of set-off, with a bill of particulars. In this plea defendants alleged that at the commencement of the suit there was due from them to plaintiff the sum of $265.26 for goods, as charged in the account attached to the declaration, and that plaintiff was at that time, and still is, indebted to defendants in an amount largely in excess of $265.26 for money advanced and paid out on account of the plaintiff, and for goods sold and delivered by defendants to plaintiff at his request, to-wit, the sum of $1,618.97, which defendants are willing to set off against plaintiff's claim, and defendants claim judgment for the excess.

And in the second additional plea it is averred that it was understood and agreed by and between plaintiff and defendants that the said goods to be furnished by plaintiff to defendants were to be of good merchantable quality, but that the goods furnished were inferior, and not merchantable. Issue was taken upon all of the pleas.

Upon final hearing, the referee rendered a judgment in favor of defendants against plaintiff for $1,563.12 and costs of suit. In reaching this conclusion the referee decided that defendants had committed no breach of the contract set up in the declaration. The parties to the suit alone were examined as witnesses, the plaintiff in his own behalf, and defendants in their behalf.

The contract alleged in the declaration, that defendants were to take and pay for all the perfumes and beverages manufactured by plaintiff during the period mentioned, is not put in issue by any plea. Plaintiff contends that defendants refused to pay for a shipment of goods made June 9, 1884, of the value of $265.26, and by reason of their failure in this respect he lost the profits on all goods which he could have manufactured during the remainder of the year, and such profits would amount to $5,029.62. Defendants insist that they have not violated their contract with plaintiff, and have not refused to accept or pay for any goods made and tendered by plaintiff according to the terms of the contract. The decision of the referee is in favor of defendants on this point. The findings of a referee on questions of fact will be accorded the same considerations as the verdict of a jury Without going into any discussion of the evidence on this point, we will simply announce that, after a careful consideration of it, we accept the finding of the referee as correct. If defendants did not refuse to accept and pay for any goods mentioned in the contract, or, as found by the referee, were not guilty of any breach of the contract, it follows, of course, that it would be useless in this investigation to consider what would be the measure of plaintiff's right in the uncompleted portion of the contract. The contract here requiring the defendants to take and pay for all the perfumes and beverages which plaintiff could manufacture within a year, an unjustifiable refusal on their part, after a part performance of it, to take and pay for any more goods, would present an important

question. In addition to the questions discussed in the cases of Brent v. Parker, 23 Fla. 200,[1] and Sullivan v. McMillan, 26 Fla. 543, 8 South. Rep. 450, the further question, whether or not the profits claimed by plaintiff are the proximate results in law of the breach alleged, would become involved. But the finding of the referee that defendants have not violated the contract, and the acceptance by us of this finding as correct, make it unnecessary for us to go into the question suggested. The referee not only decided against the plaintiff on his demand for future profits, but rendered judgment against him in favor of defendants for $1,563.12 on the plea of set-off. Under our statute, all debts or demands mutually existing between the parties at the commencement of the suit are the proper subjects of set-off. The terms "debt or demand," used in the statute, refer to matters arising out of contract, express or implied. The plea of set-off filed by defendants is for money advanced, and for goods sold and delivered by defendants to plaintiff at his request before the commencement of the suit. There is no doubt about the demand here sought to be set off arising out of contract. But it is very questionable whether or not such a demand can be set off against the cause of action set up in the first count of the declaration. See Robinson v. L'Engle, 13 Fla. 482; Hall v. Penny, Id. 621; Matthews v Lindsay, 20 Fla. 962.

The second and third counts in the declaration are for goods bargained and sold, and for work and material provided by the plaintiff for defendants; and under these counts we have no doubt defendants can set off their demand against any cause of action that plaintiff is entitled to prove under them, and such, we think, they intended. It is conceded that plaintiff shipped on June 9, 1884, to defendants, goods to the value of $265.26. At that time plaintiff was indebted to defendants in the sum of $1,618.97, but he insists that said sum was not due until the 21st day of April, 1885. The decision of the referee on this point is that on the 9th day of June, A. D. 1884, the plaintiff was due defendants for advances made by them the sum of $1,618.97, and that there was no breach of the contract by defendants, as, under the circumstances of this case, it was the clear intent of the parties that Hughes and Gill should be repaid their advances out of the proceeds of sale of plaintiff's manufacture. We accept as correct the ruling of the referee on this point, on the testimony before him. The conclusions here reached settle the entire merits of this case.

The other assignments of error have been duly considered. They relate principally to questions as to the admissibility of evidence tending to establish the measure of plaintiff's damages in the uncompleted portion of the contract. The referee found from the evidence—and we think the finding correct—that plaintiff had shown no right to any such damages for a breach of contract.

We notice that the judgment entered of record in the circuit court of Duval county is for $1,533.12, a sum less than the amount found due by the referee from plaintiff in error to defendants. This is probably a clerical error in the transcript before us.

Upon a consideration of the entire case, our conclusion is that the judgment appealed from should be affirmed; and it is so ordered.

[1] 1 South. Rep. 780.

(28 Fla. 626)

JOHNS v. COUNTY COMMISSIONERS OF ORANGE COUNTY.

(*Supreme Court of Florida.* Oct. 24, 1891.)

REWARDS BY COUNTY COMMISSIONERS — VALIDITY — MANDAMUS.

1. The county judge is the officer designated by statute to pass in the first instance upon the rewards allowed by chapter 3768, Laws Fla.; and until he has certified to the facts required by the statute the county commissioners will not be compelled by *mandamus* to issue a warrant for the amount of the reward to a claimant.

2. Before relator can invoke the aid of the writ of *mandamus*, he must show that all the requirements of the statute have been complied with, and that he is clearly entitled to the relief demanded.

(*Syllabus by the Court.*)

Appeal from circuit court, Orange county; JOHN D. BROOME, Judge.

Petition by Cornelius Johns, Jr., attorney, etc., for a writ of alternative *mandamus*. The writ was quashed, and relator appeals. Affirmed.

J. Hugh Murphy, for appellant. *Beggs & Palmer*, for appellees.

MABRY, J. Cornelius Johns, Jr., by his attorney, J. Hugh Murphy, filed in the Orange county circuit court, on the 24th day of May, A. D. 1888, a petition for an alternative writ of *mandamus* to be issued against the county commissioners of Orange county, Fla. In the alternative writ it is stated that the relator, Cornelius Johns, Jr., on the 5th day of March, A. D. 1888, exhibited the scalp of a wild cat to J. L. Bryan, county judge of Orange county, and that said scalp was presented within 10 days after the killing of said animal, and that said relator killed said wild cat in the county of Orange and state of Florida, and that the county judge aforesaid issued to relator the following certificate, viz.:

"State of Florida, county of Orange. I, J. L. Bryan, county judge in and for the county and state aforesaid, do hereby certify that Cornelius Johns, Jr., has this day exhibited to me the scalp of a wild cat, which he represented as having been killed in the county and state aforesaid, within the time prescribed by the statute. Witness my hand and seal of office at Orlando, Florida, this 5th day of March, 1888.

"J. L. BRYAN, County Judge."

Further, that relator, on the 9th day of May, A. D. 1888, at a regular session of the board of county commissioners aforesaid, presented the above certificate and his account properly approved by the county auditor for three dollars, the amount allowed by law for killing a wild cat, and requested said board to issue him a warrant on the county treasurer for said amount; and that said board refused a

warrant for the same, and still refuses to allow and pay the same, assigning as ground of refusal that the certificate of the county judge is not made in accordance with law.

The respondents moved the court to quash the alternative writ on the following grounds, viz.: (1) Because the county judge has not made a proper certificate to entitle the relator to the relief sought; (2) because the statute requiring the payment of rewards for killing certain animals is unconstitutional; (3) because the relator does not show that the board of county commissioners had satisfactory evidence to authorize the payment of the claim; (4) because *mandamus* is not the proper remedy for the relief sought; and for other causes. On this motion the court quashed the alternative writ, and relator appeals from this decision.

By an act of the legislature (chapter 3763, Laws Fla.) a reward of three dollars is directed to be paid for killing a wild cat. The payment is to be made from the county treasury of the county in which the animal is killed, upon the warrant of the county commissioners. The third section provides that the person who kills a wild cat shall exhibit its scalp to the county judge of the county in which such animal is killed, within 10 days after the killing; and upon the certificate of said judge that the scalp has been exhibited in his presence, and within the time specified, the county commissioners shall issue their warrant upon the county treasurer for the payment of said reward. That the scalp of such animal was exhibited in the presence of the county judge, and within 10 days after the animal was killed, are facts required by the statute to be stated in the certificate upon which the county commissioners are required to issue the warrant. In the certificate presented to respondents the county judge certifies that relator presented to him the scalp of a wild cat which he represented as having been killed in Orange county, and within 10 days from the time the scalp was presented. In part, the judge certifies to what the relator represented to him in reference to the killing of the animal. Relator contends that, as a matter of fact, the county judge could not know that the animal was killed within 10 days from the time the scalp was presented, and the legislature could not have required him to certify to this fact. The legislature had the power to prescribe the conditions upon which this bounty should be paid, and the language of the act requires such a certificate. The county judge is the officer designated in the statute to pass in the first instance upon such claims, and to him personally the claimant must present the scalp of the animal, and within the time when its appearance will materially aid him in determining when the animal was killed. He must, in the exercise of a duty imposed by statute, make the certificate upon an inspection of the scalp, and on such information as will satisfy him that the animal was killed within 10 days of the time when the scalp was presented. The third section of the statute was evidently designed to protect the counties against false and illegal demands arising out of such matters, and to prescribe the way in which said claims shall be authenticated before the warrant is issued by the county commissioners. The county judge should not withhold his certificate when a party has in good faith complied with the law and earned the reward. The recital in the certificate by the county judge in the case before us, that relator represented that he had killed the animal within 10 days of the time when the scalp was presented, does not show that the county judge believed the statement to be true. We think the certificate presented was not sufficient to require the respondents to issue the warrant. Before relator can invoke the aid of the writ of *mandamus*, he must show that he is clearly entitled to the relief demanded. State v. Helmer, 10 Neb. 25, 4 N. W. Rep. 367. He has no right to compel respondents to issue the warrant in his favor until he has complied with all that the statute requires as conditions precedent to the accruing of his right to the warrant. Canova v. Commissioners, 18 Fla. 512; State v. Cooper, 20 Fla. 547. This he has not done, and hence the court did not err in quashing the alternative writ.

Without deciding upon the other points in the motion to quash, we think it proper to say that we do not impliedly concede that *mandamus* is the proper remedy in this case.

Judgment affirmed.

(28 Fla. 660)

WATERMAN *et al.* v. HIGGINS *et al.*

(*Supreme Court of Florida.* Oct. 16, 1891.)

CONVEYANCE TO WIFE—VALIDITY—NATURE OF ESTATE—MENTAL CAPACITY.

1. By the stringent rule of the common law a conveyance from a husband directly to the wife without the intervention of a trustee is void, but courts of equity refuse to follow in all cases this common-law rule. In equity the object to be accomplished and the considerations upon which such conveyances are made will be considered, and, if found good and meritorious, and free from imposition and fraud, will be sustained.

2. W. conveyed certain property, by deed, without the intervention of a trustee, to his wife by a second marriage for life, remainder to his minor son by such marriage, upon consideration of natural love and affection, and to provide a maintenance for them. At the time of the conveyance W. was advanced in age, and declared that his reason for making the conveyance was because he had given a due share of his property to his other children. There being nothing in the record to show the value of the property in the conveyance, or to rebut the statement as to the gift to the other children, *held*, in a contest between the children of the grantor by a former marriage and the widow and child by the second marriage, that the conveyance is good in equity, and will be sustained.

3. A conveyance to a wife for life, and at the termination of the life-estate to a child then in being, as tenant in common with any other heir or heirs of the grantor and the tenant for life, and, in default of any other such heirs, to the said child in fee, creates a vested remainder in such child.

4. Mere mental weakness will not authorize a court of equity to set aside a deed if it does not amount to inability to comprehend the effect and nature of the transaction, and is unaccompanied by evidence of imposition or undue influence.

5. A decree of a chancellor solely on questions of fact will not be disturbed unless the evidence clearly shows that it was erroneous.
(*Syllabus by the Court.*)

Appeal from circuit court, Orange county; JOHN D. BROOME, Judge.

Bill by Aden E. Waterman and others against Reola A. Higgins and others to set aside and cancel a deed. The bill was dismissed, and complainants appeal. Affirmed.

Geo. B. Hodge and *Foster & Gunby*, for appellants. *Andrew Johnson*, for appellees.

MABRY, J. The heirs of Aden Waterman, deceased, by first marriage, filed a bill in the Orange county circuit court against his widow and son by a second marriage to set aside and cancel a certain deed executed by said decedent to his second wife for her life, and remainder in fee to the son. The second wife, Reola Waterman, to whom the deed was executed during coverture, subsequently married Elijah M. Higgins, and the name of the son by the second marriage is Lewis P. Waterman. The allegations of the bill which set forth the grounds for canceling the deed are as follows, viz.: "That about the 12th day of June, A. D. 1876, said Aden Waterman, in alleged consideration of the natural love and affection that he had to his wife, Reola A. Waterman, and in order to provide a sure maintenance for her and the issue of her and his bodies, did sell and convey to the said Reola A. Waterman all of his right, interest, claim, or title, either at law or in equity, to what is known as the 'Clay Springs Property,' lying and being in Orange county, Florida, whether such interest be several or joint, divided or undivided, said place being more particularly described as the 'place bought by Eliza Waterman from Dr. Hackney;' also all of his real property situate in Orange county, Florida, and described as the 'N. E. ¼ of the S. E. ¼ of section 36, township 20 south, of range 28 east, containing forty acres;' also the S. W. ¼ of the N. W. ¼, and the N. W. ¼ of S. W. ¼, of section 31, township 20 south, of range 20, containing in the aggregate one hundred and fifty-eight acres; to have and to hold the said lands to the said Reola A. Waterman for and during the term of her natural life, and, after the termination of said life-estate, then to the said Lewis P. Waterman in default of other heirs of the bodies of the said Aden E. Waterman and Reola Waterman, and to his heirs forever, in absolute fee-simple; and in case of the death of the said Lewis P. Waterman without heirs, then to the right heirs of Aden E. Waterman and their heirs forever; and which said deed was recorded in Marion county, Florida, on the 12th day of June, A.D. 1878, and in Orange county, Florida, on the ——— day of ———, A. D. 18—, all of which will more fully appear by reference to the certified copy of said deed herewith filed, marked 'Exhibit A,' and prayed to be taken as a part of this bill of complaint. And your orators allege and aver that said conveyance was invalid and inoperative for vagueness and uncertainty, and was in violation and disregard of the laws in force in the state of Florida regulating the transfer and conveyance of title to property, and was in violation and disregard of the rights of your orators as heirs at law of Aden Waterman, and is a cloud on the title of your orators as heirs at law of Aden Waterman to said property. And your orators further allege, aver, and so charge the fact to be, that at the time of the making of said conveyance the said Aden Waterman, from bad health, mental trouble, and old age, was utterly, totally, and entirely *non compos mentis*, insane, and without mind or freedom of will, and was incapable of making any contract whatever, or of judging of the proper disposal of his property. And they further aver and charge that he was entirely under the influence and mental control and volition of his said wife, Reola, and that by her exclusion of him from the society of his children by his first wife, and unfair and persistent efforts on her part to benefit herself, and by concealing her machinations from all the rest of his family, she induced him to execute said conveyance in fraud of the just rights and claims of your orators; much of the said property having been inherited by their said father from a deceased daughter, who derived her title from the deceased mother of complainants. Complainants aver and charge that said conveyance was not the voluntary and free act and deed of Aden Waterman, but was procured from him by the fraudulent representations and wicked influence and persecutions of the defendant Reola, and ought to be taken and held as inoperative, null, and void, and be canceled on the record." There are three grounds stated in the foregoing allegations for canceling the deed. The first is that the deed was executed in violation and disregard of the laws of the state in force at the time of its execution; the second is that the grantor, at the time he executed the deed, was *non compos mentis*, and incapable, on account of mental imbecility, to execute the deed; and, in the third place, that the deed was not voluntarily executed, but that the same was obtained by the fraudulent representations and wicked influence of the wife, Reola Waterman, now Reola Higgins. In connection with the allegation that the deed was executed in violation of law, it is averred that the deed is inoperative for vagueness and uncertainty, but wherein the vagueness or uncertainty exists is nowhere pointed out. The allegations of the bill above set out are not entirely correct in reference to the deed in question. From the deed introduced in evidence we are advised that it is a deed-poll, made direct, without the intervention of a trustee, from Aden Waterman to his wife, Reola A. Waterman, for and during her natural life. The consideration expressed in the deed is love and affection, and to provide a sure maintenance for the wife and the heirs of her body begotten by the grantor. The description of the land is: "All my interest, right, title, and claim, either at law or in equity, in what is known as the 'Clay

Springs Place,' situate, lying, and being in Orange county, Florida, whether such interest be several or joint, divided or undivided, said place being known more particularly as the 'place bought by Eliza Waterman from Dr. Hackney,'" and other land in Orange county, described as in the foregoing portion of the bill. The *habendum* clause of the deed is as follows: "To have and to hold the aforesaid lands, tenements, and hereditaments unto the said Reola A. Waterman for and during the term of her natural life, without impeachment of or for any manner of waste in the use or disposal of the same, or of the rents, issues, or profits thereof; and after the determination of said estate for life, then to my infant child, Lewis P. Waterman, as tenant in common with any other heir or heirs of the body of the said Reola by the said Aden Waterman to be begotten, and to their heirs and assigns forever; and in default of other heirs of the body of said Reola A. Waterman by said Aden Waterman, then to the said Lewis P. Waterman, his heirs and assigns forever; and in case of the death of said Lewis P. Waterman without heirs, then, after the determination of the life-estate, in default of heirs of the bodies of the parties hereto, to the right heirs of Aden Waterman." We think there is no uncertainty as to the intention of the grantor in executing this deed. His purpose was to convey to his wife a life-estate, the remainder in fee to his son Lewis, then in existence, and such other children as might be born to him by the life-tenant. If no other child or children of the life-tenant by the grantor should be born, then the son Lewis was to take the entire remainder in fee, upon condition that if he died without heirs the estate should revert to the other heirs of the grantor in absolute right. At the time of the execution of the deed it was certain that Lewis would take a part of the remainder if he survived the life-tenant, and in the event of no subsequent issue he would take the entire estate. Aden Waterman died about three months after the execution of this deed, and Lewis Waterman is the only issue of the marriage of the grantor with Reola. Under the deed in question Lewis P. Waterman now has a vested estate in remainder. Paul v. Frierson, 21 Fla. 529.

It is alleged first that the deed in question was executed in violation of the laws of Florida. Counsel for appellants say "that the deed was a joint conveyance from husband and wife, and no statute of Florida authorizes it, while the common law expressly prohibits it." As a matter of fact the deed does not purport to be a joint deed from husband and wife, but it is a deed from the husband direct to the wife. The question then presented is whether or not a deed executed during coverture by the husband direct to the wife, without the intervention of a trustee, is of any validity. The conveyance of the homestead is not involved. An examination of the authorities on this subject has conducted us to the following conclusions: According to the stringent rules of the common law a conveyance from a husband directly to his wife, without the intervention of a trustee, is void. This results from the unity of husband and wife as established and maintained by the common law; but, while such deeds are void at common law, courts of chancery have from an early period refused to follow, in all cases, this common-law rule. In equity, an examination will be made into the motives, considerations, and objects to be accomplished by such conveyances. If made upon good or meritorious considerations, and free from imposition or fraud, they are looked upon with favor, and upheld in chancery. In the decision of this case it is not necessary to point out all the cases in which courts of equity will sustain deeds made by husbands directly to wives. It has been stated by some courts that whenever a contract would be good at law when made to a trustee for the benefit of the wife, a court of chancery will sustain the contract when made directly to the wife without the intervention of trustees. Certainly it would be a reproach to a court of chancery to suffer a good and meritorious conveyance to fail simply on account of the absence of a trustee. In order to promote justice and equity the court will provide in such cases a trustee, if necessary. The deed before us was made in consideration of love and affection, and to provide a maintenance for a wife and a minor child. The grantor was advanced in years, and in feeble health. For some time before the execution of the deed he declared his intention to give the property described therein to his wife and child; and repeatedly stated to his wife, and also to his near neighbors, that the reason why he wished to do so was because he had given a due share of his property to his other children. The proof does not show the value of the property in question, and there is nothing in the record to rebut the repeated statement of the grantor that he had made liberal donations to his other children. It is said in the case of Moore v. Page, 111 U. S. 117, 4 Sup. Ct. Rep. 388, that "it is no longer a disputed question that a husband may settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the conveyance is not intended as a cover to future schemes of fraud. * * * His right to make the settlement arises from the power every one possesses over his own property, by which he can make any disposition of it that does not interfere with the existing rights of others. As he may give it, or a portion of it, to strangers, or for objects of charity, without any one being able to call in question either his power or right, so he may give it to those of his own household,—to his wife or children. Indeed, settlements for their benefit are looked upon with favor, and are upheld by the courts. * * * In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such relation to him as to create an obligation, legally or morally, to provide for them, as in the case of wife or children or parents, the only question

that can properly be asked is, does such a disposition of the property deprive others of any existing claims to it? If it does not, no one can complain if the transfer is made matter of public record, and be not designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, whether it be by direct conveyance from the husband or through the intervention of others." The following authorities are referred to on this point: 2 Story, Eq. Jur. § 1380; Shepard v. Shepard, 7 Johns. Ch. 57; Hunt v. Johnson, 44 N. Y. 27; Sims v. Rickets, 35 Ind. 181; Dale v. Lincoln, 62 Ill. 22; Deming v. Williams, 26 Conn. 226; Jones v. Clifton, 101 U. S. 225; Wells v. Wells, 35 Miss. 638; Maraman's Adm'r v. Maraman, 4 Metc. (Ky.) 84; Burdeno v. Amperse, 14 Mich. 91; Schouler, Dom. Rel. § 189 et seq.

Not only will a court of chancery refuse to cancel a deed direct from the husband to the wife, where he is in a situation to make a gift to her, and conveys a reasonable portion of his property for her maintenance, but such conveyances are regarded in equity with favor, and are sustained where they do not interfere with existing rights, or constitute a scheme for future frauds. It is not contended that the conveyance in question had the effect or was designed to defraud creditors of the grantor. The contention is between the children of the grantor by his first marriage and his widow and child by a second marriage. Our conclusion is that the deed from Aden Waterman to his wife will be sustained in chancery unless one of the other grounds alleged for setting it aside be sustained. The result here reached is based upon the doctrines of a court of chancery applicable to such case, and independent of any statutory enactment in this state. The second section of the act of 1845 provides that married women may hereafter become seised or possessed of real and personal property during coverture, by bequest, demise, gift, purchase, or distribution, subject to the provision that such property shall remain in the care and management of the husband. This was an enabling statute, passed to secure certain rights to married women, and there are no restrictions expressed in it as to the persons from whom the married women may acquire property. A question may arise, even in a court of law, whether or not the incapacity of a married woman to accept a deed direct from her husband has not been removed by this statute. But the proceedings here are in chancery, and, as before stated, our conclusions are based upon the rulings of such a court, independent of any statute.

The other grounds for setting aside the deed present questions of fact. Reversing the order in which they are stated above, we will first consider the third ground, namely, that the deed was not the voluntary act of Aden Waterman, but was obtained from him by the fraudulent practices and wicked influence of his wife, Reola. From the testimony before us we have no hesitancy in deciding that this ground is not sustained. Mrs. Higgins says that her husband told her before they were married that he intended to give her the Clay Springs place; and upon the birth of their child, Lewis, he promised to give his property to both of them. Several of Waterman's neighbors testify that he often declared his purpose to convey this property to his wife and child. There is no testimony in the record that will authorize us in concluding that Mrs. Higgins (then Mrs. Waterman) used improper influences in securing the deed from her husband.

The remaining ground alleged for setting aside the deed is that the grantor was, "from bad health, mental trouble, and old age, utterly, totally, and entirely *non compos mentis*, insane, and without mind or freedom of will, and was incapable of making any contract whatever, or of judging of the proper disposal of his property." We have already reached the conclusion that in a court of chancery the consideration for the conveyance from Aden Waterman to his wife is meritorious, and looked upon with favor by this court; and, further, that no fraud or undue influence is shown to have been practiced upon him to obtain the deed. The case, therefore, is not affected by considerations of undue influence practiced upon a person of weak mind, or where a deed is obtained from such a person upon a grossly inadequate consideration. The sole question is, did Aden Waterman, at the time he executed the deed, have sufficient intelligence to understand fully the nature and effect of the transaction? And in the determination of this question it must be kept in mind that mere mental weakness will not authorize a court of equity to set aside an executed contract if it does not amount to inability to comprehend the contract, and is unaccompanied by evidence of imposition or undue influence. Greer v. Greers, 9 Grat. 330; Aiman v. Stout, 42 Pa. St. 114; Graham v. Pancoast, 30 Pa. St. 89-99; 1 Devl. Deeds, §§ 68, 69. The burden, then, was upon appellants to show that there was no intelligent execution of the deed in question by their father, Aden Waterman. The proof shows that the deed was executed on the 12th day of June, A. D. 1878. It does not appear how old Mr. Waterman was when he executed the deed, though enough is shown from which we can reasonably infer that he was an old man. It is quite evident that he was at the time in feeble health, and died about three months after the deed was executed. Four witnesses were examined for complainants, and 14 for respondents. Robert Bullock testified for complainants that he had known Aden Waterman for 35 years before his death, and that during the months of May, June, July, August, and September, 1878, his mind was exceedingly weak, almost totally impaired. During said period, at times, his mind was more active than at others, but at no time during said months was he capacitated to transact business of importance, or contract judiciously with reference to the disposition of property. At the time of his death (which is shown by the testimony to have occurred on the 8th day of

September, 1878) he was an absolute imbecile, wholly incapacitated to transact or attend to business of any kind. This witness testified further that Aden Waterman and his wife visited his home in Ocala, Fla., the day on which the deed was executed, but they concealed from him their purpose in reference to the execution of the deed. That the day following the execution of the deed Waterman's wife returned to her home, 20 miles from Ocala, and left her husband in town, and that he, in attempting to return to the house of witness at night, lost his way by reason of his mental weakness, and was brought in by a guide; and that witness' house was only 1,000 yards from the public square, and that Waterman was as familiar with its location and surroundings as with his own premises, when in sound mind. That when he was brought into the house, on being asked about his wife, said he had no wife, and that it was with difficulty he could be convinced that he was married. He further testified that Waterman remembered nothing of his old friends in Ocala with whom he had lived from boyhood, and, in the opinion of witness, he was a total mental wreck, and did not remember executing the deed to his wife on the preceding day. That Waterman remained at witness' house several days, and during this time was childish, incoherent, and seemed to have no lucid intervals. The special acts and conduct of Mr. Waterman about which the witness speaks occurred on the day after the deed was executed. A. J. White, one of complainants' witnesses, testified, in substance, that he had known Aden Waterman about 20 years, and intimately for 12 years. That during the months of May, June, July, and August, 1878, he had no mind, and was nothing more than a child. That he had business with Waterman, and found that he could not understand or comprehend at all. At various times for several years before his death, when he would go to Mr. Waterman's house, he would frequently not know witness; and that on Waterman's return from Ocala the time the deed was executed witness heard unusual blowing of the boat-whistle, and, on going to the landing, found Waterman in charge of the captain of the boat. That the captain asked witness to take care of Waterman, and witness found him crazy, and seeming to have no mind. This witness did not consider Waterman capable of executing the deed. Jeff. Driggers, another witness for complainants, testified that he had known Waterman for six or seven years before his death, and that he would at times during the months of May, June, July, and August, 1878, recognize witness when he saw him, and at other times he would not know him. His mind during this time was very much impaired, almost wholly gone. At the time of his death his mind was about gone. This witness says that he accompanied Mr. Waterman and his wife to Ocala the time the deed was executed, and on the way he seemed to have no judgment or reason. That when he passed the residence of Dr. Myers, his family physician, who had known him intimately, he asked who Myers was, and seemed to be unable to comprehend that he ever knew him; and that many other such acts occurred on the way, to show his weak mental condition. That when they got to Ocala Mrs. Waterman asked witness to go up town and get some whisky for Mr. Waterman, and on his return to the residence of Col. Bullock, where they stopped, Mr. Waterman did not know witness, and took him for a colored man who worked at Col. Bullock's. This witness further testifies that he lived near Mr. Waterman before he died, and had many opportunities to see him, and from frequent intercourse with him he did not hesitate to say that he was almost wholly incapacitated to attend to any business for some time before his death, or to make any disposition of his property that would require the exercise of judgment or discretion. Dr. T. J. Myers, the fourth witness for complainants, testified, in substance, as follows: That he had known Aden Waterman for over twenty years, and for four or five years before his death he was his family physician. That during the months of May, June, July, August, and September, 1878, Waterman was *non compos mentis*, and unable to attend to business or make disposition of his property. This witness says he visited Mr. Waterman frequently during the months of May, June, July, and August, 1878, and invariably found him without mental capacity, and that his weakness of mind dates from an attack of congestion of the brain in 1874. That when Waterman and wife were on their way in Ocala to execute the deed they and Driggers remained all night at his house, and Waterman's mind was no better then, and he regarded him as *non compos mentis*. That in the months of August and September, 1878, he found Mr. Waterman in a room in his house, by himself, with no clothes on, and so weak that he could not get back into the bed on falling out. That he would tear his clothes off his person; seemed to have no reason; and was perfectly helpless. There is a conflict as to a portion of Dr. Myers' testimony. Mrs. Higgins, formerly Mrs. Waterman, says that Dr. Myers did not attend her husband professionally during the year 1878, was at her house but once in that year, and then to see the child, Lewis. She produces a medical bill made out by Dr. Myers against Aden Waterman, and on it visits are charged for 1876 and 1877, but none for 1878. Mrs. Pendarvis, who lived with Mr. Waterman during the months of May and June, 1878, testified that Dr. Myers was at the house of Mr. Waterman but once while she lived there, and then to see the child, Lewis. Driggers, who accompanied Mr. and Mrs. Waterman to Ocala, says nothing about staying all night with Dr. Myers, but does say that when they passed the residence of Dr. Myers, Mr. Waterman asked who Myers was. For the respondents the attorney who drafted the deed, the officer who took Mr. Waterman's acknowledgment, a physician who specially examined his physical and mental condition, and many of his near neighbors, who were in-

timate with him, and who transacted business with him, were examined. We will not undertake to give a synopsis of the testimony of all these witnesses, as it would extend this opinion a considerable length. It appears from the evidence that Mr. Waterman formed the purpose to give the property in question to his wife some time before any question arose as to his mental condition. Mrs. Waterman and one other witness testify that he stated before his last marriage that he intended to give this property to his wife in the event of marriage. Several witnesses say that Mr. Waterman stated in their hearing, not long before the deed was executed, that he intended to convey this property to his wife and child, and the reason he assigned for doing so was because he had already made liberal donations to his other children. There is nothing in the record to show that he had not done so. For some time before his death, and up to the time the deed was executed, Mr. Waterman was engaged in a mercantile business, and conducted it without the aid of a clerk. When he was sick his wife says she helped him. Some eight or ten of his near neighbors, who traded with him and exchanged country produce for goods, testify that he transacted business in an intelligent way. Some say, at times he was out of his mind, but at other times he was as rational as any one. One witness, Robert Fort, who had known him for 22 years, says that "a few days before going to Ocala to make over his property to his wife and child, he asked me, with good sense, who was a careful person that he could get to go with him to Ocala; that his animal was wild, and he was afraid he could not manage her. I recommended Jeff. Driggers, who did go with him. Capt. Waterman said to me that he was going to give his property that he then owned to his wife and baby; that his baby was not raised nor educated, and he wanted them to have it for that purpose." He rode 20 miles in a conveyance to the county-seat; stopped at the residence of Col. Bullock, who married his daughter; sent for an attorney, and gave him specific instructions about preparing the deed. The attorney says that at the time Aden Waterman gave instructions about how to draw the deed he seemed to be very feeble, and lay on a bed, but he saw nothing to indicate a want of mental capacity. The deed was prepared, and the next day Mr. Waterman went before the clerk of the circuit court and acknowledged it. The clerk says that while Mr. Waterman appeared physically weak, he readily answered all questions properly asked him about the acknowledgment of the deed, and there was no apparent defect about his mind at the time. Dr. T. P. Gary, who knew Mr. Waterman for 20 years before his death, testified that he examined his physical and mental condition, he thinks, in the month of June, 1878. Mrs. Higgins says the examination by Dr. Gary was made in July, 1878. Dr. Gary says that physically he (Waterman) was rather debilitated; mentally he was strong and intellectual. In the opinion of this witness he was fully able at that time to discharge any ordinary business, and dispose of any property he desired. This purpose of Aden Waterman to convey his property to his wife and child, formed undoubtedly when his mind was clear and vigorous, he carries out in an intelligent way by directing a deed to be drawn in accordance with his wishes, and then executes it in the usual way before the proper officer. On final hearing the chancellor dismissed the bill. A decree solely on questions of fact will not be disturbed unless the evidence clearly shows that it was erroneous. Fuller v. Fuller, 23 Fla. 236, 2 South. Rep. 426. On the evidence before us we are unable to say that the decree was erroneous.

The decree dismissing the bill is therefore affirmed.

(69 Miss. 99)

ADAMS, Revenue Agent, v. VICKSBURG BANK.

(*Supreme Court of Mississippi.* Oct. Term, 1890.)

TAXATION—COLLECTION.

A revenue agent cannot sue for taxes due from a delinquent tax-payer on property which was subject to taxation if the taxes have not been assessed and put upon the assessment roll in the manner and by the officer provided by the statute.

Appeal from circuit court, Warren county; JOHN D. GILLAND, Judge. Affirmed.

Action by Wirt Adams, revenue agent, against the Vicksburg Bank, to collect taxes alleged to be due on its capital stock. A demurrer to the complaint was sustained, and plaintiff appeals.

The complaint alleged that defendant failed to make out its assessment, and turn it over to the assessor, and that, by reason of such failure, no taxes had been collected from it during certain years, being the years for which the taxes sued for were alleged to be due. Defendant demurred to the declaration on the ground that it was not alleged, and did not appear, that defendant refused to give in its taxable property to the assessor, on demand, or that it prevented the proper officers from assessing its property, as provided by law, when it had escaped assessment; that plaintiff did not show or allege any assessment by the proper officers for any of the years mentioned, but that it did show and aver that defendant's property was not assessed by the proper officers for such years, in consequence of which no obligation on the part of defendant to pay the taxes sued for existed.

Calhoon & Green, for appellant. *Dabney & McCabe*, for appellee.

WOODS, J. To reverse the judgment of the court below, it will be necessary for us to hold that the revenue agent may sue for taxes due from a delinquent tax-payer on property subject to taxation, which taxes, though required to be assessed in the usual method by the ordinary officer, and put upon the assessment rolls, have never been so assessed or so placed on the rolls. The recovery is sought for taxes alleged to be due on property which, as is charged by the declaration, has escaped taxation. The property, on the averments of the complainant, should have been placed on the assessment roll, as di-

rected in section 498, Code 1880. If there was such failure on the part of the president and cashier of the bank as is denounced in the said section, then the whole capital stock authorized by the charter should have been assessed by the ordinary officer charged with that duty in the usual method. Though the revenue agent may not collect, (the property never having been assessed,) yet the loss alleged to have been sustained by the state by reason of the dereliction of the tax assessor, if such there was, may now be recovered by suit on the delinquent officer's bond. The remedies provided by law are ample to protect the interests of the state from detriment if the law be only executed in accordance with its plain requirements. Bearing in mind what we have already said in the case of State v. Thibedeaux, 10 South. Rep. 58, (at the present term,) further remark will appear to be superfluous. Affirmed.

(95 Ala. 579)

KYLE *et al.* v. PERDUE *et al.*

(*Supreme Court of Alabama.* Nov. 4, 1891.)

CANCELLATION OF DEED—FRAUD.

A conveyance by defendant, an aged woman, while very sick, to plaintiffs, who had been for years her confidential advisers in business affairs, by which she conveyed to them all her property to collect rents, etc., and out of the proceeds to keep the property in repair, pay taxes, etc., and pay the residue to defendant during her life, and at her death the remainder to be divided between them, will be set aside where plaintiffs' statements to defendant, at the time of making the instrument, as to the effect thereof, were that, as proposed by her, in consideration of the instrument, they were to support her during her life.

Appeal from chancery court, Etowah county; S. K. MCSPADDEN, Chancellor.

Bill by R. B. Kyle and others against Augusta E. Perdue and others to foreclose a mortgage, of which they claim to be owners under an instrument alleged to have been executed by defendant Mrs. Perdue. Decree ordering the delivery of the mortgage to defendants by the complainants, and the cancellation of the same. Complainants appeal. Affirmed.

W. H. Denson, for appellants. *Dortch & Martin*, *W. L. Whitlock*, and *Amos E. Goodhue*, for appellees.

WALKER, J. The original bill in this case was filed for the foreclosure of a mortgage, the ownership of which was claimed by the appellants R. B. Kyle and Sam Henry under a certain instrument alleged by them to have been executed by Mrs. Augusta E. Perdue on the 9th day of August, 1886. The case was in this court at a former term on an appeal from a decree sustaining demurrers to the bill. It was then held that, so far as the title to the mortgage and the right to sue on it were concerned, the instrument was not testamentary in character, but operated as a deed. It was decided that the demurrers had been improperly sustained. Kyle v. Perdue, 87 Ala. 423, 6 South. Rep. 296. After the remandment of the cause Mrs. Perdue interposed an answer and cross-bill, wherein she denied the rights set up by Kyle and Henry under the instrument of August 9, 1886, and asked that it be canceled, on the grounds (1) that her signature to it was made at a time when she was physically and mentally incapable of transacting business of any kind, so that in signing the instrument she knew nothing of its contents or of its import; and (2) that in the alleged execution of said instrument she did not act freely and understandingly, but that her signature to the same was procured by the fraud and undue influence of Kyle and Henry, who had long been her confidential friends and business advisers, and as such had great influence over her, which they abused by getting her to convey all her property to them at a time when she was prostrated by a serious illness, and when she did not understand the terms or effect of the instrument which she signed. That instrument cannot stand if either of the above-mentioned grounds of attack upon it is sustained by the evidence. The testimony of several witnesses, whose credibility does not seem to be affected by any improper bias, tends strongly to show that on the 9th of August, 1886, Mrs. Perdue was in no condition, mentally or physically, to attend to the disposition of her property. Two colored women who waited on Mrs. Perdue during her sickness described her condition at and about the time the paper was signed as one of extreme illness. It appears from their testimony that she was physically helpless, was out of her head, and was unable to transact any business. Mrs. Hosmer, who was a near neighbor of Mrs. Perdue, and was present when the instrument in question was signed, describes her as completely prostrated mentally and physically at that time, and says that her mind was not then strong enough to enable her to know and understand the business she was engaged in. Mr. Mower, a minister of the Protestant Episcopal Church, states that he had known Mrs. Perdue since 1850, and was for many years a friend of her deceased husband, who was a minister of the same church. He testifies that as minister he called to see Mrs. Perdue on the day the paper was signed, and that at that time her mind was seriously impaired, and that she was neither mentally nor bodily in a condition to attend to any business relating to the disposal of her property. Mr. Dortch, an attorney, states that on Sunday, the 8th of August, 1886, he was asked by R. B. Kyle to go to Mrs. Perdue's residence, Kyle stating that Mrs. Perdue wanted to dispose of her property, and wished the witness to draw the papers. Mrs. Perdue was found in a condition of such prostration that the business was postponed until next day. On the next morning Mr. Kyle again asked the witness to go to Mrs. Perdue's residence. The witness refused to go, at the same time telling Mr. Kyle that he had determined not to go back there, as it was his judgment and opinion that Mrs. Perdue was unable to dispose of her property, and that he would have nothing to do with drawing the papers. There was other evidence to support the allegation that Mrs. Perdue was at that time physic-

ally and mentally unfit to attempt the transaction of business. On the other hand, the witnesses introduced by the defendants to the cross-bill, including the physician who regularly attended upon Mrs. Perdue during her sickness, stated that she was competent to transact business, and that she was able to understand the instrument when she signed it. We are thus confronted with irreconcilable conflicts in the testimony upon the issue as to Mrs. Perdue's mental competency at that time.

In considering the evidence bearing upon the charge that Mrs. Perdue, in signing the instrument, was unduly influenced by Kyle and Henry, who abused the confidence which she reposed in them as her trusted friends and business advisers, it is material to ascertain at the outset the truth as to the relations existing between the parties. Kyle and Henry admit that they were on terms of intimate friendship with Mrs. Perdue, but deny that they occupied towards her any relation of special trust or confidence. From their own account of this matter the following state of facts is disclosed: Kyle and Henry were men of wealth, actively engaged in business pursuits. For many years prior to his death they were intimate personal friends of Dr. Perdue, who was a clergyman and a school-teacher. He frequently advised with them as to his business affairs. His means were invested in a residence in Gadsden, in railroad stocks and bonds, and in notes and mortgages. He had no children, and bequeathed all his property to his wife A few weeks before his death he told Mr. Henry that he wanted him to look after and care for his wife. This conversation Henry repeated toMrs. P erdue after her husband's death. After she became a widow both Henry and Kyle frequently advised her in regard to her business affairs. She had such confidence in them that she requested them to use money she had on hand, and pay her interest on it, as she preferred that disposition of it to any other investment. To satisfy her, each of them accepted some of her money in this way, giving their notes and paying the interest as it accrued. The box containing her valuables was kept in Mr. Henry's vault. He attended to getting the securities which her husband had left her transferred to her name, and looked after collections for her. She was an old woman, and it is plain that she regarded Kyle and Henry as her trusted friends; that she was in the habit of applying to them for advice in all business matters or troubles; and that they advised and assisted her whenever the occasion to do so was afforded. She had been quite ill for several weeks when, on August 8, 1886, Mr. Kyle called to see her in response to a message to the effect that she wished to see him on business. When he entered her room she said that she wanted to see him about her business. In the course of the conversation she said that she was very sick, and wanted to arrange her business before she got worse. She did not on that occasion state what disposition she wished to make of her property, but requested Mr. Kyle to bring Mr. Dortch to draw the papers. Kyle returned with Mr. Dortch during the afternoon of that day. At that time Mrs. Perdue was greatly prostrated, and stated that she was unable to attend to the business. She requested Mr. Kyle to bring Mr. Henry with him when he came again. Henry states that on the morning of August 9th Kyle said to him that Mrs. Perdue wished them to come to her house; that she wanted to make some disposition of her property. They accordingly went to her house that morning. Mr. Dortch having refused to go with them, they decided to take another attorney. The attorney who accompanied them had never spoken to Mrs. Perdue before that day. When her attention was called to his presence, and he spoke to her, she asked him if he was a lawyer. Both Kyle and Henry say that when they went to Mrs. Perdue's residence that morning they did not know what disposition she proposed to make of her property. From their own version of the circumstances attending their visit, it is plain that they understood that Mrs. Perdue wished to make some deposition of her property, and that she desired them to be present to see that the business was properly attended to. Mr. Henry says that when the instrument which she signed was read over to her she asked him if it was right. She sought and relied upon his advice, as she had often done before. In considering the transaction then had between Mrs. Perdue on the one hand, and Kyle and Henry on the other, due regard should be had to their attitude towards her as shown by their previous relations with her, and by the circumstances which led to their presence in her house on that occasion.

There are well-established rules to be applied in passing upon transactions between persons whose relations are such as to suggest that in dealings between them confidence is reposed and accepted to such an extent that one of them is subject to the influence or ascendency of the other. When such a relationship is shown to exist, if the one who was in a position to exert the influence claims the benefit of a contract with the person bestowing the confidence, the burden is cast upon the former to show affirmatively that the influence of his position was not unduly exerted; that the utmost good faith was exercised; and that all was fair, open, voluntary, and well understood. This rule as to the burden of proof is of familiar application to contracts by which benefits are conferred by a *cestui que trust* upon his trustee, by a ward upon his guardian, by a child upon his parent, by a client upon his attorney, by a patient upon his physician, or by any one upon his priest or spiritual adviser. Noble v. Moses, 81 Ala. 530, 1 South. Rep. 217; Dickinson v. Bradford, 59 Ala. 581; Malone v. Kelley, 54 Ala. 532; Boney v. Hollingsworth, 23 Ala. 690; Johnson v. Johnson, 5 Ala. 94; Marx v. McGlynn, 88 N. Y. 357; Huguenin v. Baseley, 2 White & T. Lead. Cas. 1156. The relations here mentioned are but instances in which the principle is applicable. It is not essential that any formal or technical relationship of a fiduciary char-

acter has been established between the parties. It suffices that they stand in such a relation to each other that, while it continues, confidence is justifiably reposed by one, and the influence which naturally grows out of that confidence is possessed by the other. When the parties are merely friends of each other, and deal upon terms of equality, the burden of showing the invalidity of any transaction between them is upon the one who assails it. But where their situation is such that, as a matter of fact, confidence is reposed on one side, and there is superiority on the other side, resulting from the influence acquired by the acceptance of the confidence bestowed, there is a presumption of undue influence to be rebutted by the superior party. Transactions between such persons may be entirely valid, but the one who is in a position to influence the other must show that the duty which he assumed by the acceptance of the confidence has been fully performed. Voltz v. Voltz, 75 Ala. 555; Shipman v. Furniss, 69 Ala. 555; Waddell v. Lanier, 62 Ala. 347; Ferguson v. Lowery, 54 Ala. 510; Cowee v. Cornell, 75 N. Y. 99; Billage v. Southee, 9 Hare, 534; Tate v. Williamson, L. R. 2 Ch. App. 55; Kerr, Fraud & M. (Bump's Ed.) 183; 2 Pom. Eq. Jur. §§ 956, 963; 8 Amer. & Eng. Enc. Law, 647-654. In the present case it appears from the testimony of the beneficiaries in the instrument which is assailed that the grantor therein had long been in the habit of seeking and relying upon their advice and assistance in reference to her business affairs; that the circumstances leading to their visit to her on the occasion when the instrument was signed were such as to make it plain that she looked to them to see that the disposition of her property which she desired was properly made; and that by the arrangement which she then suggested, and to which they fully assented, they formally assumed the position of trustees of all her property, with powers implying her unlimited confidence in their fidelity to her interests. It does not often happen that any of the familiar relations of a fiduciary character between adults beget in fact more of trust and confidence than the statements of Messrs. Kyle and Henry show that they were the recipients of on the occasion in question. We are satisfied that it is incumbent upon them to show that Mrs. Perdue signed the instrument voluntarily, deliberately, and advisedly, with full knowledge of its nature and effect; that there was an absence of all undue influence, advantage, or imposition; and that they did not in any way mislead her as to the meaning or operation of the paper prepared for her signature. Balkum v. Breare, 48 Ala. 75; Jackson v. Harris, 66 Ala. 565; Haydock v. Haydock, 34 N. J. Eq. 570; Gillespie v. Holland, 40 Ark. 28; Baker v. Monk, 4 De Gex, J. & S. 388; and authorities cited supra. Mr. Kyle states that Mrs. Perdue said to Mr. Henry: "I wanted to see you and Col. Kyle about the disposal of my property. They want me to give it to the church, but I do not want to do it. I know what I want to do with it. I want you and Col. Kyle to take charge of all my property, and take care of me while I live, and when I die I want you to pay all my debts, if any, and put a tombstone like the one over my dear husband's grave over my grave, and then I want the balance of my property divided equally between you and Col. Kyle, reserving to Bookie and Zeebie the lots set apart to them. Can I do it?" Col. Henry replied very promptly, "You certainly can, madam, if you desire to do it." Henry says: "When I went into her room I went up to her bed. I asked her how she felt. After answering me, she told me that she had sent for Mr. Kyle and me; that she wanted to give him and me everything she had in trust; that we were to look after her business and attend to her business. I won't be certain what other word she used. She said that she wanted to give it to me and Kyle square out, the property to be held by us during her life in trust for her support. This is all that I recollect now that she said before the paper was written." As to what occurred when the paper was signed, he says: "Capt. Cunningham read over the paper to her. She remarked that she wanted to give Kyle and me the property in trust. She seemed not to have grasped the idea of its being given in trust in the paper. It was then re-read to her. She then asked me if that was right, and I told her, if what she told me just before the paper was written was right, it was. She then took pen in hand, as above stated." And also, in reply to an inquiry as to what explanation was made by Cunningham: "The explanation given by him was that she gave her property to Kyle and Henry, but that they were to have it for her support." Henry called to see Mrs. Perdue after her recovery, and she then asked him as to the contents of the instrument which she had signed during her illness. He testifies: "I told her that in the paper she had given everything she had to Kyle and me; that we were to look after her and support her, and have the property in trust for that purpose; and that in the paper she authorized us to make a deed each to Bookie and Zeebie of an eighth of an acre each, with the houses where they lived. She asked me then if the interest on her papers would not support her, or, if she was to get sick again, how was she to be provided for. I told her that it was Kyle's and my duty under the deed to take care of her and support her." It is plain from the testimony of both Kyle and Henry that they understood that, by accepting the benefit of the instrument, they became bound to provide for the support of Mrs. Perdue during her life, without regard to the sufficiency of the income to be received by them from her property. They are careful to state that the money and supplies which they have furnished her were from their own means, and were not derived from the trust-estate. The instrument which was signed by Mrs. Perdue does not provide for such a disposition of her property as the statements of Kyle and Henry show was proposed and was understood to be effected. There is nothing in the instrument to impose upon the grantees any duty to care for or sup-

port the grantor during her life. They are only required to pay her so much of the income from the property as may be left after deducting all expenses for repairs and for all charges, taxes, and assessments. No provision is made for the payment of the grantor's debts, or for the erection of a tombstone over her grave. The trust for her support during her life does not extend to the property conveyed, but only to the income therefrom. Yet the trustees do not intimate that they understood that her claim upon the trust-estate for a support was to be limited to the income. That, however, is the extent of the provision in her favor. The effect of the instrument which was prepared and signed is that Mrs. Perdue strips herself of all beneficial interest in her property except as to the net income therefrom during her life, and that the grantees do not undertake to contribute one cent to her support, either from their own means or from the *corpus* of the trust-estate. If Mrs. Perdue signed the instrument on Henry's assurance that it was right, and that it conformed to her directions, it is plain that she acted under an entire misapprehension of its real meaning and effect. A comparison of the contents of the instrument with the statements by Kyle and Henry as to what was proposed and understood, leads inevitably to the conclusion that in signing the instrument Mrs. Perdue did not understand its contents. Henry's own statement shows that he misled her, whether he intended to do so or not. The grantees acquired greater benefits than were intended to be conferred, and they did not assume the obligations to which they consented. The disposition of her property which Messrs. Kyle and Henry say Mrs. Perdue expressed a desire to make was not effected by the instrument which she signed after being assured by Henry that the paper conformed to her directions. If that instrument is allowed to stand, the grantees thereby acquire all of the grantor's property, of every description, without becoming liable to secure to her the substantial advantages which were contemplated to be provided for in her favor by the arrangement which was proposed. The testimony of the grantees themselves shows that the grantor never intended to make such a disposition of her property as is embodied in the instrument which she signed. In view of the relations of trust and confidence existing between the parties, and of the evident reliance by the grantor on the false assurances of one of the grantees, an instrument, the provisions of which fall so far short of the grantor's understanding of its operation in her favor, cannot prevail against her impeachment of it. The result is that, accepting the version of the transaction as detailed by the parties who assert its validity, it must, upon their own statements, be pronounced invalid. It is therefore unnecessary to pass upon the conflicts in the testimony upon the issue as to Mrs. Perdue's mental competency at the time she signed the instrument. It is urged that, by accepting money and supplies from Kyle and Henry, Mrs. Perdue ratified the invalid instrument. It is plain that she had no intention to ratify it. She was asserting its invalidity in the courts. Her adversaries, by the active assertion of their claim, had succeeded in cutting her off from the enjoyment of the income from her property. She received their contributions towards her support during the pendency of this suit, and while she was under the stress of want, caused by the withdrawal of her accustomed means of livelihood. On one of the receipts which was presented for her signature she wrote, "I take this money because I am starving." Receipts given in such circumstances are entitled to no weight as evidence of a free consent to confirm the voidable transaction. The evidence by no means shows that the alleged acts of ratification were free, voluntary, and well understood. Voltz v. Voltz, 75 Ala. 567; Thompson v. Lee, 31 Ala. 292; Butler v. Haskell, 4 Desaus. Eq. 651; 2 Pom. Eq. Jur. § 964. We discover no error of injury to the appellants in the decree of the chancery court. Affirmed.

(28 Fla. 511)

ADAMS v. STATE.

(*Supreme Court of Florida.* Nov. 28, 1891.)

HOMICIDE — INDICTMENT — PLEADING — CHANGE OF VENUE — EVIDENCE — INSTRUCTIONS — CONDUCT OF TRIAL.

1. In an indictment for murder it is essentially necessary to set forth particularly the manner of the death and the means by which it was effected; but in stating the facts which constitute the offense no technical terms are required, and an averment of the manner and means by which the deceased came to his death, in concise and ordinary language, and in such a way as to enable a person of common understanding to know what was intended, is sufficient.

2. It is within the discretion of the trial court to allow a plea of not guilty to be withdrawn for the purpose of pleading in abatement.

3. A plea in abatement alleging that two members of the grand jury that found an indictment against an accused were not legally registered voters, and that the illegality of their registration consists in the fact that they were not registered within the time prescribed by the general election law, but were registered, or their names placed upon the registration books, within the time prescribed by chapter 3577, Laws Fla., being an act to provide for the election of delegates to the constitutional convention held in 1885, *held*, that the plea is not good, for the reason that persons duly registered under said act were as duly-registered voters of the county as those who registered under the general election laws.

4. An application for a change of venue is addressed to the sound discretion of the court, and its ruling refusing the change will not be disturbed, unless it appear from the facts presented that the court acted unfairly, and abused a sound discretion.

5. The refusal of the court to grant a change of venue, where the application is based upon the grounds that a fair and impartial trial cannot be had in a county, and that the accused is odious to the inhabitants thereof, and supported by the uncorroborated affidavit of the accused, although the facts therein stated, if true, are sufficient to require the change, will not be reversed on writ of error, in the absence of anything to show that the decision of the court was not based upon the insufficiency of the proof of the facts alleged in the affidavit, and that the accused was not prevented from getting corroborative evidence by hostile public sentiment.

6. A party has no right to cross-examine a witness, except as to facts and circumstances connected with the matters stated in his direct examination; and if he wishes to examine the witness as to other matters he must do so by making the witness his own.

7. An accomplice, jointly indicted, and as to whom the indictment has not been disposed of, can testify on behalf of the state against his co-defendant on a separate trial; and in such case the wife of the accomplice is a competent witness for the state.

8. A map, diagram, or picture, whether made by the hand of man or by photography, verified as a correct representation of physical objects about which testimony is offered, and which does not contain thereon indications of matters and things in question before the jury, and not a part of the physical objects when the map, diagram, or picture was made, is admissible in evidence for the use of witnesses in explaining their evidence, and to enable the jury to better understand the case.

9. Under the defense of an *alibi* it is sufficient if there is enough evidence to produce in the minds of the jury a reasonable doubt as to the presence of the prisoner at the scene of the killing. The evidence of an *alibi* need not make it impossible for the prisoner to be present at the killing, nor is it required that such evidence be absolutely clear; but it is sufficient if it raises a reasonable doubt in the mind of the jury, from all the circumstances of the case, whether or not the accused was present at the killing.

10. It is the province of the court to pass upon the admissibility of the evidence, but, when admitted, its credibility and weight are questions for the jury. The trial judge, under our system, is prohibited from intimating to the jury his views as to the effect, weight, or credibility of any testimony before him.

11. A charge to the jury that, "when proof of an *alibi* is attempted, and proven to the satisfaction of the jury, it is conclusive of the case. When it is attempted, and the proof to sustain it is not satisfactory, the failure to prove it satisfactorily is a circumstance unfavorable to the defendant, but it is no more so than an attempt to clear himself by any other false or fabricated testimony,"—*held* to be erroneous.

12. It is not proper for a trial judge to state in his charge to the jury the facts of a case decided by our supreme court, and then submit to them the question whether or not that case and the one under consideration are parallel. Such a course would not be giving the law of the case, but would leave the jury to form notions of the law by a comparison of the two cases.

13. Under an indictment for murder in the first degree, the question of premeditation is one of fact, to be ascertained by the jury from the facts and circumstances of the case. The law does not presume malice or premeditation from the fact of killing, but such state of mind is to be ascertained by the jury from the circumstances surrounding the killing.

14. In a capital case the prisoner must be present during the trial, and no steps can be taken by the court in his absence.

(*Syllabus by the Court.*)

Error to circuit court, Columbia county; JOHN F. WHITE, Judge. Reversed.

Indictment of William Adams for murder. From a conviction of murder in the first degree defendant brings error.

B. B. Blackwell and *A. J. Henry*, for plaintiff in error.

MABRY, J. William Adams, the plaintiff in error, Ike Spanish, and T. P. Bethea, were jointly indicted on the 26th day of February, A. D. 1891, at a term of the circuit court for Columbia county, Fla., for the murder of James Moore. Adams was indicted as principal in the first degree, Spanish as principal in the second degree, and Bethea as accessory before the fact.

It is charged in the indictment (the formal parts omitted) "that William Adams, Ike Spanish, and T. P. Bethea, late of said county, laborers, on the 19th day of January, A. D. 1891, at and in the county, circuit, and state aforesaid, with force and arms did then and there unlawfully, feloniously, and of their malice aforethought, and from a premeditated design to effect the death of a human being, make an assault upon one James Moore. And the said William Adams, with a certain double-barrel shotgun, then and there loaded with gunpowder and leaden balls, commonly called 'buckshot,' and by him, the said William Adams, then and there had and held in his two hands, did then and there unlawfully, feloniously, and of his malice aforethought, and from a premeditated design to effect the death of him, the said James Moore, shoot off and discharge at, to, against, and upon the body of him, the said James Moore, thereby and by thus striking the body of him, the said James Moore, with the said leaden bullets, commonly called 'buckshot,' so shot off and discharged out of the double-barrel shotgun aforesaid, unlawfully, feloniously, and of his malice aforethought, and from a premeditated design to effect the death of him, the said James Moore, inflicted then and there in and upon the chest and belly of him, the said James Moore, three mortal wounds, each of the depth of six inches and of the breadth of one-quarter of an inch, of which said mortal wounds the said James Moore then and there instantly died.

"And the jurors aforesaid, upon their oaths aforesaid, do further say that the said Ike Spanish then and there unlawfully and feloniously, and of his malice aforethought, and from a premeditated design to effect the death of the said James Moore, was then and there present, aiding, abetting, helping, comforting, assisting, and maintaining the said William Adams, the murder of him, the said James Moore, in manner and form aforesaid, to do and commit.

"And the jurors aforesaid, upon their oaths aforesaid, do further say that the said T. P. Bethea did then and there unlawfully, feloniously, and of his malice aforethought, and from a premeditated design to effect the death of him, the said James Moore, incite, move, aid, counsel, hire, abet, assist, procure, and command the said William Adams, the murder of him, the said James Moore, as aforesaid, in manner and form aforesaid, to do and commit.

"And so the jurors aforesaid, upon their oaths aforesaid, do say that the said William Adams, Ike Spanish, and T. P. Bethea, the said James Moore, then and there, in manner aforesaid, and by the means aforesaid, unlawfully, feloniously, and of their malice aforethought, and from a premeditated design to effect the death of him, the said James Moore, him, the said James Moore, then and there did kill and murder, against the peace and dignity of the state of Florida, and contrary

to the form of the statute in such cases made and provided."

Adams and Spanish were in custody when the indictment was presented in court, and, so far as the record shows, Bethea has not been arrested.

On motion of the state a severance was granted, and William Adams, the plaintiff in error, after arraignment and plea, was tried and convicted of murder in the first degree. Motions in arrest of judgment and for a new trial were overruled, and by judgment of the court the sentence of death was passed upon this accused. From this judgment a writ of error was taken to this court.

The first and second assignments of error call in question the sufficiency of the indictment, are in substance the same, and will be considered together. Before arraignment and plea the plaintiff in error moved to quash the indictment, (1) "because it alleged a premeditated design to effect the death of a human being, without naming the deceased as the person whose death was intended to be effected through the premeditated design alleged; (2) because said indictment is argumentative, and states a conclusion, and does not allege in positive terms that the deceased was struck and penetrated by the means alleged to have caused his death; (3) because said indictment is vague, indefinite, and uncertain, and calculated to embarrass the defendant in his defense." The overruling of this motion is the first error assigned. After verdict, a motion in arrest of judgment, alleging substantially the same defects in the indictment, was denied, and this is presented as the second error. We do not think the court committed any error in overruling the motions to quash the indictment and in arrest of judgment. As will be seen by reading the indictment, the principal allegations of which are given above, three persons are jointly indicted,—one as committing the felonious act, a second as present, aiding and abetting, and a third as inciting, counseling, hiring, and procuring the commission of said act. It is true, as contended, that the indictment states that the three persons named did, with the intent and in the manner alleged, with the design to effect the death of a human being, make an assault upon one James Moore; but, taking the indictment together, we think it is clear that the person whose death was designed to be effected was James Moore. If the words, "to effect the death of a human being," be discarded as surplusage, the averment would be positive and direct that the accused, with force and arms, did then and there unlawfully, feloniously, and of their malice aforethought, and from a premeditated design, make an assault upon one James Moore. Another objection urged to this indictment is that it is argumentative, and does not allege in positive terms that the deceased was struck and penetrated by the means alleged to have caused his death.

It is essentially necessary in an indictment for murder to set forth particularly the manner of the death and the means by which it was effected. The facts which constitute the offense must be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an offense or not, and also the character or species of offense they do constitute, to enable him to prepare his defense, to plead a conviction or acquittal in bar of another prosecution for the same offense, and that there may be no doubt as to the judgment which may be given in case of conviction. In alleging offenses created by statute the language of the statute, of course, must be employed. In stating the facts and circumstances which constitute the offense no technical terms are required to be employed, but an averment of the means and the manner by which the deceased came to his death, in concise and ordinary language, and in such manner as to enable a person of common understanding to know what is intended, is sufficient. In the case of Pittman v. State, 25 Fla. 648, 6 South. Rep. 437, the indictment charged that the defendant, "in and upon one George H. Hughes, with a certain deadly weapon, to-wit, an open knife, which he, the said Edward F. Pittman, was then and there armed, feloniously, willfully, and of his malice aforethought did make an assault, and the said George H. Hughes in and upon the right side of the neck of him, the said George H. Hughes, then and there with the knife aforesaid, and by cutting, stabbing, and wounding, feloniously, willfully, and of his malice aforethought, to kill and murder;" and it was held that, while the indictment was not artistically drawn, there was in it enough to show that Pittman was the party doing the cutting, and that Hughes was the party cut, and that the indictment shows by whom the assault was made, how it was made, and upon whom it was made. The averments in the indictment before us are not as direct and positive as they could be made, still we think they are sufficient to show that the plaintiff in error did unlawfully, feloniously, and with a premeditated design to effect the death of James Moore, shoot off and discharge at, to, against, and upon the body of the said James Moore, a certain double-barrel shotgun held by the accused, and loaded with gunpowder and leaden balls, and by striking the body of the said James Moore with said leaden balls, so shot out of the gun aforesaid, inflicted three mortal wounds upon the body of the said James Moore, at the place mentioned, and in the manner alleged, in the indictment, and of which said mortal wounds the said James Moore did then and there instantly die. The allegations here are sufficient to inform the accused of the nature of the offense intended to be charged, and the manner of its commission. In the event of conviction or acquittal the accused would find no difficulty in pleading successfully the judgment in bar of a second prosecution.

The action of the court in overruling the motion of defendant, Adams, to withdraw his plea of not guilty, and plead in abatement, is assigned as error. The indictment was presented in court on the 26th day of February, A. D. 1891, during a

regular term of court, but the trial was not had until a special term of the court, beginning on the 23d day of March, A. D. 1891. Before the adjournment of the regular term the state's attorney moved for the arraignment of the defendant, Adams, to which he objected, for the reason that, as the case had to go over until the special term, he desired until that time to examine the record, and ascertain as to the legality of the organization of the grand jury that found the indictment; his counsel also stating that they were not then prepared to plead to the indictment. The court ruled that the defendant should then be arraigned, which was done, and he pleaded not guilty. At the special term the defendant, Adams, moved the court to allow him to withdraw his plea of not guilty, and to be allowed to interpose a plea in abatement of the indictment, at the same time presenting his plea, properly sworn to before the clerk of the circuit court of Columbia county. The court refused this motion. The action of the court requiring defendant, Adams, to plead at the regular term, and the refusal to allow him to withdraw his plea of not guilty, and plead in abatement at the special term, are both assigned as error.

It is within the discretion of the circuit court to allow a plea of not guilty to be withdrawn for the purpose of pleading in abatement. This court has recognized this right in the case of Savage v. State, 18 Fla. 909, and it is unnecessary for us to cite the numerous authorities sustaining the position. In the Savage Case it is said by Chief Justice RANDALL: "It may have been within the discretion of the court to permit the accused to withdraw the plea of not guilty for the purpose of pleading abatement, but such discretion should never be reviewed or set aside." It would seem from this language that the exercise of the discretion of the court in such matters is not subject to review. It does appear, however, that the court in the same case looked into the merits of the plea in abatement tendered, and held that the court did not err in refusing the motion to withdraw the plea in bar, and for leave to plead in abatement. Without stopping to settle the question whether or not the decision in the Savage Case precludes a review of the discretionary powers of the circuit court in such matters, we proceed to inquire into the merits of the plea in abatement tendered. It follows, of course, that, if the plea is not good, no harm has been done the plaintiff in error in forcing him to plead before an opportunity was given to look into the validity of the indictment. The plea sets up the fact that two members of the grand jury that found the indictment were not legally registered voters of Columbia county, and the illegality of their registration is alleged to exist in the fact that the registration books of Columbia county show the parties to have been registered, or their names placed on the registration books, on the 14th and 23d days of April, A. D. 1885. It is contended by the plaintiff in error that the two jurors named in the plea did not register within the time prescribed by the general election law, but they did register within the time prescribed by the special act of the legislature, (chapter 3577, Laws Fla.,) providing for the calling of a constitutional convention. The second section of this act provides that "there shall be held throughout the state, under the provisions of the election laws of the state, on the first Tuesday in May, a general election for delegates to said convention, which shall consist of one hundred and eight members, apportioned among the several counties and senatorial districts, in accordance with the present representation in the legislature; that the registration books of the several counties be opened in the various precincts for the registration of voters not now legally registered from the first Monday in April, 1885, to ten days next preceding the election; and that the clerk of the circuit court appoint registration officers for such precincts." The effect of this act was to open the general registration books within the time mentioned for the registration of all voters legally entitled to registration and not already registered; and when persons were registered, and their names placed upon the general registration books, under and by virtue of this act, they were as much legally registered voters as any others whose names appeared upon the books. The legislature had the power to direct the opening of the books for general registration at any time, and it was the purpose of the act of 1885 to open the general registration books from the first Monday in April, 1885, to 10 days preceding the first Tuesday in May, 1885. The fact that the registration permitted at that time was for the purpose of voting for delegates to the constitutional convention makes no difference. The election for such delegates was held under the provisions of the general election laws, and the registration books used for this election were the same used for all general elections. There was nothing in the plea to show that the jurors named were not legally registered voters of Columbia county; and, conceding that we have the power to review the action of the court in refusing to allow the plea to be interposed, it follows that the court did not err in so doing. There is nothing in the case of State v. Commissioners, 20 Fla. 859, in conflict with the conclusion here reached.

The refusal of the court to grant a change of venue to the defendant, Adams, is assigned as error.

The accused, Adams, before the beginning of the trial at the special term, made a motion for a change of venue on the grounds that a fair and impartial trial could not be had in Columbia county by reason of extreme prejudice of the inhabitants of that county against him, and because he was odious to such inhabitants. In support of this motion the accused presented to the court his own affidavit, uncorroborated by the affidavit or sworn testimony of any other person. In his affidavit the accused stated that the murder for which he was indicted was an assassination, the deceased having been shot down in his own house in the presence of

his family; that several days after the killing, one Ike Spanish was arrested on suspicion, and under threats of his life if he did not confess and implicate others, and also under promises of protection if he would divulge, he confessed to a participation in said murder, and implicated accused, as principal in the crime, and one T. P. Bethea, as accessory before the fact; that thereupon the accused, Adams, was arrested on said charge, and bound and held in chains, and a large and excited crowd of people, with rifles, shotguns, pistols, and other weapons, assembled around him and threatened to lynch him; that accused verily believed from the demonstrations of violence on the part of said people that he was in imminent danger of being lynched, and that he would have been lynched with said Spanish but for the fact that the other person implicated had not been arrested; further, that in February, 1889, one Keene was assassinated in Columbia county by some unknown person, in a manner similar to the way in which the person was killed for which he now stands indicted, and that he was suspicioned of the murder of said Keene, but which was without foundation, except said accused at the time of Keene's death was in a controversy with him; that at the fall term, 1889, of the circuit court for Columbia county, said accused was indicted for the murder of Keene, and at the said term of the court eight other indictments were presented by the grand jury of said county against him, one of which was for personal violence on said Keene in his lifetime; that of the said nine indictments against him four were tried and verdicts of acquittal rendered, and the others were dismissed on the part of the state; that while said accused was entirely innocent of either of the crimes charged against him, nevertheless the finding of said indictments, all at one term of court, and the arrest and arraignment of said accused thereon, had the effect to greatly prejudice the public mind against him throughout the county, and render him extremely odious. The accused further states in his affidavit that the confession of the said Ike Spanish, implicating him, was published in two newspapers in Columbia county, and this had the effect to further prejudice, excite, and irritate the public mind against him. Copies of the papers giving an account of the confession made by Ike Spanish and the arrest of the accused, Adams, are attached to the affidavit as a part of it. The publications in the newspapers give an account of the killing of James Moore, the public indignation manifested over it in the neighborhood where it occurred, and a determined purpose on the part of the people by diligent search and investigation to find out the perpetrators of such a crime. From the newspaper accounts it appears that there was much excitement in the neighborhood of the deceased, and for miles around, over his death. In the accounts published there is no advice given to deny the parties implicated a fair and impartial trial in the courts of the country. One of the papers particularly cautions the people to act deliberately, and to give the accused a right to be heard, and a fair and impartial trial. The accused further states in his affidavit that, by reason of the newspaper publications and the other matters stated in his affidavit, the public mind was inflamed against him, and that by reason thereof, at the request of the governor of the state, he was transferred from Columbia county to Duval county in this state, to prevent his being lynched; that at the last term of the court, which was about three weeks prior to the presentation of the application for a change of venue, when the accused asked for a continuance of the prosecution against him, there were many rumors afloat that, if said continuance was granted, accused would be lynched, and but for the fact that a special term of the court was ordered to convene in a short time for the trial of the accused he is satisfied that said threats would have been put in execution; that since the assembling of the court it has been made known to the counsel for accused that there is an organization now in force for the purpose of lynching him in the event of his acquittal or conviction, claiming as a justification for their unlawful purpose that, if the accused be acquitted, it will be a wrongful acquittal, and, if he is convicted, instant execution should take place in order to prevent an appeal to a higher court; that by reason of such matters the public mind is greatly prejudiced against the accused, and it will be impossible to secure a jury in said county to try him uninfluenced thereby.

The state made no counter-showing, and on the motion and affidavit of the accused the court refused to change the venue. We have duly considered this application of the accused for a change of venue, and have reached the conclusion, on the showing made, the verity of the facts stated appearing only by the uncorroborated affidavit of the accused, that we cannot disturb the action of the court. It is true that the constitution guaranties to every person under a criminal prosecution a trial by an impartial jury, and by statute it is provided that when it shall appear to the satisfaction of the trial court by affidavit that a fair and impartial trial cannot be had in the county where the offense is committed the court shall direct that the accused be tried in some other county, where a fair and impartial trial can be had. It is said in the decisions that the principles which should guide the trial court in such matters are simple. If it be shown to the reasonable satisfaction of the court that an impartial trial and an unbiased verdict cannot be reasonably expected, the venue ought to be changed. Posey v. State, 73 Ala. 490. To grant an accused less than this would deprive him of a right given, under our system, both by the constitution and statute. As has been well expressed in the case of Seams v. State, 84 Ala. 410, 4 South. Rep. 521: "These provisions have in view not only the object of securing a just verdict, but a just mode of procedure in obtaining it." In Florida, however, such matters are, to a large extent, committed to the trial court;

not absolutely so, because its decision is subject to review here. An application for a change of venue is addressed to the sound discretion of the court, and its ruling refusing the change will not be disturbed unless it appear from the facts presented that the court acted unfairly, and was guilty of a palpable abuse of sound discretion. McNealy v. State, 17 Fla. 198; Irvin v. State, 19 Fla. 872. Before us there is nothing to overrule the action of the court in refusing the change, except the uncorroborated affidavit of the accused. If we consider the extracts from the newspapers in connection with the affidavit, they do not show, independent of what the accused swears, that the public prejudice against him is such that he cannot obtain a fair trial in the county. Neither do we think that because there was applause in the court-room during the argument of the state's attorney it is shown that a fair and impartial jury had not been obtained in the county. The application here for a change of venue, based, as it is, on the ground that the public mind was so prejudiced against the accused, and that he was so odious, that a fair and impartial trial could not be had in Columbia county, if sustained, must be upon the unsupported affidavit of the accused. We think it would be unsafe to announce such a rule on such a showing. Counsel for plaintiff in error have referred us to no case, and we have been unable to find any, where the discretionary action of the trial court has been set aside on such showing. In the affidavit before us it is shown that the accused has been in custody, and most of the time out of the county, since he was suspected, and hence his means of knowing the public sentiment in the county must be by information derived from others. Nor does it appear that he has made any effort to get corroborative evidence of his statement, and had been prevented from getting it by reason of hostile public sentiment. We do not intimate that what he has stated, if true, is not sufficient to entitle him to a change of venue, but we do say that in a case like this we are unwilling to disturb the decision of the trial court, which may have been based upon the insufficiency of the proof of the facts alleged, without further showing than the uncorroborated affidavit of the accused. To hold otherwise would permit every accused to obtain a change of venue at his pleasure, or force the trial judge, on such *ex parte* showing, however groundless the application may appear to him, to suspend the regular business of the court, and inquire into the public sentiment in the county in reference to the accused.

It is alleged for error that the court sustained the state's objection to the question propounded to Mrs. Moore, the wife of the deceased.

The ruling of the court was based upon the ground that the question was not in cross-examination of anything brought out by the state on the examination in chief. The rule stated by Greenleaf, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination, and, if he wishes to examine him as to other matters, he must do so by making the witness his own, is recognized in this state. 1 Greenl. Ev. § 445; Savage v. State, 18 Fla. 909. In the examination in chief of Mrs. Moore she was asked about the killing of her husband, but stated nothing in reference to the defendant. She knew that her husband was shot down in his house just after dark, but she did not see the person who shot him. There is nothing in her examination which, under the rule, entitled the defendant to examine her on the cross as to the relations between her husband and the defendant, and the court did not err in sustaining the objection. In this connection we will consider the assignment of error based upon the ruling of the court sustaining the objection of the state's attorney to the question asked the witness Andrew Spanish, who was introduced as a witness for the state, and testified that in the evening of the night the deceased was killed he was in the field with his father, mother, and sister, and that the accused, Adams, came in the lane, and called him and his father; that they went to the accused in the lane, and the witness gave him a gun; and that the accused and witness' father went towards the river. On cross-examination the witness was asked if he knew where his father went that evening, and the court excluded the question, on the ground that it was not in cross of anything brought out in chief. This ruling was not correct. The father had testified that he and the accused went to Moore's house that evening, and just after dark the accused shot Moore. Andrew Spanish was put on the stand to corroborate the father in his testimony. He says that he saw his father and the accused together in the lane, and saw them go towards the river. It was proper on the cross to prove by this witness, if he knew, where his father went that evening, and the inquiry as to his knowledge of this matter was preliminary to such examination. Savage v. State, supra.

Another ground of error is that the court erred in permitting the witness Hanks to testify as to statements made to him by the accused.

It appears from the record that the witness Hanks was present when the accused was arrested, and heard him say where he was at the time Moore was shot. Hanks was not an officer, and no threats were made against the accused, or promises held out to him, at the time of his statement. The court ruled that the statements of the accused as to his whereabouts at the time of the homicide could be proved by the state. In this, we think, the court was correct. Newton v. State, 21 Fla. 53.

It is assigned for error, and contended here, that the court erred in allowing Ike Spanish, an accomplice, and jointly indicted with the accused, Adams, to testify against him.

As has already been stated, Adams and Spanish were jointly indicted—the one as principal in the first degree, and the other as principal in the second degree—for the murder of James Moore.

After a severance, procured at the instance of the state, Spanish was tendered as a witness on the part of the prosecution against Adams, and was permitted to testify over his objection. We do not understand that the objection goes to the extent that no accomplice can testify under any circumstances against his associate in crime, but that an accomplice, jointly indicted, and as to whom the indictment has not been disposed of, cannot testify as a witness against his co-defendant, whether the trial be joint or separate. It has been announced in several cases decided by this court that an accomplice is a competent witness against an accused on trial. Sumpter v. State, 11 Fla. 247; Keech v. State, 15 Fla. 591; Bacon v. State, 22 Fla. 51; Tuberson v. State, 26 Fla. 472, 7 South. Rep. 858. In Tuberson v. State, supra, although it is said that an accomplice is a competent witness, and a conviction upon his testimony may be sustained, yet there was no such evidence in the case. In Sumpter v. State, supra, the accomplice who testified was not under indictment; and in Bacon v. State, supra, although the accomplices who testified were jointly indicted, no objection was made by the defendants on trial to such testimony. In Keech v. State, supra, the accomplice who testified for the state was jointly indicted with the party against whom the evidence was given, and it appears from the record that the defendant objected to the accomplice testifying. It is contended that at common law a party to the record was incompetent as a witness for himself, or for or against a co-defendant, and that in criminal cases such disability has not been removed in this state by statute. At common law, when two persons were jointly indicted, neither was admissible as a witness for his co-defendant, and this rule obtained whether they were tried jointly or separately. If during the trial no testimony should be developed against a defendant, and the state refuses to dismiss as to him, the court has the power, and it would be its duty, to submit his case first to the jury, and after acquittal he can testify for the other defendant. State v. Roberts, 15 Mo. 28; Shay v. Com., 36 Pa. St. 305; State v. Jones, 51 Me. 125; Moss v. State, 17 Ark. 327; People v. McIntyre, 1 Parker, Crim. R. 371; State v. Bruner, 65 N. C. 499; Rex. v. Rowland, Ryan & M. 401; Com. v. Marsh, 10 Pick. 57; People v. Bill, 10 Johns. 95; Foster v. State, 45 Ark. 328; 1 Bish. Crim. Proc. §§ 1020, 1021. As parties jointly indicted in the same record cannot be called as witnesses to testify for each other, whether tried jointly or separately, it is contended that an accomplice jointly indicted with another cannot be used by the state as a witness against his co-defendant until the case has been disposed of as to the accomplice who proposes to testify. The case of Edgerton v. Com., 7 Bush, 143, sustains fully this position. The decision in the case of State v. Chyo Chiagk, 92 Mo. 395, 4 S. W. Rep. 704, cited by counsel for plaintiff in error, is based upon a statute. Section 1079, 1 Bish. Crim. Proc., at first glance, seems to sustain this view. It is here stated that, "if two persons are jointly indicted, neither of the defendants can be a witness for or against the other, even though not tried together, until the case is disposed of, either by the conviction or acquittal of the defendant whose testimony is to be used, or by the entry of *nol. pros.* as to such defendant. One method of procedure, therefore, when there is pending such a joint indictment, and one of the defendants is to be admitted as state's evidence against the other, is to let such defendant plead guilty; then, before sentence, he is a competent witness." This author is stating one method of procedure in obtaining the testimony of accomplices, but he does not say this is the only method. In considering this question it is important to distinguish between the weight or effect of such evidence, and the admissibility of it, and also the difference between the right of either the state or the defense to compel a party to testify and disclose what he knows not criminative of himself, and the testimony of a party who criminates himself and also furnishes evidence for the purpose of bringing others to justice. The true view of the matter, we think, is that the right of the state to examine a party who volunteers testimony not only against himself, but others, is founded upon an exception to the common-law rule excluding parties to the record. Mr. Greenleaf, in section 379, says that "the admission of accomplices as witnesses for the government is justified by the necessity of the case, it being often impossible to bring the principal offenders to justice without them. The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference, as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime." It is stated in 2 Hawk. P. C. p. 603, § 91: "It hath been often ruled that accomplices who are indicted are good witnesses for the king until they be convicted." Vide, also, 1 Rosc. Crim. Ev. p. 198; Whart. Crim. Ev. § 439; Wixson v. People, 5 Parker, Crim. R. 119; Carroll v. State, 5 Neb. 31; Best, Ev. § 170. The rule stated by Mr. Greenleaf in the section mentioned above we think is the correct one at common law, and that the witness Ike Spanish is competent to testify against the accused; his testimony to be weighed as that of an accomplice. It was held in the case of Keech v. State, supra, that a principal in crime before conviction of felony was a competent witness against his associate on a separate trial. We think that conclusion was correct, according to the principles of the common law. The right of the accomplice to testify at common law was not absolute, but rested within the discretion of the court to admit him or not, as was deemed proper. Rex. v. Rudd, 1 Cowp. 331; Charge of ABBOTT, C. J., Trial of Thistlewood, 33 State Tr. (1817–1820,) 683–690; People v. Whipple, 9 Cow. 707. Judge RANDALL says in the Keech Case that "the act of March 15, 1843, (Thomp. Dig. 335,) provides that 'no person shall be deemed an incompetent witness by reason of having committed any crime unless

he has been convicted thereof in this state;' and it follows that it is not within the discretion of the court in this state to admit or reject the witness, for he is by express statute a competent witness." If the statute mentioned has made an accomplice jointly indicted a competent witness before conviction, then it would seem that all defendants are competent witnesses before conviction,—a result which we do not concede without further consideration. We follow the decision in the Keech Case, because we think it correct, according to common-law practice.

It is also contended that Charity Spanish, wife of Ike Spanish, is an incompetent witness.

The ground urged for her exclusion is that she is the wife of Ike Spanish, the person jointly indicted with the defendant, Adams. We have just seen that Ike is a competent witness. If he is competent, she is also competent, and there was no error in permitting her to testify. Wixson v. People, 5 Parker, Crim. R. 119; Whart. Crim. Ev. § 391.

Another assignment of error is that the court permitted the map made by one Brown to be exhibited to the jury and put in evidence on the part of the state.

A map, plan, or picture, whether made by the hand of man or by photography, if verified as a true representation of the subject about which testimony is offered, is admissible in evidence to assist the jury in understanding the case. They are frequently formally admitted in evidence, and, in so far as they are shown to be correct, are proper for the consideration of the jury, not as independent testimony, but in connection with other evidence, to enable the jury to understand and apply such evidence. In State v. Lawlor, 28 Minn. 216, 9 N. W. Rep. 698, diagrams of the premises where a homicide was committed, made from actual measurements, and verified by the party who made them as correct, except that the position of certain chairs, tables, and movable objects in the house on the night of the homicide was indicated thereon upon information given him by the keeper of the house, were used on the trial. These diagrams were not formally offered in evidence, but the witnesses in giving their evidence were allowed to refer to them to explain their testimony. Held, that there was no error in this. Maps or diagrams, shown to be correct representations of physical objects about which testimony is given, can be exhibited before the jury, and witnesses will be permitted to use them in explaining their evidence. Blair v. Pelham, 118 Mass. 420; Shook v. Pate, 50 Ala. 91; Vilas v. Reynolds, 6 Wis. 214; Moon v. State, 68 Ga. 687; Udderzook v. Com., 76 Pa. St. 340; Ruloff v. People, 45 N. Y. 213; State v. Knight, 43 Me. 11, 130. In section 545 of Wharton's Criminal Evidence, it is stated that authenticated plans or diagrams of the *locus in quo* are admissible. But such a plan ought not to contain any references to matters before the jury when such matters were not existing when the survey was made. The map introduced in evidence in the case before us was made by John V. Brown. He testified that he was familiar with the country and locations indicated on the map, and that the measurements were correct. So far as being a diagram of the country, including the roads, houses, fields, and fixed objects between the residences of the deceased and the accused, we think the map was sufficiently verified to admit it in evidence. There are some indications on the map which we think are improper, and the state should not have introduced it in evidence with these indications on it. The witness Ike Spanish testified that the accused killed Moore, and that he, Spanish, was present. In his testimony he gave a description of the route traveled by himself and the accused to where Moore was killed. On this map is traced distinctly in large lines a route, and there is written along it, "Ike Spanish's route." Another witness, Sandy Sheffield, testified that on the evening that Moore was killed he was splitting rails at a point near where Ike Spanish said he and the accused passed, and that he (witness) saw the accused going that way. There is marked on the map the words, "Sandy Sheffield was here," and also a designation on the map of where "Will Adams" was. Ike Spanish did not take the map and trace the route in explanation of his testimony; neither did Sandy Sheffield mark on the map where he was, and where he saw Will Adams passing along; but it appears that Mr. Brown put these indications on the map. It also seems that the map was introduced in evidence after Spanish and Sheffield had testified. We think a map or diagram of the country in its physical condition at the time can be put in evidence, and any witness, in giving testimony as to localities, can indicate on the map the relative position of things or persons. But for a person who knew nothing of these matters, except what he heard from others, to designate the movements of persons on the map would be testimony of a secondary character, and improper to be admitted.

On the subject of an *alibi* the judge charged the jury as follows, viz.: "If you find from the evidence and are satisfied the defendant was not present when the deceased was killed, you must find him not guilty. To make the defense of an *alibi* available as defense the evidence of its existence must cover the whole time when the presence of the defendant was required. You must determine from the evidence whether the defendant has proven that he was not present when Moore was killed or not. If you have a reasonable doubt in your minds as to whether he was present at the time Moore was killed, you should find him not guilty. *When the defense of an alibi is clearly proven by reliable and truthful evidence it is, of all others, the most decisive, because it is impossible for a man to be in two separate places at the same time. The evidence must be such as to render it impossible that the crime could have been committed by the person that claims that he was not present, and that he could not be guilty as charged.* The evidence in support of it and against, as well as all the other evidence in the case, demands your most careful and thoughtful consideration." The portion of

the charge in italics was excepted to by the accused.

We think the proposition of law stated in the first clause of this charge is proper; that is, to the effect that, if the jury have a reasonable doubt as to whether the defendant was present at the scene of the homicide, he is entitled to the benefit of such doubt, and should be acquitted. But we think that the subsequent portion of the charge, from its phraseology, may have a tendency to mislead the jury, and to obliterate from their minds the idea that a reasonable doubt, arising out of the evidence as to the *locus* of the prisoner at the time of the killing, must work an acquittal. We think that the evidence in support of an *alibi* need not be absolutely clear. It is sufficient if there is enough to produce in the minds of the jury a reasonable doubt as to the presence of the prisoner at the scene of the killing. Neither do we think that the evidence of an *alibi* should in any case make it absolutely impossible for the prisoner to be present at the killing. It is sufficient if it raises a reasonable doubt in the minds of the jury, from all the circumstances, whether he was present or not. 1 Greenl. Ev. § 81*b;* State v. Waterman, 1 Nev. 543; Turner v. Com., 86 Pa. St. 54; People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. Rep. —; Landis v. State, 70 Ga. 651; Pollard v. State, 53 Miss. 410; Means v. State, 10 Tex. App. 16; State v. Lewis, 69 Mo. 92; People v. Pearsall, 50 Mich. 233, 15 N. W. Rep. 98; Houston v. State, 24 Fla. 356, 5 South. Rep. 48; Kerr, Hom. §§ 512, 522.

In addition to the portions of the charge above referred to, the judge further instructed the jury on the subject of an *alibi* that, "when proof of an *alibi* is attempted and proven to the satisfaction of the jury, it is conclusive of the case. When it is attempted, and the proof to sustain it is not satisfactory, the failure to prove it satisfactorily is a circumstance unfavorable to the defendant, but it is no more so than an attempt to clear himself by any other false or fabricated testimony." In Turner v. Com., 86 Pa. St. 54, the trial judge instructed the jury on the subject of an *alibi:* "If proved, it constitutes a complete defense; if not proved, and you think it has not been proved, the attempt to manufacture evidence is a circumstance which always bears against the person. No innocent person is driven to manufacture evidence." Of this instruction it is said that it was clearly wrong, in this: "that the jury are told that the defendant, having undertaken to defend himself on the ground of *alibi*, must produce evidence sufficient to work his acquittal, or, if not, his failure is in itself evidence of guilt. This is adding a penalty to what may be, not the defendant's crime, but his misfortune,—a result that we cannot sanction. Were the defendant detected in an attempt to corrupt witnesses, or to manufacture evidence, it would certainly weigh heavily against him; but his failure to prove a given point in his defense is no evidence of such attempt, and it ought not to have been submitted" as having any bearing on the case. Here the jury are told that a failure to prove the defense of *alibi* satisfactorily is a circumstance unfavorable to the defendant, but no more so than an attempt to clear himself by any other false or fabricated testimony. The failure to prove satisfactorily the *alibi* is placed upon the same basis as an attempt to fabricate testimony. We cannot accept this as correct. The defense of an *alibi* may be true, and the evidence fail to establish it, or the defendant may put in all the evidence which he has to prove his *alibi*, and it may not be satisfactory to the jury, yet the unsuccessful attempt does not prove that the evidence introduced by him was false or fabricated. If the attempt to prove the *alibi* is by means of fabricated evidence, and this fact should be disclosed, it would be unfavorable to the accused. Its unfavorableness would consist in the fact that the accused was attempting to shield himself by corrupting the administration of law, and by relying upon what he knew to be without foundation. Toler v. State, 16 Ohio St. 583.

The judge further says in this portion of his charge that if the accused fails to prove satisfactorily to the jury his defense of *alibi* it is a circumstance unfavorable to him. The jury should consider all the evidence, and they have a right to draw therefrom conclusions favorable or unfavorable to the accused; but it is not within the province of the court to do this for the jury. A further discussion of this phase of the charge will be found under the next assignment of error.

Again, the court instructs the jury that, "if there have been circumstances proven tending to show that the defendant was connected with the homicide, and the knowledge to explain such circumstances is plainly shown to have been in the possession of the defendant, and if you are satisfied from all the evidence that he has willfully declined or intentionally omitted to explain such circumstances, then such omission is a further circumstance unfavorable to the innocence of the defendant." This portion of the charge was excepted to by the defendant.

It will be noted that, while the judge informs the jury that they are the sole judges of all the evidence, he proceeds to tell them that, if there have been proven circumstances tending to show that the accused was connected with the homicide, and the knowledge to explain such circumstances is in his possession, and that he has willfully declined or intentionally omitted to do so, such omission is a further circumstance unfavorable to the accused. If the circumstances tend to show that the accused was connected with the homicide, he is required, under this instruction, to explain, or, in default, it is counted against him. It is also said that, if he have the knowledge to explain under the circumstances, and fail to do so, it is unfavorable to him. The word "knowledge," in the connection in which it is found, would seem to be used as synonymous with "ability." A knowledge to explain would not be of much value to the accused, unless he was possessed of the ability to explain the circumstances. The objection, however, to this portion of the

charge is that the judge is not charging upon the law of the case, but is within the province of the jury. In Newberry v. State, 26 Fla. 334, 8 South. Rep. 445, it was held that an instruction of the court to the jury in this language: "Always remembering that every variance or contradiction is not of itself an indication of any design to evade the truth on the part of those testifying,"—was improper, as being a charge on the facts of the case. In Gibson v. State, 26 Fla. 109, 7 South. Rep. 376, it was said that a charge of the court to the jury that "it is the privilege, as well as the duty, of counsel to argue to the best advantage in behalf of their clients. It is the study of a life-time that they learn how to distort, change, color, and discolor facts, in order that they may use them to the best advantage of their clients,"—was in violation of the statute which forbids a judge to charge on the facts. In Garner v. State, 27 Fla. —, 9 South. Rep. 843, it is said by the court: "It is the province of the court to pass upon the admissibility of evidence, but, when it is in, its credibility and weight are questions for the jury. The guaranty which our statute gives against the court throwing the weight of its opinion as to any question of fact when charging a jury would be of little or no benefit to litigants if judges were at liberty to intimate the same opinions, making rulings or otherwise, in the progress of a cause. The policy of our jurisprudence is that a jury shall decide all such questions of themselves, and entirely liberated from the influence of an intimation of the judge's impressions." In Pinson v. State, 27 Fla. —, 9 South. Rep. 706, it is said that "not only is the trial judge prohibited from charging the jury directly as to the sufficiency or weight of the evidence, or from assuming in his charge that certain facts in issue are proven, but he cannot draw an inference or presumption of fact from the evidence. He may charge as to the presumptions which the law, by settled rule, draws from given facts; but an inference of fact, or the conclusion of the existence of a fact from some other fact or facts, is always drawn by the jury, who are triers of questions of fact." Tested by these decisions, the instruction under consideration was wrong.

In his motion for a new trial the accused excepted to the following portion of the charge to the jury, to-wit: "As to whether the case at bar and the Coffee Case, he himself being on trial, are parallel cases, and as to what extent the witness Ike Spanish may have been influenced to tell a lie on the defendant, Adams, and himself, by reason of fear, or by hopes held out to him, you alone are the judges from all the evidence." This is not all that the court charged in reference to the Coffee Case. The other portion of the charge on this subject, and which immediately preceded the portion excepted to, is as follows: "The opinion of our supreme court, read and commented on to the court by the counsel, in the case of Coffee v. State, 25 Fla. 501, 6 South. Rep. 493, was delivered upon an appeal taken by Coffee himself after he had been convicted of murder in the first degree on his own confession of guilt, extorted from him through fear of his life, with a rope around his neck, placed there by an excited crowd, and who made him promise to tell the same things the next day, and to stick to it in court, and which confessions were afterwards used against him on his trial, and which were admitted as evidence over the objection of his counsel, because his said confessions had been obtained by threats, violence, and fear, and because his said confessions were not his free and voluntary act. The law, as laid down by our supreme court in that case, has been the law for ages in all civilized countries. Judge MITCHELL, speaking for the court, and showing that such confessions could not be used against Coffee on his trial, used the following language, and asked, 'Does the evidence clearly show that the confession made at Martel was freely and voluntarily made?' and then goes on to say as follows: 'But the day before, the prisoner, who was accused of a most atrocious crime, was taken by the guard, under whose protection he should have been, from the very presence of the officers of the law, including the justice of the peace, carried to the woods near by, with a rope around his neck, and there swung up to a limb, and before the muzzles of shotguns and Winchester rifles, and being told it was his last hour, was forced to confess that he was guilty of the crime with which he was charged, forced to promise that he would stick to the confession he had made, and forced to promise that he would stick to what he then confessed in court.'" The portion of the charge excepted to contains two propositions, viz., to what extent the case at bar and the Coffee Case are parallel, and to what extent the witness Spanish was influenced in his testimony by reason of hope or fear. One of these propositions, viz., as to what extent Spanish was influenced by hope or fear, is unquestionably correct, and under the rule in reference to exceptions we might decline to consider this assignment of error; but, as this case must go back for another trial, it is not improper for us to express our opinion in reference to the portion of the charge on the Coffee Case. Under our judicial system the trial judge instructs the jury only on the law of the case. In doing this he informs them what is the law applicable to the case under consideration. To state to the jury the facts of a case already adjudicated by our supreme court, and then submit to them the question whether or not that case and the one under consideration are parallel, would be improper, and would not be giving them the law of the case, but would be leaving the jury to form notions of the law by a comparison of the two cases. The principle of the law in reference to the admission of voluntary confessions was applied in the Coffee Case, and the same principle must be applied in every case coming up for adjudication where the facts make it applicable. The question discussed in that portion of the Coffee Case submitted by the judge to the jury has reference to the admissibility of the confessions in evidence,—a question exclusively within the province of the court. In the

Coffee Case the trial court erred in permitting to go before the jury the confessions of the accused, but in the case before us no objection was made to the evidence of Ike Spanish on the ground that it was not voluntary. It is true that some testimony was introduced tending to show that, before Spanish made a former statement implicating the accused, threats were made against him, and inducements were held out to him, to make the statement; but these were matters properly laid before the jury, in order that they might arrive at a correct verdict as to whether or not his testimony on the trial was false. The jury have nothing to do with the questions as to the admissibility of evidence, and we think the court erred in instructing them as it did in reference to the Coffee Case.

A further exception to the charge of the court is based upon the following portion, viz.: "Malice is implied from any deliberate, cool, injurious, and unlawful act against another, which shows an abandoned and malignant heart; and if one person, without apparent provocation, willfully and intentionally and unlawfully shoots another with a deadly weapon, although he had no previous malice or ill will against the party slain, yet he is presumed to have had such malice at the moment of the shooting, and, unless the evidence shows that he was acting from some innocent or proper motive, or that he was justified or excusable, such killing would be murder. (It is a presumption of law that every sane man intends the natural and reasonable consequence of his own free and voluntary acts, and if a sane person willfully and intentionally fires a load of buckshot into the body of another person in close proximity to him, it is an inference of the law that he intends thereby to cause great bodily harm or death; and, unless such shot was fired under circumstances showing justification or excuse, then it is an inference of law and the law presumes that it was maliciously done.) And if the evidence shows that such shot was fired in pursuance of a well-formed purpose to kill such person unlawfully, or to kill a human being unlawfully, and the person shot dies from the effect of the wounds then and there given, then the person firing such shot is guilty of murder in the first degree, even though prior to such killing the relations of the slayer and the slain might have been friendly, or apparently friendly, and even though the motive for such unlawful act be not fully proven, or, if proven, it appears totally inadequate to you."

Prior to the enactment of the statute on the subject of homicide in 1868, the common-law rule in reference to presumptions of malice from the act of killing a human being obtained in this state. By this rule the offense of murder was established by proving the fact of killing, and then it devolved upon the accused to show the facts and circumstances reducing the crime to a lower degree, or showing that the killing was justifiable or excusable, unless such facts and circumstances appeared from the proofs on the part of the state. Holland v. State, 12 Fla. 117; Gladden v. State, 13 Fla. 623; Dixon v. State, Id. 637. It was held in Dukes v. State, 14 Fla. 499, that this common-law rule was essentially changed by the statute, and that this legal presumption of malice arising from the fact of killing no longer existed. The interpretation placed upon the statute by the previous decisions of this court has wrought a decided change in the law of felonious homicide, and one necessary to be observed in laying down the law on this subject. Dukes v. State, supra; Ernest v. State, 20 Fla. 383. This change is so radical as to require a departure from the common-law indictment in alleging the offense of murder. Denham v. State, 22 Fla. 664; Wiggins v. State, 23 Fla. 180, 1 South. Rep. 693. In fact the common-law offense of murder no longer exists in this state, and in lieu thereof we have the statutory crime of premeditated killing. Under our adjudications the law does not presume malice or a premeditated design from the mere fact of killing. The statute declares murder in the first degree to be a killing with a premeditated design to effect the death of the person killed, or a human being. The act of killing is only part of the offense, and, in order to be complete, it must be done with a premeditated design to effect death. The *animus* with which the killing was done must be ascertained from the facts and circumstances of the case. In every case the question of a premeditated design is one of fact, like every other fact in the case, to be ascertained by the jury from the testimony. Savage v. State, 18 Fla. 909. In charging the jury on the subject of premeditation the court cannot draw conclusions from the facts any more than it can upon any other branch of the case. The portion of the charge now under consideration contains some correct statements of the law on this subject, but mixed along with these statements are some propositions that are not correct as to the presumptions of the law on the subject of premeditation or malice. In this charge it is asserted that it "is a presumption of law that every sane man intends the natural and reasonable consequence of his own and free voluntary acts, and, if a sane person willfully and intentionally fires a load of buckshot into the body of another person in close proximity to him, it is an inference of the law that he intends thereby to cause great bodily harm or death." So far there is no objection, but immediately following it is said: "And unless such shot was fired under circumstances showing justification or excuse, then it is an inference of law and the law presumes that it was maliciously done." This clause asserts that the law presumes malice from the mere fact of killing, in the absence of any other showing; and in this respect it is wrong. The law does not imply or presume malice or premeditation from the fact of killing. This must be shown by the facts and circumstances of the case; and the jury, and not the court, can infer malice or premeditated design from the facts. To state the matter briefly, under our adjudications the court must submit the question of premeditation just as it would any oth-

er question of fact arising in the case. On the facts of the case before us, we do not commit ourselves to the proposition that the accused would be entitled, for the error mentioned, to a reversal of the judgment, in the absence of other errors. However erroneous the judge was in charging the jury that malice or premeditation was a presumption of law, yet, if they believed the accused shot the deceased under the circumstances of this case, the fact that it was done with premeditation was irresistible.

The accused assigns as error the following other portion of the charge of the court to the jury, viz.: "It is natural and human for you to sorrow when you contemplate the fact that young Moore was suddenly struck down in the morning of life, and sent into the presence of the eternal judge, with no time for preparation; nor can humanity refuse to show its tears with, and to sympathize with, his young wife and her little babes; and it is equally natural, and our humanity cannot help sympathising with a fellow-being on trial for his life, and for his faithful wife and her innocent children, for his weeping mother and devoted brother; but you were not sworn to try the case by your sympathies, but by the evidence as delivered to you by the witnesses on the witness stand under their oaths." Immediately preceding this portion of the charge the judge had stated to the jury that much had been said about the consequences to society and the accused growing out of their verdict. It is not objectionable for the court to call the attention of the jury to the fact that they are to try the case by the evidence given to them, and not by their sympathies. No doubt the able judge who sat at the trial of this case thought it proper to caution the jury against being led astray by their sympathies. The language of the charge employed to accomplish this object, however, is calculated to impress the mind with the idea that the very condition against which the judge was seeking to guard was likely thereby to be produced, to-wit, an undue excitement of the sympathies of the jury.

Another assignment of error is "that the defendant, during the progress of the trial, was carried from the court-room against his consent, and locked up in jail."

The bill of exceptions shows that an objection was made by the counsel for the accused to the competency of Ike Spanish as a witness for the state, and pending the discussion of this question before the court the jury was sent from the court-room. The officers who had the custody of the defendant, Adams, through mistake took him also from the court-room, and carried him to jail. Counsel for the defendant then proceeded to discuss before the court the competency of Ike Spanish as a witness, and had proceeded about 10 minutes with the discussion in the absence of the prisoner, when his presence was missed. The state's attorney called the attention of the court to the absence of the prisoner, and thereupon the court requested the counsel for defendant to suspend his argument, which he did, at the same time excepting to the removal of the prisoner from the court-room without his consent, and of his being deprived of a right guarantied by the constitution. On the return of the prisoner to the court-room the judge requested his attorney, in order to save any difficulty that might arise by reason of the inadvertence, to commence anew his argument, and that the court would hear his views and authorities anew. Defendant, by his counsel, declined to say anything further, but insisted that his objection to taking the accused from the court-room be noted. Without any argument further, either from defendant or the state, the court decided that the witness was competent to testify against the accused. It was early decided in this state, and has been rigidly adhered to in later decisions, that the prisoner has the right to be and in fact must be present during the trial of a capital case, and no steps can be taken by the court in his absence. Holton v. State, 2 Fla. 476, 500; Gladden v. State, 12 Fla. 562; Irvin v. State, 19 Fla. 872. There is no doubt about the fact that the accused here was taken from the court-room and remained out for at least 10 minutes during the discussion of the competency of a witness against him. He has the right to be present and to hear questions of law as well as questions of fact discussed, and in fact no steps can be taken in the case in his absence. The court must see in capital cases that the accused is present before any proceedings are taken in the case. The fact that the court directed the argument to be gone over again could not possibly restore the accused to the position of hearing what had already been said in his absence.

The last ground of the motion for a new trial is "that the jury received whisky during the progress of the trial."

The brother of the accused made an affidavit stating that he learned from the bailiff that he had taken jugs of whisky from the express office for several members of the jury, and that whisky was conveyed to them, from time to time, during the progress of the trial. The bailiff J. C. Marcum filed an affidavit, in which he states that he took from the express office for the jury a half-gallon jug of whisky, and that during the trial four of the jurors were sick, and, under instructions from the court, he gave the jury small portions of said whisky at a time, as medicine; and that at no time was any one of said jury under the influence of said liquor, but they were sober, thoughtful, and very discreet, both in and out of the court. The other bailiff makes an affidavit corroborating Marcum's statement. There is nothing to show that the jury received any whisky except what the court permitted to be given to them as medicine; and it is made affirmatively to appear, and there is nothing to the contrary, that there was no misbehavior on the part of the jury in consequence of the whisky. The court did not err in refusing to set aside the verdict on the ground that whisky was given to the jury. Bird v. State, 18 Fla. 493.

There are some other assignments of

error in the record, and one involving a grave question of misconduct on the part of the bailiff in charge of the jury and one of the jurors. As the case has to go back on other grounds for a new trial, and these assignments of error present questions that are not likely to arise again, we will not prolong this opinion by discussing them. In a case like this, where human life is involved, the verdict of the jury should not be influenced by any improper considerations, and no avenue of improper approach should be left open. We feel that we can rely upon the circuit judge to guard against an opportunity to improperly influence the verdict of the jury.

For the errors herein pointed out the judgment in this case must be reversed, and a new trial awarded.

(28 Fla. 441)

STATE *ex rel.* FLEMING, Governor, v. CRAWFORD, Secretary of State.

(*Supreme Court of Florida.* Nov. 13, 1891.)

MANDAMUS TO SECRETARY OF STATE — ELECTION OF UNITED STATES SENATOR—DUTIES OF SECRETARY OF STATE.

1. The performance of a clear ministerial duty may be required of the secretary of state by *mandamus*.

2. Neither the secretary of state nor the supreme court of Florida has power to pass upon the legality of an election of a United States senator by the legislature, or of an appointment of a senator by the executive of the state. The power is in the United States senate alone.

3. The commission of a United States senator appointed by the governor should be signed by the governor, and sealed with the great seal of state, and countersigned by the secretary of state, in accordance with section 14, art. 4, of the constitution of this state.

4. Where there has been an election of a United States senator by the legislature, and afterwards the governor, holding that there is a vacancy in the office on account of the illegality of such election, signs an appointment or commission of a United States senator, and requests the secretary of state to seal the same with the great seal of state, and to countersign it, it is the duty of the secretary to do so, and he has no right to refuse because he deems the governor's action illegal. If he refuses the performance of the duty, it may be required by *mandamus*.

5. A commission is not complete until it has been signed, countersigned, and sealed in accordance with section 14 of article 4, nor is a copy of an uncompleted commission, or of the record thereof, evidence of any appointment to office.

6. Affixing the seal of state to an executive appointment of a United States senator, and countersigning the same, does not commit the secretary of state to the legality of such appointment. It implies no opinion as to the legality of either such appointment or of a previous election of another person to the same place by the legislature.

7. The commissioning of a United States senator or other public officer is a matter of public interest, and it is the duty of the executive to see that his commissions of persons appointed to office are completed; and as the chief magistrate, charged with seeing that the laws are faithfully executed, he is a proper relator in a proceeding by *mandamus* to require the sealing and countersigning of a commission.

(*Syllabus by the Court.*)

Petition for *mandamus* by Francis P. Fleming, governor of the state, to compel John L. Crawford, secretary of state, to seal and countersign the appointment and commission of Robert H. M. Davidson as United State senator.

The other facts fully appear in the following statement by RANEY, C. J.:

The alternative writ, the declaration in causes of this character, states in substance that, on the 22d day of September of the present year, the relator, Francis P. Fleming, the governor of this state, he having ascertained and determined that a vacancy existed in the office of United States senator from this state, did, in exercise of the power conferred upon him by law, proceed to appoint Robert H. M. Davidson, a citizen of the state, having all the legal qualifications for such office, to be United States senator from Florida, to fill such vacancy until the meeting of the next legislature; and that, to evidence and give effect to such appointment, the petitioner prepared and signed an appointment or commission in the words and figures following, to-wit:

"In the name of the state of Florida. To all whom these presents may come, greeting:

"Whereas, the term of office of Wilkinson Call, as United States senator from Florida, expired on the third day of March, A. D. 1891, during the recess of the legislature of said state, whereby a vacancy then happened in the office of United States senator from Florida during such recess as aforesaid; and whereas, a senator has not been chosen by the legislature of the state of Florida to fill such vacancy; and whereas, the legislature of the state of Florida is not now in session, and a recess thereof exists at this time:

"Now, therefore, I, Francis P. Fleming, governor of the state of Florida, by virtue of the authority in me vested by the constitution of the United States, have appointed, and by these presents do hereby appoint, Robert H. M. Davidson to be United States senator from the state of Florida, until the next meeting of the legislature of the state of Florida.

"In testimony whereof I have hereunto set my hand, and caused the great seal of the state to be affixed, at Tallahassee, this twenty-second day of September, A. D. one thousand eight hundred and ninety one, and of the independence of the United States the one hundred and sixteenth year.

"FRANCIS P. FLEMING,
"Governor of Florida.

"Attest: ————,
"Secretary of State."

That thereupon the said governor caused the said appointment or commission to be transmitted to the defendant, John L. Crawford, secretary of state of this state, and instructed and directed him to seal it with the great seal of the state, and to countersign the same as a due and proper attestation of the executive act of such appointment, to be delivered to said Davidson as his full and complete appointment to be such United States senator, and the evidence thereof; but that the said Crawford, secretary of state, in disregard of his duty in the premises, failed and refused to seal the said appointment or com-

mission with the great seal of the state, and to countersign the same, and has failed and refused, and still refuses, so to do, to the great prejudice and injury of the people of the state.

That afterwards, on or about October 13, 1891, the said governor required and instructed William B. Lamar, the attorney general of the state, to institute proceedings in this court to procure the writ of *mandamus* to require the said secretary of state to seal such appointment or commission with such seal, and to countersign the same, but the attorney general has failed and refused, and still refuses, to institute the proceedings.

The writ then recites the prayer of the petition: That, in order to protect and secure the public interests in the premises, and to enforce and carry into effect his said executive act as such governor, the writ may issue, and, in compliance with such prayer, directs the secretary of state to seal and countersign the said appointment or commission, or to show cause, on the day and at the time mentioned therein, why he had not done so.

On the 29th day of October, at the time stated in such writ, the secretary of state made return to such writ, stating in effect:

(1) That this court has no jurisdiction of the respondent on the case made by the writ in respect to the specific act sought to be enforced.

(2) That the relator, the governor, has no such interest in or relation to the specific act sought to be enforced, upon the allegations of the writ, as authorizes or justifies him in instituting this proceeding.

(3) That the state has no such interest in or relation to the specific act sought to be enforced, upon the allegations of the writ, as authorizes the institution of the proceeding by the state, or on its behalf, or by or on relation of the governor of the state.

(4) That there is no law enjoining upon this respondent the performance of the specific act sought to be enforced.

(5) That it does not appear that the performance of the specific act therein sought to be enforced is necessary to make effectual the alleged appointment.

(6) That the allegations of the writ are not sufficient to show that the relator has a right to enforcement of the specific act sought to be enforced.

(7) That the petitioner is now, and was on September 22, 1891, governor of the state; that defendant has no means of knowing, and does not know, whether, on or before the day mentioned, the petitioner claimed to have ascertained and determined there was a vacancy in the office of United States senator from the state of Florida, nor the several grounds, methods, and processes upon and through which such alleged ascertainment and determination was had, other than as proclaimed by said petitioner to the people of Florida, under a writing made and published by him on the 4th day of August of the present year, a copy of which writing is annexed as a part of this return, for the purpose of showing merely the claim therein set up, and the alleged grounds and the reasoning upon and by which the alleged ascertainment and determination was reached.

That no vacancy in the office of the United States senator existed on the said 22d day of September; that "theretofore" the vacancy created by the expiration of the term of office of Wilkinson Call, United States senator, had been filled by the legislature of the state, by whom Wilkinson Call was duly and constitutionally elected United States senator," as shown by a duly-certified copy of said legislative proceedings," filed as a part of the return; and that Wilkinson Call applied for and obtained from the respondent a duly-certified copy of said proceedings, to be presented to the senate of the United States, as the due and legal evidence of his election as such senator.

That it is true that the governor did prepare and sign "the document in writing," a copy of which is set out in the alternative writ, and thereupon caused the same to be transmitted to respondent, with instructions to him to seal with the great seal of state, and countersign the same, and that this respondent refused so to do.

That the communications and transactions by and between the governor and the attorney general, constituting the former's alleged demand, and the latter's alleged refusal, to institute proceedings to procure from this court the writ of *mandamus* for the purposes alleged, were conducted in writing, and a copy of the same is annexed as a part of the answer.

All of this return, except the paragraphs numbered from 1 to 6, inclusive, was demurred to as not setting up facts sufficient in law to bar the writ, and the six paragraphs were treated as a demurrer, and the demurrer joined in.

Fred. T. Myers, for plaintiff. *A. W. Cockrell & Son*, for defendant.

RANEY, C. J., (*after stating the facts.*) That the writ of *mandamus* lies to require the performance of a clear official duty, not involving discretion, by any one of the "administrative officers of the executive department" of this state, (sections 3, 17, 20, 26, art. 4, Const. 1885,) is a settled proposition of law in Florida, (Towle v. State, 3 Fla. 202; State v. Gamble, 13 Fla. 9; State v. Board, Id. 55; State v. Board, 16 Fla. 17; State v. Board, 17 Fla. 29; State v. Drew, Id. 67; State v. Barnes, 25 Fla. 298, 5 South. Rep. 722.) To hold that the mere fact of these officers belonging to the executive department of the government should exempt them from this judicial process, as to a plain ministerial duty, or where they are given no official discretion, would be in irreconcilable antagonism to a consistent line of judgments running back over 40 years. There is, moreover, nothing in the five cases specially called to our attention in behalf of the defendant, and noticed in the next paragraph of this opinion, to cause us to doubt the correctness of the conclusion reached by our predecessors, even though the conclusion was arrived at in the face of conflict of authority,—a condition not unfrequently confronting appellate courts.

The case of Com. v. Wickersham, 90 Pa. St. 311, holds that the writ did not lie in the court of common pleas against the defendant, who was superintendent of public instruction, as that court had never been given power to issue it against state officers. It is stated, however, in the opinion of the judge of the common pleas, which opinion is adopted by the supreme court, that by an act of May 22, 1792, which continued in force until abrogated by a convention held in 1872-73, for forming a new constitution, (Com. v. Hartranft, 77 Pa. St. 154,) such power had existed in the supreme court, and that no inconvenience was ever felt from its exercise by that tribunal; but the convention limited the power, as an exercise of original jurisdiction, to cases against inferior courts, and that the legislature had not given to any inferior court the power now invoked. The decision in State v. Hobart, 12 Nev. 408, is that the office of state comptroller, which Hobart held, was one of public trust, and conferred upon the individual for the benefit of the public; and if the acts which he refused to perform concern the public interests, and are such as the law requires to be performed by him, the writ of *mandamus* should issue to compel the performance of the duty. The writ was issued. In State v. Hayne, 8 S. C. 367, it was decided that the supreme court has jurisdiction by *mandamus* over the executive officers of the state, as, for instance, the secretary of state, and might by such writ supervise, control, and direct their duties, the duty in the particular case being ministerial. The conclusion reached in Bledsoe v. Railroad Co., 40 Tex. 537, in so far as the comptroller was concerned, was that the duty in question was not a mere ministerial duty, but it was his duty to see that preliminary work proper to be done had been performed; and that the district court had not power under the constitution to compel an officer of the executive department of the government to perform an official duty; and that whereas, under the former constitution, the supreme executive power was vested in the chief magistrate, under that then in force it was vested in the entire body of magistry, composing the executive department, with the powers of each separately defined. The remaining one of the particular cases cited in behalf of defendant (Dane v. Derby, 54 Me. 95, 89 Amer. Dec. 729) does not involve the question of a *mandamus* against a state officer, and need not be noticed; and of the Texas case, the only one requiring comment, it is necessary to say merely that in Florida the "supreme executive power is vested in a chief magistrate, who shall be styled the 'Governor of Florida,'" (section 1, art. 4, Const.,) and that two of the judges dissented from the conclusion reached by the other three.

It is not within the possibilities of any one opinion to review all the authorities referred to in the note to Dane v. Derby, in the eighty-ninth volume of the American Decisions. This court long ago decided the question, and in doing so, and in adhering consistently in past years to that decision, it has followed in the footsteps of MARSHALL and his associates, and others who have rested their conclusion upon the ground that ours is "a government of laws, and not of men," and that where there is no right to exercise discretion in the premises any officer less than a governor, acting as such, (as in State v. Drew, 17 Fla. 67, and cases therein cited,) is not exempt from this process of the law; and upon this theory it was held in Marbury v. Madison, 1 Cranch, 137, that the secretary of state would be the subject of a *mandamus* to compel him to deliver a commission which had been signed and sealed, and upon the same principle peremptory writs of *mandamus* have been awarded against other secretaries of departments of the general government, (Kendall v. U. S. 12 Pet. 524; U. S. v. Schurz, 102 U. S. 378.) See, also, Butterworth v. Hoe, 112 U. S. 50, 5 Sup. Ct. Rep. 25. In Com. v. Hartranft, 77 Pa. St. 154, the supreme court deplored the limitation, referred to above, upon its former jurisdiction, as a result which deprived the people of one of the forms of remedy essential to the interests of a republic; and we feel assured that it will not be denied that the history and practical utility of the writ in Florida entitles it to the highest consideration for effectually securing the performance of public official duty and establishing public right. It is the character of the duty, and not the nature of the office, which must, as long as the law is regarded, always control a court in deciding whether or not it will award a peremptory *mandamus* against an officer of the character of the respondent, (Marbury v. Madison, supra; U. S. v. Windom, 137 U. S. 636, 11 Sup. Ct. Rep. 197; U. S. v. Blaine, 139 U. S. 306, 11 Sup. Ct. Rep. 607;) and this would be a late day for the supreme court of Florida to depart from this rule.

II. It appears that on the 4th day of August last the governor issued an address to the people of Florida, announcing as his judgment and conclusion that the action of the joint assembly of the legislature taken on the 26th of May last, at which Mr. Call received the votes of 14 senators and of 37 representatives, and Mr. Mays received the vote of one representative, and at which the president of the joint assembly announced that, Mr. Call having received a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, was duly elected United States senator for the term beginning March 4, 1891, was not an election of Mr. Call; and the reason, as is shown by the return before us, is that a majority or quorum of the senate was not present at, and did not participate in, such election. In this paper the governor also announced that he could not, "in the discharge of his duty," certify that Mr. Call was elected, and gives a full statement of the grounds upon which his conclusions are based. On the 22d day of September the governor prepared and signed the appointment of Mr. Davidson, set out in the preceding statement of the case before us; and it will be observed that this appointment recites that a term of office of United States senator held by Mr. Call had expired on

the 3d day of March last, during a recess of the legislature, and that thereby a vacancy happened in such office, and that no senator had been chosen by the legislature to fill such vacancy, and that the legislature was not in session, but, on the contrary, a recess thereof existed at the time; and, upon these premises so recited, the governor, by virtue of the authority vested in him by the constitution of the United States, appoints Mr. Davidson to be United States senator from Florida until the next meeting of the legislature.

The election mentioned is set up by respondent as a bar to the allowance of a peremptory writ. He says that, by virtue of this action of the joint assembly on the 26th day of May, Mr. Call was duly and constitutionally elected United States senator, and that consequently no vacancy existed when the governor made the alleged appointment, the vacancy occurring on expiration of Mr. Call's previous term having been filled by such election. The respondent also supplements this defense with the statement that Mr. Call applied to and obtained from him, as secretary of state, a duly-certified copy of said proceedings, to be presented to the senate of the United States as the due and legal evidence of his election as such senator.

The constitution of the United States provides that the senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, and (after directing how they shall be classified as to length of terms) ordains that, if vacancies happen by resignation or otherwise during the recess of the legislature of any state, the executive thereof may make temporary appointment until the next meeting of the legislature, which shall then fill such vacancies, (section 3, art. 1;) and that the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but congress may at any time by law make or alter such regulations, except as to the place of choosing senators, (section 4, art. 1;) and that each house shall be the judge of the elections, returns, and qualifications of its own members, (section 3, art. 1.)

The constitution of the United States has not elsewhere given to this court the power to pass upon the question of the legality of the election of a United States senator, but by the last of the provisions quoted above it has expressly excluded from it the right to do so. The constitution of the state has not attempted to confer any such power upon us, nor has congress, nor our own legislature, nor is it to be imagined that any such attempt would be made. Whether Mr. Call was legally elected by the legislature is not for us to say. Our predecessors, when asked in January, 1869, under the power given the governor by the constitution to require their opinions "upon any point of law," whether the election of Mr. Abijah Gilbert, as senator, in 1868, was legal, replied, in effect, that the senate of the United States was the exclusive judge of the elections, returns, and qualifications of its own members; and whether an election of a senator by a state legislature was in conformity with such regulations as are prescribed by congress, or whether, for want of strict conformity therewith, it was illegal and void, were questions which the court had no jurisdiction to decide. Advisory Opinion, 12 Fla. 686. That we have not jurisdiction to entertain the question of the legality or illegality of Mr. Call's election is palpable, and that anything we might decide about it, should we so far forget ourselves as to enter upon its consideration, would be inexcusable usurpation, and of no effect whatsoever, cannot be denied. Whether the legislature has in its action so far complied with the true intent and meaning of the statute of the United States governing such election, or whether the statute, if it contemplates legal action in the absence of a quorum of either of the houses where the organic law makes a quorum essential to the transaction of business, is constitutional, are questions for the senate alone to decide.

The question occurs to us, however, that, admitting we cannot decide upon the legality of the election, is it not a sufficient answer to the application for this writ that the joint assembly is shown to have done what it in fact did, and as it was constituted, and to have announced through its presiding officer the same to be a legal election? It is, we find, after the most careful consideration, impossible to pursue this course without usurping the functions of the senate. As shown above, the executive of a state may, if a vacancy happens during the recess of the legislature, make temporary appointments until the next meeting of the legislature, which shall then fill the vacancy; and it is unquestionably the primary function of the executive, subject solely to the judgment of the United States senate, to decide when any such vacancy exists. The correctness of his decision, and the legality of his action in making an appointment, are matters entirely beyond our jurisdiction. Whether the constitution gave the governor power, after the adjournment of the legislature, to appoint, was a question which addressed itself primarily to the governor, and, however erroneous may be the conclusion which he has reached, he has in fact made a decision in favor of his power, and has proceeded, to the extent indicated by this record, in making an appointment to fill what he holds to be a vacancy, within the meaning of that clause of the constitution which confers upon him the power of appointment. We cannot close our eyes to this fact as an existing feature in the case before us, any more than to the action of the legislature or any other fact shown by the record. It cannot be said that, as between the governor and this court, it was not a matter for his decision. We cannot hold, then, that the simple fact of the legislature having taken the action set up constitutes a bar to the proceeding sought at our hands, without usurping the power to decide that this action, however illegal or ineffectual it may be held by the senate, precluded any action by the governor, or, in other words, deprived him of

the power to act. To decide the question would be to do what the constitution has devolved upon the senate exclusively. It is a question as to the relative validity of legislative and executive action, of which we have no jurisdiction. What we cannot do the secretary of state cannot do; and for the same reason that the power has not been placed in him, unless it is implied by the imposition upon him of the duty to seal and countersign this commission, if such duties have been put upon him,—questions to be hereafter considered. He cannot, unless the power to do so is implied by the imposition of the stated duties, decide that the appointment of Mr. Davidson is illegal, or that it is so because the election of Mr. Call was legal, and no vacancy existed, and consequently the governor had no power to appoint. The erroneous exercise of power by either the governor or the legislature confers no power on either the secretary of state or us, and in our conduct we should leave the action of each to be judged of by the senate, and perform such duties as the law has placed upon us, without assuming any responsibility not imposed upon us. Knowledge on our part of what may have been the decision of the senate in any analogous case does not create power or jurisdiction in this court. Unless there is, in the nature of the act of sealing and countersigning, the implied power of passing upon the legality of the governor's action, the secretary has no more power to do so, and refuse to attest the governor's act, than he would have had to refuse Mr. Call a certified copy of the proceedings of the legislature, of whose records he is, under section 21, art. 4, of the constitution, the keeper, had it been his judgment that the election by the legislature was illegal and void. In certifying and giving such copy he performed a duty imposed upon him, which in no wise involved or implied what his personal judgment of the validity of that election is, and the law does not give him any official judgment as secretary of state in the premises.

III. It is, however, contended, in effect, that the right to have this writ issued is dependent upon the right of Mr. Davidson to the office of senator; or, in other words, the legal right of the governor to make the appointment. In support of this contention, counsel for respondent cites the case of Clarke v. Trenton, 49 N. J. Law, 349, 8 Atl. Rep. 509, which was an application by Clarke for a *mandamus* to compel the board of health of the city of Trenton to admit him as a member of such board. It was a proceeding to put him in physical possession of an office. Clarke had been nominated by the president of the council, who had assumed to act as mayor when he understood the mayor was absent from the city, and his nomination had been confirmed by the city council to succeed one Cloke, whose term of four years had expired, but who, under the law, was authorized to hold until his successor should be appointed and qualify. Cloke still held his seat on the board, and was recognized by it as a member; and it was contended by the board, the defendant, that the president of the council had no authority to make the nomination, as the mayor was not, at the time it was made, really absent from the city, such absence being a contingency necessary to the president's power, and the one which was assumed by him to exist and authorize the action taken. The court held that, as it was shown that the mayor was not absent, there was no power in the president of the council to nominate, or in the council to recognize it, and that the nomination and confirmation were not proof of such absence, and that a *mandamus* would not issue. It was held that, as the charter of the city had not provided that any particular certificate of appointment should be evidence of title to the office, therefore the case differed from those where the law provides that the certificate of an election board shall be evidence of the result of an election; but, if the charter had provided for issuing a commission evidencing a right to membership in the board, the contention that the nomination by an acting mayor, and confirmed by the council, would make out a conclusive title, on an application of this kind, might be sustained.

It is true that *mandamus* will lie to compel the surrender of books and papers and buildings to one possessing certain *prima facie* evidence of title to the office; and this, even though *quo warranto* may be pending to test the real title to the office; and the award of the writ of *mandamus* will have no effect upon the other proceeding, for *mandamus* is not the proper proceeding to determine the title to office as between contestants; and, where the party seeking the latter writ has not muniments of title to the office which the law has made *prima facie* evidence, relief, even to the extent indicated above, will not be given if his right to the office is even doubtful. High, Extr. Rem. §§ 70, 73, et seq.; State v. Dusman, 39 N. J. Law, 677; State v. Saxon, 25 Fla. 792, 796, 6 South. Rep. 858. It is, however, established, by the overwhelming current of authority, that where an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, *mandamus* will not lie to compel the admission of another claimant, or to determine the disputed question of title, and for the reason that an adequate and specific remedy at law exists, which is *quo warranto*, (High, Extr. Rem. §§ 49, 67;) and in the New Jersey case relied on by respondent it is admitted that the relief in such cases is usually sought by *quo warranto*. See, also, State v. Gamble, 13 Fla. 9, 28; People v. Mayor, 3 Johns. Cas. 79.

The distinction between the New Jersey case and the one before us is unmistakable. There the claimant to an office was seeking to oust one holding possession of it, and obtain possession himself, not in the ordinary way, but by a remedy never available except under peculiar circumstances, not then existing, and, when available, not conclusive of the question of title to the office. Here there is no question of the right of possession to the office. Besides our not having jurisdiction to try this question of title, neither of the parties

who may claim the office of senator, under the election or the appointment, is before us; and whatever we may decide can in no wise affect the decision of the right to the office by the only tribunal which has any power or jurisdiction to decide that question. The contest before us is between the governor, as governor, and the secretary of state. The governor, claiming that he has, as the "executive" of the state, the right to appoint a senator, has exercised that power to the extent of signing an appointment, and placing it with the secretary, and requested him to seal and countersign it. We have shown that the power to review the legality of the governor's act is beyond our jurisdiction, as it is beyond that of the secretary of state. In the case of State v. Board, 17 Fla. 9, it was contended that this court had no jurisdiction to award the writ of *mandamus* to compel the board of canvassers to canvass the returns and declare the result as shown by the precinct returns, because the particular office as to which the relator sought the relief was that of representative in the congress of the United States. Replying to this objection, the court, after remarking that it was not pretended by the relator that the canvassing of the votes determines his right to this office, said: "That must be determined by the house of representatives. But the relator says that the law of the state under which the election was held entitles him, if he shall appear to have a majority of the votes according to the election returns, to a certificate of that fact." The relator was seeking to lay the basis for getting a certificate of election by having the county canvassers canvass the precinct returns, and to transmit to the capital their own returns, to be canvassed by the state board with other county returns. All he could get as even the remote result of his litigation was a certificate of his election. The legality of that election could not be passed upon by the court, and this was the real substance of the board's objection, but it was held to be no reason for refusing the writ. The legality of the election could not be considered, but the evidence of the result of an election held under the laws of the state, and by its authority could be enforced; and this, although it is the constitution of the United States, and not the state constitution, which provides that "the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature," (section 2, art. 1;) and that "the times, places, and manner of holding elections for * * * representatives shall be prescribed in each state by the legislature thereof, but congress may at any time by law make or alter such regulations," (section 4, art. 1.) Again, in State v. Board, 17 Fla. 29, where the relator was seeking a canvass by the state board, it was objected that he did not show that he had the requisite age for a member of congress, and the court replied: "This proceeding seeks only to procure such certificate as the candidate voted for may be entitled to under the laws of this state, which certificate is a property which the person obtaining the most votes is authorized by law to demand. Upon this inquiry the right to take and hold the office is not in question, and a slight examination of the rules laid down in the books does not show that such a question has ever been entertained by the courts. Whether the relator possesses all the qualifications necessary to entitle him to a seat in congress can only be inquired into by the house, in which he may present a certificate of election." Thus again the court does not permit its jurisdiction, and the right of the relator in procuring the evidence of an actual election, to be defeated or interfered with by its inability to consider questions of the legality of such election.

That there can be any reason why the inability to inquire into the legality of the appointment of a senator should bar the power to award a *mandamus* to require the perfection of the evidence of the actual appointment of a senator, when it does not do so where evidence of election as a member of the other branch of the national legislature is concerned, or why in the one case it should be necessary to pass upon the legality of the appointment before the relief can be granted, and not on the legality of the election in the other, and this, too, when the authority to appoint is to be found in the same article of the same constitution of the general government, is something which is not only beyond the comprehension of the court, but for which no explanation has even been attempted.

The case of People v. Forquer, 1 Breese, 104, is also relied upon in behalf of respondent. A careful consideration of it will disclose that the commission of one as paymaster general, which it was sought to have the secretary seal and countersign, had been signed by the lieutenant governor after the return of the governor to the state. The lieutenant governor had, upon notice from the governor that he would be absent from the state, assumed the duties of governor, and, although the governor had returned and resumed the duties thereof, the lieutenant governor was still claiming to be the lawful executive of the state, upon the theory that the governor had by his absence from the state forfeited his office. It was held by the court that, even assuming the lieutenant governor to be the rightful governor, the constitution did not authorize him to make the appointment, as the office had never been filled or occupied. In answer to this, it was contended by the relator that the secretary was still compelled to affix the seal and countersign it. The court met this by relying upon the language of the statute, which was that "all commissions required by law to be issued by the governor shall be countersigned by the secretary of state," and holding that the secretary was "only required to countersign those commissions 'required to be issued by law.'" This language was, in effect, held to vest a discretion in the secretary of state, yet not without the court's

suggesting that, if it was wrong on the point, there was still ground for refusing the *mandamus*.

The marked distinction between this case and the one at bar is that neither we nor the secretary of state have the power to pass upon the legality of the governor's act. It is a question between him and the United States senate. The Illinois court, by assuming that the lieutenant governor was rightfully the executive, could, as against the relator applying for relief, decide that the relator's appointment was illegal, there being no other person occupying the office of paymaster general, (State v. Gamble, 13 Fla. 9, 21, 28;) but we cannot say that the governor's act is illegal without usurping the jurisdiction of another tribunal.

If it is the legal duty of the secretary of state to seal and countersign the appointment of Mr. Davidson, we are entirely satisfied, both upon reason and authority, not only that the liability of the court to inquire into the legality of the appointment is not a reason for refusing the writ, but also that a decision upon the legality of the appointment is not necessary to an adjudication of the question of awarding the writ.

IV. The foregoing conclusions bring us to the question whether or not, under the law obtaining in this state, it is the duty of the secretary of state to affix the seal of state to this commission, and countersign the same.

The declaration of the constitution (section 12, art. 16) that "the present seal of the state shall be and remain the seal of the state of Florida," implies that there is such a seal, as does the provision that "the secretary of state * * * shall be the custodian of the great seal of the state," (section 21, art. 4.) It is not denied that there is such a seal, nor that the respondent is the actual and legal custodian of it. There can be no doubt that the purpose of a seal of state is to authenticate or prove the genuineness of charters, grants, and other public instruments emanating from the state. England, from whom we inherit governmental customs of law not peculiar to ourselves, first adopted a great seal in the eleventh century, and its general use for authenticating grants and charters and other public instruments became established about the middle of the thirteenth century. The United States and every state has a great seal, and the adoption of one by the government is for the purpose of authenticating its acts, and securing public recognition of the same as genuine. The public seal of a state proves itself. It is a matter of notoriety, and may be taken notice of as a part of the laws of nations acknowledged by all. The public national seal of a kingdom or a sovereign state is, by common consent and the usage of civilized communities, the highest evidence and the most solemn sanction of authenticity in relation to proceedings, either diplomatic or judicial, that is known in the intercourse of nations. Griswold v. Pitcairn, 2 Conn. 85; Church v. Hubbart, 2 Cranch, 187; Santissima v. Trinidad, 7 Wheat. 283; 2 Bl. Comm. 346, 347; Story, Confl. Laws, § 643; Toml. Law Dict. tit. "Great Seal of England." The constitution of our own state (section 14, art. 4) has directed that "all grants and commissions shall be in the name and under the authority of the state of Florida, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state;" and our statute law has made it the duty of the secretary of state to record all * * * orders, messages, and other official acts and proceedings of the governor; and it is made the duty of the governor before issuing any order, or other promulgation of any official act or proceeding, (except military orders,) to deliver the same, or a copy thereof, to the secretary of state to be recorded, (section 2, p. 933, McClel. Dig.)

We see from the provision of our own constitution last quoted that the purpose of its framers, and the people who adopted it, was that all commissions issued by the state should be sealed with the great seal of state, signed by the governor, and countersigned by the secretary of state. That it is, under this section, the official duty of the officers named to sign and countersign, and the duty of the secretary of state, who, by another section of the same article, is made the custodian of the seal, and whose countersigning is an attending testimony of the authorized use of such seal, to seal all commissions emanating from the state, is the only interpretation of the organic law that would not violate common reason. What is a "commission," in the sense in which it is here used? It is written authority or letters patent issued or granted by the government to a person appointed to an office, or conferring public authority or jurisdiction upon him. Bouvier's, Tomlin's, and Abbott's Law Dictionaries, "Commission;" U. S. v. Reyburn, 6 Pet. 352. The commission is not the appointment itself, but it is the evidence of the appointment. Jeter v. State, 1 McCord, 233. Where the appointment is evidenced by no act but the commission, the two, says Judge MARSHALL in Marbury v. Madison, supra, seem inseparable, it being impossible to show an appointment otherwise than by proving the existence of the commission, which, though not necessarily the appointment, is the conclusive evidence of it. The president's signature, said he, is the warrant for affixing the great seal to the commission, and it attests the verity of the president's signature; and that in all cases of letters patent certain solemnities are required by law as evidence of the validity of the instrument, and that in cases of commissions the sign-manual of the president and the seal of the United States are these solemnities. In U. S. v. Le Baron, 19 How. 73, it was held that when a person has been nominated to an office by the president, confirmed by the senate, and his commission has been signed by the president, and the seal of the United States affixed thereto, his appointment to that office is complete; that congress might provide, as it had done in that case, that certain acts should be done by the appointee before he should enter upon the possession of the office under his appointment; that such acts became conditions

precedent to the complete investiture of the office, but they were to be performed by the appointee, not by the executive; that all the executive could do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions his title to enter on the possession of the office is also complete. Judge WESTCOTT, speaking for the justices of this court under date of October 28, 1875, said: "When the commission of a justice of the peace is signed and sealed, all that is necessary to his investiture of the office is complete. Under the practice in this state, all the conditions as to taking oaths, etc., are complied with before the commission issues. To him, upon the signing and sealing the commission, belongs the office." Advisory Opinion, 15 Fla. 736, 738, 739. See, also, People v. Murray, 70 N. Y. 521: Mechem, Pub. Off. § 114. In Conger v. Gilmer, 32 Cal. 75, it was held that an appointment to office by a board of supervisors was not complete until the appointee had received the certificate of the same under the seal of the board, signed by the proper officers, but the rule was different in cases of election by the people; and in State v. Allen, 21 Ind. 516, that where the title to an office is derived solely by executive appointment, the commission of the executive is the only legal evidence of such title. See, also, People v. Whitman, 10 Cal. 38.

There can be no doubt that the word "commissions," as used in the above section of our constitution, at least includes appointments to office. The provision in the constitution of the United States, that the executive of any state may, under the circumstances therein specified, "make temporary appointments" of senators, carries with it the power to issue written evidence of any such appointment, and, not only this, but it also implies the duty to do so. It imports that the executive authority of the state shall execute such evidence of the authority of the appointee as can be presented to the senate of the United States, and be passed upon by that body. Such credentials must, in the very nature of things, to serve these ends, be written, and cannot be in parol. In the case of People v. Murray, supra, the view of the court is that there cannot be an appointment to office by parol or word of mouth, unless it was permitted by the terms conferring the power; and we are satisfied that none other than a written appointment is practicable, or is within the meaning of the words of the constitution. The way in which things have for a long series of years been done by those legally authorized and required to do them is a safe index to the intention of the law-makers as to how it was intended they should be done; and an examination of the proceedings of the senate shows in each of the numerous cases we have been able to find that the "credentials" of the appointee were presented to the senate, and in every instance but one the entry is that they were also read before the appointee was seated, and the oath of office was administered to him, the excepted case being on where the senate was not organized when the credentials were presented. See Case of Niles, Senate Jour. Dec. 21, 1835, p. 43; Case of Atherton, Cong. Globe, Dec. 1, 1845, p. 1; Case of Whyte, Cong. Globe, July 14, 1868, p. 4024; and the Case of Key, Cong. Rec. Dec. 6, 1875, p. 165.

Any written appointment of a person to an office by the governor of this state is a commission, and the express fiat of the constitution is that all commissions issued under the authority of the state shall be signed by the governor, and sealed with the great seal of state, and countersigned by the secretary of state. The purpose of the constitution is that the warrant of all persons professing to represent the authority of the state shall be in the form indicated, and none other. The authority to appoint to an office, or to delegate the exercise of the state's power, contemplates conformity to this section of the constitution in making the appointment; and this section makes it the duty of the officers named, whenever the power of appointing is exercised, to see that the commission or written evidence of the appointment is signed and authenticated as therein directed.

It is contended that this provision of the state constitution is not applicable to the case at bar, for the reason that the power to appoint is not found in, or conferred by, the state constitution or any law of the state; or, as it is otherwise put, because it is found in, or "conferred solely by, the constitution of the United States, the supreme law of the land." Counsel for respondent, while conceding that, under the federal constitution, the time, place, and manner of holding elections for senators and representatives are to be prescribed by the state legislatures, subject to the paramount right of congress to make or alter such regulations, except as to the place of choosing senators, yet says: "But congress has no right to prescribe, nor has the state any right to prescribe, the time or manner or mode of certifying the appointment by the governor of senators to fill vacancies. In the exercise of his appointing power the governor of a state, under the constitution of the United States, is exempted from any interference or control by any authority, legislative or judicial, federal or state. It is purely political;" and upon this theory he asserts the entire federal legislation is based, it regulating the manner of certifying an election, but saying nothing as to certifying an appointment.

The governor of a state, in appointing a senator, exercises an executive function of the state; and it is none the less so because the power is conferred by the constitution of the United States upon "the executive." The authority is conferred upon the executive power of the state, and is inherent in that power, however it may be constituted by the state, and not upon any functionary or creature of the federal government, and whether it be lodged in one governor, or an executive council of three or more, or otherwise. The purpose of the provision is to preserve the perpetual representation of the state in the senate, and an appointment made by the

governor of Florida is the exercise of state authority, and none the less so because the state derives it from the federal constitution. He does it as the executive and officer of a state, and not as an officer of the United States. The legislature of a state, in electing a senator, acts for and represents the state, and does so as the legislature of the state, and in the exercise of the state's right to be represented in the senate or government of the United States by senators thus chosen. That it is the duty of the legislature to elect,—a duty not only to the state, but also to the general government,—in view of the nature of our government, cannot be denied, but the duty does not change the character of the body and make it a federal legislature. The grant to congress of power to alter and make regulations as to the elections of representatives and senators was founded on the possibility that the state legislatures, agencies of the state, might be remiss in the premises. The authority given to the state executive to appoint is not, except as to the mode of appointment, a limitation upon the state's power to choose its senator, but was to preserve and execute that power, and secure representation to the state, through the action of its own executive under certain contingencies, and by the two processes the power of the state to choose its senators at all times and under all circumstances preserved. Mr. Madison, in speaking of the selection of senators by state legislatures, said: "It is recommended by the double advantage of favoring a select appointment, and of giving to the state governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems." And, as to the equal number of senators allowed each state, he observes that it "is at once a constitutional recognition of the portion of the sovereignty remaining in the individual states for preserving that residuary sovereignty. So far as to the equality it ought to be no less acceptable to the large than to the small states, since they are not less solicitous to guard by every possible expedient against any improper consolidation of the states into one simple republic." The Federalist, No. 62, pp. 346, 347.

In the absence of legislation by congress providing the form in which the appointment of a senator shall be authenticated, it is unnecessary to discuss the power of congress to legislate upon the subject. If it has not such power, its deprivation of it is no reason why the state cannot exercise it. The senate has as much power to inquire into the legality of the appointment of a senator by the executive power of a state as into that of the election of one by a legislature. If it has not, any appointee can take his seat in the senate upon the assumption that the governor has appointed him, and given him evidence of the appointment satisfactory to executive discretion. In all cases of any alleged executive appointment a primary question for the senate is, has the executive authority of the state made an appointment? Its validity as an executive appointment cannot be investigated until it is satisfactorily shown that there has been an appointment in fact by the executive. Under the constitution and laws of the United States, and of this state, there is no known mode of evidencing or proving that an appointment of a United States senator, or any other officer, has been made by the executive of this state, except, or unless and until, a commission has been duly signed, sealed, and countersigned in accordance with the above-quoted provision of our organic law. Section 14, art. 4, Const. It is true that it is the duty of the secretary, under a statute referred to above, to record all commissions, like any other executive act; but this duty does not arise, nor can it be legally performed, until the commission has been signed, sealed, and countersigned, as is clearly established by the cases of Marbury v. Madison, and U. S. v. Le Baron, supra, and implied in the advisory opinion of October 28, 1875; for until then it is not complete, and, even if the incomplete commission should be permitted by the appointee to remain in the secretary's office, no certified copy of it would be effectual to prove the appointment, for until complete it is not legal evidence of the title to the office. The law does not contemplate that it shall remain in the office, but that it shall be recorded as soon as complete, and be delivered to the appointee, as the evidence of his title. When complete, it is the appointee's property, and its surrender to him may be compelled by *mandamus* brought on his relation. Marbury v. Madison, supra.

In the absence of any provision in the constitution or statutes of the United States, when a governor of this state wishes to appoint a senator, the only legal way of evidencing his act, so as to command the recognition of it by the United States senate as his official act, is to comply with the formula which the people of the state have in our constitution declared to be the proper form for exercising the executive power of appointing to office. Any appointment of a senator not thus signed, sealed, and countersigned is not authenticated in the manner which our organic law—the only law regulating the subject—provides, and is not entitled to recognition by the senate of the United States as a commission or appointment as United States senator from the state of Florida, or its executive authority acting for the state. Assuming that congress has the authority to prescribe how such an appointment should be authenticated, until it does so the only reasonable conclusion is that this executive act of the state government shall be evidenced in the manner provided by state law in such cases, and the only appointments or commissions of senators extended upon the proceedings of congress within our reach appear to have been signed by the governor, sealed with the great seal of state, and attested or countersigned by the secretary of state. We have been unable to find anything that suggests any other possible way of evidencing the executive act than that provided by the provision of our own organic law, nor is there in the constitution of the United States any-

thing that prevents the state from regulating the evidence of this official act, at least until congress shall act in the premises. The governor, as the representative of the state, and her chief executive power, whose duty it is to see that the laws are enforced, is seeking to have an act done by him as her chief magistrate, authenticated in the only manner that it can be done to command recognition of it as done by him, and, in our judgment, he is, as her representative, entitled to have it done, unless there is in the nature of the act required of the secretary of state something involving the exercise of official discretion.

It is in our judgment clearly the official duty of the secretary to affix the seal of the state to the appointment, and to countersign or attest the same as evidencing the official act of the executive authority of the state in appointing a senator in the congress of the United States, and this duty is one involving no official discretion or judgment on his part. In the case of State v. Wrotnowski, 17 La. Ann. 156, a *mandamus* was sought to require the secretary of state of Louisiana to affix the seal of state, and countersign a commission signed by the governor appointing the relator sheriff of the parish of Orleans. The secretary replied that the governor was attempting to issue the commission without warrant or authority of law, and in direct violation of the constitution and laws of the state; that the office of sheriff was then held by another person under a commission which would not expire until the next regular election for the office in question; and that the governor had no authority to supersede the incumbent sheriff. The statutes of Louisiana enacted that there should be a public seal for authenticating the acts of the government, and that the secretary of state, who, as in Florida, was a constitutional officer, should be its keeper, and affix it to all official acts, the laws alone excepted. The governor was vested with the appointing power in certain cases, but it was not shown or pretended in the opinion that he had legally exercised it in the case. "The secretary of state," said the court, "is not to suspend his action to inquire why and wherefore any appointment by the governor is made. His duty is plain. He is not directed, but ordered, by law, to perform it. When commissions from the governor need authentication, he shall affix his official signature and the public seal of state, for these are official acts. Whatever improvidence or illegality there may be in the issuing of commissions, that concerns him not. His authenticating any official act can never compromit him; for he has no discretion to exercise regarding it. * * * Were this right of supervision, which is almost equivalent to a veto power, in the secretary of state, as it is seriously contended it is, it would, indeed, produce startling consequences. The secretary of state could paralyze at will constitutional appointments made by the executive. * * * The secretary of state cannot go behind commissions officially presented to him for authentication. * * * When two commissions, duly authenticated, for the same office, are extant, and it becomes necessary to determine which of the two appointees is legally entitled to the office, that issue, presented in a proper manner and at a proper time, can be entertained; * * * but the courts will not inquisitively seek to know upon what evidence the executive acted in the performance of a constitutional duty; at all events, in advance of the consummation of an official act."

The distinction between the above case and that of State v. Farquer, supra, is clear. There is no language in the constitution of the United States or in our own which can be construed to give the secretary any discretion or judgment as to whether the governor's action in appointing a senator is legal.

The duty devolved upon the secretary of state in the case before us is merely to authenticate the commission signed and presented to him by the admitted rightful executive of the state. It is purely ministerial, and involves no exercise of discretion. There is from the very nature of the duty no place in it for the exercise of judgment. It involves nothing but affixing the seal and signing officially. It is entirely impossible for any one to infer from, or to find implied in, the simple duty of authenticating this evidence of an appointment to an office known to exist, and which, under certain circumstances, the executive of the state has authority to fill, the further duty or the power to question the legality of the exercise of the authority to appoint. If such duty or power of inquiry exists at all, then it covers every question as to legality of the appointment that can be made. It extends not only to the question of whether or not there is a vacancy, but also to the appointee's qualifications as to age, residence, or citizenship. If it exists at all, then the power conferred by the constitution of the United States upon the executive of a state to appoint a senator is not subject simply to the exclusive jurisdiction of the senate as to the election or appointment and qualifications of its members, but to another jurisdiction, which is the judgment of the secretary of state, and has the power to deny to the governor the right of the constitutional evidence that he has even made an appointment. If this power obtains in the case of the appointment of a senator, it, arising as it must and alone can from the mere duty to authenticate a commission, exists also in the case of every justice of the peace, county commissioner, or other county officer, and of every state officer of whom under any contingency the governor may have the power to make an appointment. In so far as the existence of the power is concerned, there is no possible distinction in the several cases. To say that it would not be exercised is no answer, but is an assumption of the existence of the power. Knowledge as to when or by whom the power, if its exercise is recognized, will be used or renounced, is not a subject for our consideration.

In authenticating the executive appointment of a senator, the secretary of state

in no wise commits himself to the legality of such act. The governor is not responsible to the secretary, nor the secretary for him. If the act is illegal, the authentication of the secretary is the evidence of its consummation; it proves what the governor has done, but it does not involve the secretary in responsibility for it. The secretary's certificate to the transcript of the legislative proceedings furnished Mr. Call is official evidence of what those proceedings in fact were, and nothing more, and in no wise implies any opinion of his as to the regularity or legality of such proceedings; and the same is true, no less nor any more, of his authentication of the executive act in question. Nor does the appointment, though duly authenticated, have any affect upon the legality of Mr. Call's election, or towards creating any vacancy which does not otherwise exist. If an award of the writ would have any such effect, we would, and upon the plainest principles should, refuse to award it; and for the reason that Mr. Call is not before the court, nor is Mr. Davidson, and *mandamus* is not the remedy for settling a conflict for an office, even where the right to decide such a contest is in the court, which is not the case here. People v. Farquer, supra; People v. Mayor, 3 Johns. Cas. 79; State v. Hyams, 12 La. Ann. 719, cited in State v. Wrotnowski, 17 La. Ann. 163.

V. It is also contended that neither the state nor the governor has any such interest in relation to the specific act sought to be enforced as authorizes or justifies the institution of this suit.

It is entirely clear from the authorities, (Marbury v. Madison, U. S. v. Le Baron, and Advisory Opinion, supra,) and what has been announced in preceding portions of this opinion, that the executive or governmental duty of completing a commission is not consummated until it has been sealed and countersigned. Even admitting that, when a commission has been signed and delivered by the governor to the secretary of state, the appointee named therein, who may have previously taken the oath and given bond or done anything necessary to justify him in entering into the office upon the perfection of the commission, has such a private interest therein as gives him a *status* to require, through the instrumentality of this writ, the sealing and countersigning, or admitting that the executive power of revoking his action has passed as soon as a commission so signed has been delivered to the secretary, or even as soon as it has been signed with the intention of such delivery, these positions and concessions, if proper, are in no way inconsistent with, nor do they affect, the interest of the public in the appointment and commissioning of public officers, nor do they remove the fact that the governor is charged with the "care that the laws be faithfully administered." Section 6, art. 4, Const. The commissioning of a public officer is not at any stage of its progress a mere matter of private interest. The entire public are directly interested in the consummation of his appointment, in order that he may perform the duties of his office, which duties, and the necessity of the performance thereof to the public, account, not only for the appointment, but for the creation of the office itself. Of this interest of the public in having offices filled, and commissions sealed and countersigned or completed, so that the title to the office shall vest in, and the performance of its duties become incumbent upon, the appointees, the governor is the constitutionally designated representative or trustee of the people, and as such he has the right, and it is his duty, to take such measures as will secure the benefits of the same to the people. The duty of commissioning officers cannot in reason, nor without great detriment to the public, be transferred to inchoate appointees. If it is thus transferred, and the secretary of state shall refuse to authenticate appointments which the governor may deem it his duty to make, the filling of offices will depend, not upon official duty, but on the financial ability and the disposition of appointees to litigate. It will remit to the private citizen, and impose upon private resources, a public duty which the supreme court of the United States and our own court tells us is not performed until the commission is complete. The governor, in presenting the petition for this writ, has acted in his official capacity, and in behalf of the state, and not in behalf of any private interest. In Kentucky v. Dennison, 24 How. 66, 97, it is said: "In the case of Governor of Georgia v. Madrazo, 1 Pet. 110, it was decided that, in a case where the chief magistrate of a state is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party on the record. This was a case where the state was the defendant. The practice, where it is plaintiff, has been frequently adopted of suing in the name of the governor in behalf of the state, and was indeed the form originally used, and always recognized as the suit of the state." It is the settled law that where writs of *mandamus* issue, as they may, upon the relation of a private citizen, to compel the performance of a public duty, the interest in which is common to the whole community, the state is the real plaintiff. State v. Board, 17 Fla. 707; Hamilton v. State, 3 Ind. 452; County of Pike v. People, 11 Ill. 202; City of Ottawa v. People, 48 Ill. 233; People v. Collins, 19 Wend. 56; People v. Halsey, 37 N. Y. 344; State v. County Judge, 7 Iowa, 186, 202. The special interest of the private relator is important only where the matter is one solely of private right. Whether we hold the state or the governor, as the chief executive, to be the real plaintiff in this case, we have no doubt of the power or duty of the governor to act. State v. Dubuclet, 22 La. Ann. 602.

VI. That there is no other adequate remedy is clear from the fact that the commission must be complete before it can be recorded, or a copy of the original can be evidence of the appointment. "In the case of commissions, the law orders the secretary of state to record them. When, therefore, they are signed and sealed, the order for

their being recorded is given." Marbury v. Madison, 1 Cranch, 161. Until signed, sealed, and countersigned, there is no legal evidence of an appointment of which a certified copy can be made.

VII. Upon the case made by the pleadings, our conclusion is that the peremptory writ should be awarded; but, in view of the character of the parties, we will suspend until Monday next any formal order in the premises, further than one adjudging the return of the respondent insufficient, and sustaining the demurrer thereto.

(94 Ala. 640)

WURTZBARGER v. ANNISTON ROLLING-MILLS.

(*Supreme Court of Alabama.* Nov. 6, 1891.)

PAROL EVIDENCE.

An action on a written subscription to stock cannot be defeated by evidence of a prior or contemporaneous oral agreement that the stock was not to be issued, nor the subscriber held liable on his subscription.

Appeal from city court of Anniston; B. F. CASSADY, Judge. Affirmed.

Action by the Anniston Rolling-Mills against David Wurtsbarger to recover on his written subscription to the capital stock of plaintiff. Defendant's demurrer was overruled, and judgment rendered for plaintiff. Defendant appeals.

Gordon Macdonald, for appellant.

MCCLELLAN, J. This action is for deferred installments of an amount subscribed by Wurtzbarger to the capital stock of the Anniston Rolling-Mills. The subscription was in writing. The defendant, in addition to the general issue, pleaded that he did not make the contract of subscription laid in the complaint, did not authorize any one to make such subscription for him, and that it was never understood or agreed between plaintiff and himself that he should take or subscribe for stock in said company as alleged; but that it was agreed between them, at the time he signed the book of subscription for said stock, that said stock was not to be issued to him, nor was he to be bound on said subscription, but that it was then and there agreed that his said alleged subscription was merely for the purpose of getting his name to assist in the promotion of the company, and upon this condition and understanding alone he signed said subscription. To this plea plaintiff replied that the agreement set forth in the plea was prior to or contemporaneous with the signing of the written agreement upon which the suit is based, and that said alleged agreements and understandings were oral, that after they were had or made the defendant signed the written contract sued on, and that, therefore, the alleged oral agreements were merged in the writing. A demurrer was interposed to this replication, and overruled, and judgment rendered on the evidence for the plaintiff.

The only assignment of error here goes to the action of the court upon this demurrer. We think that ruling was entirely proper. The fact that the contemporaneous agreement relied on in the plea lay in parol destroyed its efficacy as a defense to the action on the written contract; and the replication alleging this fact was a perfect answer to the plea, on the familiar doctrine that, "when a contract is reduced to writing, all oral agreements, whether prior or contemporaneous, are merged in it, and considered as waived, and parol evidence of them cannot be received to vary the legal import of the writing." Brewing Co. v. Handley, 90 Ala. 486, 7 South. Rep. 912; Pollard v. Maddox, 28 Ala. 321; Chambers v. Ringstaff, 69 Ala. 140; Griel v. Lomax, 86 Ala. 132, 5 South. Rep. 325; Dexter v. Oblander, 89 Ala. 262, 7 South. Rep. 115. Affirmed.

(94 Ala. 530)

BURKE v. TAYLOR.

(*Supreme Court of Alabama.* Nov. 4, 1891.)

CANCELLATION OF DEED—BURDEN OF PROOF—UNDUE INFLUENCE.

1. A negro woman 80 years of age, with but little education, physically feeble and incapable of carrying on business, at the solicitation of one B., who at the time was insolvent, conveyed to him the fee to land worth $4,000 for an expressed consideration of $250, no part of which was paid, with the understanding that the grantee should pay the taxes, keep the property in repair, etc., "collect the rents, paying same to the grantor during her life-time, and on her decease to erect over her grave a small tombstone, costing about $10." The grantee had been acting as her agent in managing the property for about three weeks before the execution of the deed, which was done by affixing her mark on hearing it read over once, but without explanation or an opportunity to have it examined for her benefit. *Held*, that the deed was void.

2. In actions to avoid a deed on the ground of inadequacy of consideration and undue influence arising from the relation of the parties, the burden is on the grantee to prove that it is equitable in every respect.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor. Affirmed.

Bill in equity by Nancy Taylor against Michael Burke praying for the cancellation of a deed from plaintiff to defendant. Prayer of plaintiff granted. Defendant appeals.

The bill in this case was filed by the appellee, Nancy Taylor, against the appellant, Michael Burke, and prayed to have set aside and annulled a deed made by her to the defendant, June 7, 1888, on the ground that it was obtained by fraud and undue influence; and the bill also prayed to have the defendant removed as her trustee. The facts set forth in the bill, and which are seemingly sustained by the testimony, are that the plaintiff was an old negro woman, above 80 years of age; was born a slave; that she had but little education; that during the months of May and June, 1888, she suffered greatly from a disease of the eyes and from the infirmities of old age; that she had had an operation performed on her eyes, which caused her much suffering, and left her feeble both in body and mind; and that about the month of May, 1888, the defendant, who was an intelligent white man, and who had had much and varied experience in business life, became acquainted with the plaintiff, and soon thereafter, during the same month, became her agent,

to rent her houses, and collect the rent. The bill further avers that the defendant is insolvent, and this he does not deny. Such other facts as are averred in the bill, which are shown by the published testimony, are sufficiently stated in the opinion. Upon the submission of the cause, on the pleadings and proof, the chancellor decreed that the plaintiff was entitled to the relief prayed for, and ordered the deed from her to the defendant to be canceled. The defendant brings this appeal, and assigns the chancellor's decree as error.

Moore & Finley, for appellant. *Arrington & Graham*, for appellee.

COLEMAN, J. It is no part of the purpose of this opinion to construe and declare the full legal effect of the instrument in writing dated 7th day of June, A. D. 1888, the validity of which is attacked in this suit. It is enough to say it purports to convey in fee to the grantee, in trust, the property rights of Nancy Taylor, the grantor, in all her real estate. It appears that besides the lot conveyed, and improvements thereon, she owned no other property, except some furniture. The bill charges that the execution of this instrument was procured by fraud and undue influence. The consideration expressed in this conveyance is $250, paid by the grantee, and the assumption on his part to superintend and control generally the property of the grantor, to keep it in repair, to pay the taxes, and keep the property insured, and to rebuild from the insurance money, in case of its destruction by fire, the buildings, to collect the rents, and pay them over to the grantor during her life. A small tombstone was to be erected also over her after her death, which the proof shows would not have cost exceeding $10. It is not pretended that the $250 was paid by the grantee or that its payment was in fact contemplated by the parties. Mere inadequacy of price is not sufficient to set aside a deed of conveyance, and, when relied upon alone, it must be so great as to shock the understanding, and induce the belief that the transaction was fraudulent. Any person possessed of reasonably good faculties and understanding has the right to fix the price of his own property, and part with it on such terms as he may see proper, in the free exercise of his judgment and will. A mere voluntary consideration is sufficient to sustain a deed. Davidson v. Little, 60 Amer. Dec. 82. Gross inadequacy of consideration, when coupled with other facts strongly tending to show fraud or undue advantage, is a suspicious circumstance. In the case of Waddell v. Lanier, 62 Ala. 349, it is said: "All transactions between trustee and *cestui que trust*, guardian and ward, attorney and client, principal and agent, parent and child, are narrowly watched and jealously scrutinized in courts of equity. In all the variety of the relations of life, in which confidence is reposed and accepted, and dominion may be exercised by one person over another, the court will interfere and relieve against contracts or conveyances, when they would abstain from granting relief if no particular relation existed between the parties, in which trust and confidence was reposed and accepted, and there was not an opportunity for an abuse of the confidence and the exercise of undue influence. * * * The relation of principal and agent is affected by the same consideration which influences the court in dealing with transactions between persons standing in other fiduciary relations. * * * It is certain that agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals, or, by abusing their confidence, to acquire unreasonable gifts or advantages; or to deal validly with their principals in any case, except when there is the most entire good faith, and a full disclosure of all the facts and circumstances, and an absence of all undue influence, advantage, or imposition;" citing 1 Story, Eq. Jur. § 315. In all such cases the burden rests on the party claiming under the deed to prove "satisfactorily that it is just, fair, and equitable, in every respect, and not on the party seeking to avoid it to establish that it is fraudulent." The same doctrine is laid down as to the burden of proof in such cases, in Shipman v. Furniss, 69 Ala. 562, and again in its full force in Lyons v. Campbell, 88 Ala. 469, 7 South. Rep. 250, and reaffirmed in Bancroft v. Otis, 91 Ala. 279, 8 South. Rep. 286, so far as it applies to transactions *inter vivos*. In 62 Ala., supra, it is further said that feebleness of intellect, or its diminution or infirmity from age, disease, or other cause, would be a circumstance of importance, if the inquiry was directed to the existence of actual fraud; but where fiduciary relations exist, or that of principal and agent, it is not essential that the donor be of unsound mind, or of feeble or impaired intellect. Many authorities might be cited to sustain the proposition that where there is weakness of mind, arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration, connected with circumstances of undue advantage, a contract made under such circumstances will be set aside in equity. Tracey v. Sacket, 1 Ohio St. 54, and cases cited. The deed was read over to the grantor once, but without explanation, and she affixed her signature by making her mark. The grantee, Michael Burke, is a white man of extensive and varied business experience. Nancy Taylor, the grantor, was a negro woman, and at the time of the execution of the paper was about 80 years of age, and in feeble health. The instrument was prepared by an attorney at the instance of Burke, and as directed by him, in the absence of the grantor. The evidence shows that the grantor had no children, but she had taken into her care Mary Williams when only 6 months old; that Mary Williams was now 34 years old; and that they had lived together during all of that time; that they spoke and regarded each other as mother and daughter; and that by her will, made before the execution of the instrument of conveyance, and which had never been altered or revoked, the grantor had devised all her property to Mary Williams; that the conveyance to grantee was procured by the grantee during a time when Mary Williams was absent. These

important facts are fairly sustained by the evidence, and we do not think it necessary to point out and comment on many circumstances proven which tend to weaken the testimony of the appellant. It is fairly proven that at the time the instrument was executed the relation of principal and agent existed; that the consideration is grossly inadequate; that the grantee was old, infirm, in feeble health, and suffering great pain, and confined to her bed, in consequence of an operation which had been performed on her eyes. The testimony of Dr. Baldwin is that he performed the operation in 1888, and that she was suffering a great deal, and that she was confined to her bed for some time afterwards; that she was physically feeble at the time of the operation; had but little vision, and that was out of but one eye. The notary public, James Jackson, testified that he did not know the condition of her mind at the time she signed the instrument, but that she was not capable of carrying on any business then. The lot of land, at the lowest valuation, was worth $4,000, and a part of it was rented to tenants. The evidence shows that the grantor had known the grantee but a short time, and that she had employed him as her agent to rent out her property, and to collect her rents, and to perform the duties of a real-estate agent for her in regard to her property. His own account shows he was acting in some capacity for her as early as May 18, 1888. She had employed him to sell her furniture at auction, which it seems was very valuable, and which the proof shows he appropriated to his own use without her knowledge and without a sale. We do not think it necessary to say, in regard to the facts proven, as the court did in King v. Cohorn, 6 Yerg. 75, where the facts in many respects were very similar, "that no woman in her circumstances, if in her senses and not under a delusion, would make such a contract, and it may confidently be asserted that no honest or fair man would have accepted it;" but we do hold that the facts amply show that she is entitled to relief. The decree of the court below is affirmed.

(94 Ala. 540)

WEIL v. McWHORTER *et al.*

(*Supreme Court of Alabama.* Nov. 4, 1891.)

LANDLORD'S LIEN—GOODS IN WAREHOUSE—PRIOR DEBT.

The Code, § 3069, provides that the landlord of any store-house shall have a lien on the goods belonging to the tenant for his rent, superior to all other liens. *Held*, where the tenant turned out a quantity of goods in payment of a debt not connected with the business, to one having knowledge of the tenancy, that, since such sale was not in the usual course of business, it did not displace the lien.

Appeal from circuit court, Madison county; H. C. SPEAKE, Judge. Reversed.

Action in attachment by Isaiah Weil against Pierce & Crumbacker and Morgan McWhorter for rent of a store-building. Judgment for defendants was had, and plaintiff appeals.

The action was brought to recover the amount due, and that would be due, for the rent of a certain store-house, leased to the defendants Pierce & Crumbacker, under a contract, and was commenced on June 28, 1888, by an attachment issued on an affidavit and bond given by the plaintiff. Upon the levy of the attachment upon the goods which were found in the rented store-house, and also upon certain goods in the hands of the appellee Morgan McWhorter, the said Morgan McWhorter interposed a claim to the property so levied on in his possession. A statutory trial of the right of property was thereupon inaugurated, and the issues which were formed were tried by the court, without the intervention of a jury, upon an agreed statement of facts. The facts as agreed upon were substantially as follows: The plaintiff rented to the defendants in attachment, Pierce & Crumbacker, a store-house for a term commencing on March 1, 1888, and terminating December 31, 1888; that the defendants carried on in such store-house a mercantile business in paints, oils, wall-paper, and other house furnishing goods. The grounds of the attachment, as alleged in the affidavit made by plaintiff, were that the defendants had "fraudulently disposed of some of their goods;" that in the trial of the attachment suit judgment was rendered for the plaintiff; that the property which was levied upon in the store-house sold for $65, the amount of the judgment being $173.34. The testimony for the claimant tended to show that on January 15, 1888, the defendants borrowed from him $200, for which they gave their partnership note, which became due on June 20, 1888; that, upon the defendants' failure to pay said note at maturity, claimant threatened to sue them; that they said they had no money, but offered to pay claimant's debt in goods from their store; that claimant accepted said proposal, and bought and removed from said store-house the goods in issue, which did not exceed in value the amount of defendants' indebtedness to claimant, and the claimant receipted and delivered to the defendants their said note for $200. It was further shown that, when the claimant accepted said goods in payment of the said note, he did not know that defendants owed any rent, but, on the contrary, he was informed by the defendants and believed that they had paid all the rent for which they were liable, but the claimant knew that the store-house occupied by the defendants was not their property. Upon the agreed statement of facts, the court ruled "that the lien of the plaintiff was displaced by reason of the removal of the goods, and that said goods, so levied on by the sheriff, and for which the claimant interposed his said claim, were not liable to the attachment, and the court thereupon entered judgment in favor of the claimant against the plaintiff." The bill of exceptions then recites that "to the action of the court in so ruling and so entering said judgment the plaintiff then and there duly excepted."

Lawrence Cooper, for appellant. *Richard H. Lowe*, for appellees.

MCCLELLAN, J. We have had occasion in the cases of Ex parte Barnes, 84 Ala. 540, 4 South. Rep. 769, and Abraham v. Nicrosi, 87 Ala. 173, 6 South. Rep. 293, to institute a comparison between the rights and remedies of a landlord existing under the common law of distraint and his rights and remedies under Code 1886, §§ 3069,[1] 3074, providing a lien on the property of the tenant for the rent of store-houses and other buildings. In the case last noted we held that our statute "must be construed in the light of the common law, and be accorded such operation and effect, not inconsistent with its terms, as was given to the landlord's remedy under the old law of distress." Upon this principle we there held, in consonance with the rule obtaining at common law, the statute being silent on the subject, "that where there are leases from year to year, and the rent of a former is in arrears during a subsequent year, the goods of the tenant then on the premises are subject to the statutory lien for the satisfaction of the rent which accrued under another lease for a previous year." So in Ex parte Barnes, supra, the terms of the statute being broad,—sufficiently so, indeed, if not restrained by recognized general principles, to cover all property belonging to the tenant, whether at the time or ever on the premises or not,—it was ruled that the general terms of the act must be construed with reference to the policy of the common law in respect of distress, which did not contemplate the subjection of property to the payment of rent which had not enjoyed the protection of the demised premises; that property which had never been on the premises could not be subjected to the statutory lien. There are doubtless other matters with respect to which the operation of the statute will be shaped by reference to the principles obtaining in regard to the common law of distress. But, in addition to the points of radical difference between the two remedies adverted to in Abraham v. Nicrosi, there is one such which has an important bearing on the case at bar. The landlord, at common law, had no lien upon the goods of his tenant until distress levied. Moreover, originally he had no right of distress upon goods of the tenant after they had been removed from the premises, unless removed after the landlord or his bailiff, armed at the time with the right to distrain, had had view of them on the premises. This was subsequently changed by statute so as to allow distress within a certain number of days upon goods which had been fraudulently removed, but still there was no lien until the distress had been actually made. On the other hand, the statute we are considering, as construed in Ex parte Barnes, supra, in terms gives the landlord a lien on all property of the tenant from the moment it is brought on the premises, and the remedy by attachment is not, as in distress, to fix a lien, but to enforce one already existing; the lien does not depend upon levy, but is the predicate for the levy. It attaches from the commencement of the tenancy for the security of the rent when it matures. Garner v. Cutting, 32 Iowa, 547; Grant v. Whitwell, 9 Iowa, 152; Hunter v. Whitfield, 89 Ill. 229.

This lien is similar in all respects to that created by statute in favor of agricultural landlords, except as to the species of property to which it attaches, and the reasons upon which the charge upon the property proceeds. Once attached, we can conceive of no ground for giving it a different operation and effect, as regards the rights of the parties to it or the rights of third parties who acquire an interest in the property, than is given by our statute and decisions to the lien in favor of landlords of agricultural lands, save only in one particular to be presently discussed. With respect to liens of the latter class, the law with us is thoroughly well established, that they are not displaced by the removal of the property from the premises, nor by its sale to a third person, who either knows or is chargeable with knowledge of the lien; and it is equally well settled law that one is chargeable with such knowledge who knows that the property he purchases is the product of rented lands. Scaife v. Stovall, 67 Ala. 237; Stern v. Simpson, 62 Ala. 194; Manasses v. Dent, 89 Ala. 565, 8 South. Rep. 108. And we cannot doubt that ordinarily one who purchases from a tenant of a building property to which the landlord's lien has attached, with a knowledge of the existence of the tenancy, takes it subject to the lien. Notice of the tenancy is sufficient to put him on inquiry as to whether any rent has accrued, and where this inquiry, if properly prosecuted and information sought of the landlord, would disclose that rent had accrued, whether due or not, the purchaser is held to know the fact. To make inquiry of the tenant will not suffice. On these considerations and authorities, it is our opinion, on the agreed facts, that the claimant below bought the property with notice of plaintiff's lien, and that his claim thereto against the attachment cannot be maintained unless the transaction between him and the tenant is brought within the exception before alluded to. It is the recognized doctrine of the common law of distress that, when a house is rented for mercantile purposes, it is the implied understanding of the parties that goods kept therein for sale may be disposed of in the usual course of the particular business, free from the claim for rent, and that the purchaser, though with full notice, it may be, that rent has accrued, takes them discharged from the landlord's lien; and on the principles laid down in Abraham v. Nicrosi, supra, this doctrine must be held to obtain under our statute. The tenant in the present case appears to have been a dealer in paints, oils, wall-paper, and the like, and rented the store-house from the plaintiff for the purpose of conducting that business therein. The usual course of trade in such business we

[1] Code Ala. 1886, § 3069, provides that the landlord of any store-house, dwelling-house, or other buildings shall have a lien on the goods, furniture, and effects belonging to the tenant, for his rent, which shall be superior to all other liens, except those for rent.

apprehend to be the sale of the commodities constituting the stock of goods to persons who have need of them, for money either paid or to be paid. It may be, indeed, no doubt it is, that where such dealer casually owes a customer a sum of money, and that customer has need of his debtor's wares, the supplying of such necessity in consideration of the satisfaction of the indebtedness, would be in the usual course of trade, though no money was paid or to be paid. But where the tenant owes a debt, and his creditor, solely for the purpose of collecting his claim, and not to supply any necessity he may otherwise have for the tenant's goods, takes them in satisfaction of his debt, because this is the only way in which he can realize upon it, we are clear to the conclusion that this is not in the usual course of that business, and that the property so taken is not discharged from the lien. Sales for money take nothing out of the business; indeed, they add to the capital of the business to the extent of the profits which it is to be presumed are made, increase the tenant's ability to pay rent, and enable him to buy other goods which become subject to the lien, and afford security to the landlord until they are in like manner disposed of. And these considerations afford additional reasons for the law's implication that goods thus sold are, by the intendment of the parties, discharged of the lien. Not so with respect to a sale in payment of and for the purpose of paying an antecedent debt. This may be beneficial to the tenant, but it cannot be otherwise than detrimental to the business, from the point of view of the landlord. The property taken out of the business by such transaction is not replaced by other property, or by money with which to buy other property, upon which the lien would become operative. The tenant's ability to pay rent is lessened. The landlord's security is decreased. Such transactions can, in no just sense, be said to be necessary in the prosecution of the business. And every reason for an implication for an intendment between the parties that property so disposed of shall be discharged of the lien is wholly lacking. All this is true, moreover, as well with respect to a sale of any part of the stock upon such consideration as to a sale of the whole of it. The agreed facts, in our opinion, bring this case clearly within the foregoing principles. The claimant had constructive notice of the lien. With this notice he purchased the goods solely for the purpose of realizing on the indebtedness of the tenant to him. The transaction was not in the usual course of trade, and the plaintiff's lien was not displaced by the sale and removal of the property. The judgment of the circuit court must therefore be reversed, and the cause will be remanded.

(94 Ala. 612)

HUGHES *et al.* v. SOUTHERN WAREHOUSE CO.

(*Supreme Court of Alabama.* Nov. 5, 1891.)

RELEASE OF SURETY—EXTENSION OF TIME — SECONDARY EVIDENCE.

1. Where a maker pays $100 on a note, and the holder agrees to wait a certain time for the balance, and there is no additional valuable consideration to support the agreement, the surety is not discharged.

2. Parol evidence of the contents of a written lease, alleged to have been lost, is not admissible without first producing the subscribing witness to prove its execution, or showing a legal excuse for his absence.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. Affirmed.

Action on a note under seal by the Southern Warehouse Company against A. T. Hughes and F. M. Letcher. Judgment for plaintiff. Defendants appeal.

Among other charges given by the court at the request of the plaintiff was the following: "(1) If the jury believe from the evidence that the defendant Hughes was notified that the plaintiff held the note early in June, 1886, and that on the 10th day of June he went to the office of plaintiff, and said to it that money was tight, and said that if it would wait on him until fall he would pay one hundred dollars on that day on the note, and would pay the balance in the fall; and if they further believe that this was agreed to, and thereupon defendant Hughes paid the one hundred dollars, and at his instance the indorsement found on the note was then and there made; and if they further believe that the plaintiff, relying upon Hughes' promise to pay such balance, did wait until after the 15th day of October, 1886, without taking any steps to enforce the collection of the note, then the defendants would be estopped from setting up any defense on account of anything that Walker might owe him for advances, or on account of Walker's failure to make repairs on the leased premises, unless the jury believe that at the time of making the payment and obtaining the indorsement Hughes informed plaintiff of such defenses, or unless they believe from the evidence that the plaintiff had other notice of such defenses,—then the jury must find a verdict for the plaintiff." The defendants separately excepted to the giving of this charge, and also separately and severally excepted to the refusal of the court to give, at their request, the following charges: "(1) If the jury believe the evidence, the note sued on is entitled to receive the additional credit of one hundred and fifty-two dollars on account of the due-bill given by Walker to Hughes for that amount. (2) If the jury believe the evidence, the defendant Letcher is entitled to a credit on the said note, as to him, of the amount of Walker's due-bill in the sum of one hundred and fifty-two dollars. (3) If the jury believe the evidence, they must find in favor of the defendant Letcher. (4) If the jury believe the evidence that Walker owed Hughes at the time the plaintiff obtained the note in suit more than the amount of said note, then they must find for the defendants. (5) If the jury believe the evidence, the set-off of one hundred and fifty-two dollars pleaded, and under which plea of set-off the due-bill of Walker is introduced in evidence, must prevail." There was judgment for the plaintiff, and the defendants prosecute this appeal, and assign as error the rul-

ings of the court upon the evidence and the charges.

John G. Winter, for appellants. *Tompkins & Troy*, for appellee.

STONE, C. J. The present suit is brought on a note under seal or bond, due June 1, 1886, for the payment of $300. It is payable to Walker, and was by him indorsed on the day of its maturity. The note or bond is signed by Hughes and Letcher, the latter being only a surety for Hughes. The consideration is not expressed in the note or bond. Up to this point there is no conflict in the testimony. The joint defenses attempted were set-off and recoupment. Letcher, the surety, pleaded an additional, separate defense, viz., that he was only surety, and that without his consent, and for a valuable consideration, the holder of the note or bond extended the time of payment to October 15, 1886, and thereby discharged him, the surety. One replication to the pleas of set-off and recoupment sets up in avoidance of them that on June 10, 1886, the defendant Hughes agreed with plaintiff to pay, and did pay, $100 on the said note or bond, and that in consideration thereof the plaintiff agreed to indulge, and did indulge, the defendants for the balance of the demand until October 15, 1886. No demurrers were interposed to any of the pleadings, but issues of fact were joined on each plea and each replication; hence there was no judicial ruling invoked or had on any step taken in the formation of the issues. The chief contention arose on the introduction of testimony. Hughes, the defendant, testified that the note in suit was given in part security of the rent of a mill, and was proceeding to testify on certain stipulations alleged to have been embraced in the contract of lease. The lease, he testified, was in writing, and, according to his recollection, Ferguson, who lives in Birmingham, Ala., was a subscribing witness to it. He testified to having made the proper search for the lease, and that it could not be found. It was objected that he could not speak of the contents of the lease without first producing the subscribing witness to prove its execution and existence. The objection was sustained, and he excepted. It will be noted that the offer was to prove the contents of the lease, which the witness testified was in writing, and attested by a subscribing witness; and that no legal excuse was shown for the absence of the subscribing witness. Offered, as this testimony was, to prove the contents of an attested writing, we hold the circuit court did not err in excluding the testimony. 1 Greenl. Ev. § 572. Walker, the payee of the note, was then introduced, and testified that the lease was oral, and not in writing. The witness Hughes was again offered to testify to what had been previously rejected, and his testimony, on objection, was again ruled out. Had the second offer been to prove, as independent facts, what were the stipulations of the contract on Walker's part, we cannot know what the circuit court's ruling would have been. That was not the offer The proposition was to prove what the written contract of lease showed were his obligations. This involves the same question as that considered above, and the court did not err in rejecting the testimony. The proof showed that the facts of the case in regard to the extension of time were precisely those set forth in the replication, the substance of which we have given. No new consideration was paid or promised. Payment of $100 of the sum evidenced by the note is all that is pretended to have been done. It requires an additional valuable consideration—something beyond part payment of the debt proposed to be extended—to bind the promisee to an observance of even an express promise to indulge. Giving full credit to all the testimony tended to prove, the warehouse company was not hindered one minute in its right to sue by the agreement entered into. It follows that the alleged indulgence extended to Hughes, no matter how presented, could not discharge Letcher from liability on the note or bond. The promise to so indulge was gratuitous, and not binding. David v. Malone, 48 Ala. 428; Haden v. Brown, 18 Ala. 641; Railway Co. v. Brewer, 76 Ala. 135. We cannot know what defense of merit could have been made in this case, if the terms and conditions of the contract of lease had been before the jury. We have seen they were properly ruled out. There was, however, some testimony introduced, tending to prove a cross-demand or set-off. Hughes testified that with Walker's consent he put repairs on the mill; and there was some proof of their value. This Walker denied, and the question became one for the jury, if the issue had permitted them to consider it. But it did not. We have stated the substance of the replication to this line of defense, and that the testimony proves the truth of that replication. Now, whether it tendered a material issue or not, issue was joined upon it, thus conceding that it was an answer to the pleas. That issue being found in favor of the plaintiff, that line of defense necessarily fell to the ground, unless, on motion by defendants, a repleader had been awarded. 3 Brick. Dig. p. 711, §§ 5–7. No such motion was made. If the issue had permitted the inquiry, we are not prepared to say we would affirm the correctness of the first charge, given at the instance of the plaintiff. We have seen this inquiry was precluded. Of the charges asked by defendants, No. 4 is without evidence to sustain it. The others, on the evidence in the record, were properly refused. Affirmed.

(95 Ala. 259)

ENGLISH *et al.* v. PROGRESS ELECTRIC LIGHT & MOTOR CO.

(*Supreme Court of Alabama.* Nov. 5, 1891.)

ABATEMENT OF NUISANCE—ELECTRIC LIGHT PLANT.

In a suit to enjoin defendant from maintaining a nuisance by operating an electric light plant adjoining complainants' dwelling-house the evidence showed that the plant was of great public utility, and the machinery of the best quality; that the officers and agents were skillful; and that the annoyances from smoke, soot, noise, and vibrations had been materially lessened during defendant's ownership; one witness testifying that they were not one-hundredth part as great

as formerly. The evidence in regard to the vibrations of the house, caused by the engine, was conflicting; and one witness testified that they were not greater than those usually caused by a passing dray. *Held*, that the evidence did not prove more annoyance than is usually incident to a residence in a city, or such annoyances as could not be prevented by labor and money, for which there was redress at law.

Appeal from chancery court, Mobile county; THOS. W. COLEMAN, Chancellor. Affirmed.

Bill by Martha E. English and others against the Progress Electric Light & Motor Company to enjoin as a nuisance the operation of defendant's plant. Decree for defendant. Complainants appeal.

Gregory L. & H. T. Smith, for appellants. *Thos. H. Smith* and *Overall & Bestor*, for appellee.

CLOPTON, J. Appellants invoke the interference of the chancery court to abate by injunction, as a nuisance, the electric plant maintained and operated by appellee in the city of Mobile. The remedy sought is preventive, and, incidentally, compensatory. An injunction for such purpose is not a matter of absolute right; but if, as has been said, it rests in judicial discretion, the exercise of such discretion is not without limitations, and is to be guided by the settled principles on which interference by the court, in such cases, depends. In considering whether or not an injunction should be granted regard must be had, on the one hand, to the right of every person to use his own property as his taste, desires, and interest may dictate; and, on the other, to the right of his neighbors to the comfortable and unmolested use and enjoyment of their property. No one should be restrained as to the use of his property, unless such use offends the legal rights of another. There are certainly instances of private nuisances, for which an action on the case can be maintained, yet insufficient to justify interference by injunction. This extraordinary and transcendent power should be exercised only when imperatively necessary to prevent multiplicity of suits, or irreparable injury, or continuous or constantly recurring grievances, when, from their irreparable nature, continuance, or frequent repetitions, the legal remedies are inadequate to afford full redress. While it is not essential that the injury should be strictly continuous, it must not be only occasional or accidental. Rouse v. Martin, 75 Ala. 510; 16 Amer. & Eng. Enc. Law, 959. The plant of defendant was first established in April, 1885, and was operated and used by Cawthorn and his associates for the purpose of lighting the dwellings and stores in the city of Mobile, until April, 1887, when they sold it to defendant, who has continued its operation, lighting the streets as well as dwellings and stores. The house in which complainants resided is a one-story frame house, having four rooms, with kitchen and servants' rooms, and is situated on a mound about 12 feet above the level of the street and the adjacent property. Many years ago the streets in that portion of the city were graded to the level of the wharves, and the adjacent property, except complainants', cut down to the level of the streets. Brick walls were built on the four sides of complainants' lot for the purpose of supporting the embankments. The bill avers that defendant has a contract with the city of Mobile, under which it lights the streets of the city with electricity every night that the moon is not shining, and for this purpose uses four large boilers and several large dynamos; the ends of the boilers projecting to within a few feet of the wall of complainants. It further avers that when the plant is in operation a dense smoke is produced, the soot from which, in certain conditions of the atmosphere, is frequently blown up and into complainants' house, and fills it, unless the windows are closed. Further, that the machinery, when in operation, frequently and at intervals makes a loud, palpitating noise, like the puffing of a locomotive when pulling a heavy train up grade, which noise is sufficiently loud to be heard 200 yards away; also frequently creates a severe vibratory motion, that shakes the surrounding buildings, and especially the building owned by complainants. The bill further avers that the noise, vibrations, and smoke are all made in the night-time, and frequently continue from early in the evening until nearly morning; that the noise disturbs the sleep of the occupants of the building, and the vibrations are so severe as to make the tableware upon the tea-table and the windows of the house rattle, the chairs and furniture in the house rock, and to shake the occupants when in bed. That such noise and vibrations not only interfere with the sleep of the occupants, but render them nervous, and make the houses undesirable as places of residence, even for those in health; and, in case of sickness, would so excite an invalid as to seriously affect speedy recovery, and in certain cases be seriously dangerous to life. The bill further avers that on several occasions portions of the machinery have burst or blown out, making a loud noise, greatly frightening complainants, causing them to run out into the street; that there is constantly thrown from said machinery steam in large quantities, and hot water, which runs down the gutters in front of and around the residence of complainants, to their great annoyance; that the proximity of said boilers and machinery greatly increases the risk from fire and the rate of insurance, also adding great danger from the explosion of the boilers and breaking of machinery. The answer denies these allegations of the bill; sets up the great utility of the business to the public; also that, if there were causes of complaint at the commencement of the business, they have been obviated by the application of scientific appliances, and that any inconvenience experienced by complainants could have been prevented with little effort; also that the acquiescence and fault of complainants induced defendant to invest a large sum of money in improving the plant.

It is difficult, if not impracticable, to formulate a rule accurately defining the acts or facts which will constitute a nui-

sance under any and all circumstances We shall not make the attempt. As a general proposition, it may be said that any establishment, erected on the premises of one, though for the purposes of trade or business, lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a nuisance. In applying this principle, it has been repeatedly held that smoke, offensive odors, noise, or vibrations, when of such degree or extent as to materially interfere with the ordinary comfort of human existence, will constitute a nuisance. Rouse v. Martin, supra. This principle has been applied to various kinds of factories and industries located in a city, including gasworks, and the production of light by the operation of a steam-engine and dynamos. Cleveland v. Gas-Light Co., 20 N. J. Eq. 201; Yocum v. Hotel St. George Co., 18 Abb. N. C. 340. The averments of the bill clearly make a case of nuisance, calling for its abatement by the chancery court; but the denials of the answer, and the affirmative and substantial defenses set up therein, make the necessity of interference turn upon the sufficiency of the evidence; proper legal principles being applied to show that the electric plant, as now operated and conducted, so materially interferes with complainants' use and enjoyment of their adjacent dwelling as to entitle them to injunctive relief. From this consideration the evidence relating to the offensive odors may be eliminated, there being no allegation in the bill touching this matter; also the evidence relating to risk from fire, danger of explosion, depreciated value of the property, and the increased rate of insurance, for such wrongs may be adequately redressed at law. This narrows the inquiry to the degree or extent of the noise, smoke, soot, and vibrations. There is a mass of evidence,—many witnesses having been examined by both parties,—and the testimony is voluminous. The evidence is conflicting in material respects. Appellants' counsel contend that the testimony of the contradicting witnesses on the part of defendant is entitled to but little weight, for the reason that but few of them were ever in the house of complainants, and these only for a short time, and the others live at a great distance. Naturally the noise and vibrations diminish in proportion to distance; but the force of the argument is impaired by the fact that one of the most material witnesses resides in the dwelling-house owned by complainants, and mentioned in the bill as subject to the same disturbances, and some of the others in dwellings in the same block, while some of complainants' witnesses reside in dwellings in a different block, and across the street. The testimony of defendant's witnesses, having a material bearing upon the inquiry, should not be ignored, but accorded such weight as it may be entitled to, when the entire evidence and the construction and operation of the plant are considered. We shall not attempt, however, to follow counsel in their elaborate discussion of the evidence. Though the testimony of the witnesses on the part of complainants may be somewhat exaggerated by supersensitiveness and an excited imagination, it may be conceded that their evidence strongly tends to show material annoyance and inconvenience, caused by the smoke, soot, noise, and vibrations during the administration of Cawthorn, and even for a time after defendant purchased and operated the plant. The evidence, however, shows that defendant has made alterations and improvements, especially as to the escape of steam, which have greatly diminished the evils complained of. As to an establishment of public utility in a city, the rule is that its lawful use will not be perpetually enjoined, when, by the application of scientific appliances, such alterations in the machinery may be made as will remedy the evils. In such case the court will go no further than to require such appliances to be introduced, and in some cases will direct a reference to ascertain if the evils can be thus remedied. Green v. Lake, 54 Miss. 540; 1 High, Inj. § 787. On the same principle, the court will not make the injunction perpetual when such appliances have been used, even during the pendency of the suit, and the desired results effected. The real and important question is, does the manner in which defendant operates the plant, since the alterations and improvements were made, interfere with the comfortable use and enjoyment of their residence by complainants to such extent as to create a nuisance, which, when the locality and the circumstances are considered, it becomes the duty of the court to enjoin? The witness Long testifies that the noise has been diminished exceedingly, and that it "is not a hundredth part of what it was before these changes were made;" and Sossaman says: "I could feel no vibration there, but I know that sometimes, while walking down the street, one can feel a little shaking, which is caused by the running of a dray, and I noticed no more vibrations about that place than a running of a dray might cause. At the time I speak of the machinery was in motion." We have especially referred to the testimony of these witnesses for the reason that Long resides in the dwelling owned by complainants and mentioned in the bill, and Sossaman went to the house at the instance of complainants to examine and give an opinion. His attention was directly called to the subject. Their evidence is corroborated by the testimony of several other witnesses. There is, however, conflicting evidence on the part of complainants. The evidence further shows that by a comparatively small expense complainants could avoid the inconveniences and annoyances arising from the vibratory motions. When such is the case, a perpetual injunction will not be granted, full compensation being obtainable at law. In Rosser v. Randolph, 7 Port. (Ala.) 238, the bill was filed to enjoin the erection of a mill, which, it was alleged, would be injurious to the health of the neighborhood, and would drown and render useless a

spring on which complainant relied to furnish himself and family with pure water. The mill having been erected, and it not appearing that the health of the community had suffered, the court said, in reference to the spring: "By the application of labor, the value of which can be ascertained, or which the defendant, if applied to, might be willing himself to do, the spring can be restored to its original state; thereby giving to complainant the full enjoyment of his spring of water, and at the same time securing to the defendant those rights which appertain to him as owner of the adjacent land." Also in Kingsbury v. Flowers, 65 Ala. 479, where the bill was filed to enjoin future interments in a private burial-ground, it is said: "The apprehension of injury from this source, it is evident, could be quieted by but slight labor expended in drainage,—a labor, it may be, if requested, the defendants would have performed, rather than to have been forced into this litigation." These were cases in rural districts. The rule is especially applicable to industrial establishments in a large city.

We do not think the evidence shows that the locality in which the plant was situated is so exclusively devoted to industrial enterprises, or business purposes, or so remote, as to afford defendant immunity on this account. The dwellings of complainants and others in the vicinity were erected long before the plant was established. However, a person cannot expect to possess in a city the peace, quiet, enjoyment, and freedom from annoyances of the country, and must submit to the ordinarily incidental annoyances of living in a city. It has been aptly said: "A person who resides in a large city must not expect to be surrounded by the stillness that prevails in rural districts. He must necessarily hear some of the noise, and occasionally feel slight vibrations, produced by the movements and labor of its people, and by the hum of its mechanical industries. The aid of a court may be invoked to keep annoying sounds within reasonable limits. Every noise, however, is not a nuisance; nor when produced in the exercise of a lawful occupation should the strong arm of a chancellor be extended to suppress it." McCaffrey's Appeal, 105 Pa. St. 253; Coffin Co. v. Warren, 78 Ky. 400. Whether or not the transcendent power of the court should be exercised under such circumstances must be determined in view of the relative rights of the parties and the public welfare. Gilbert v. Showerman, 23 Mich. 448. Unquestionably the electric plant is of great public utility, and its abatement by injunction would entail heavy loss upon its owners, and, according to the testimony, increased cost of light to the citizens of Mobile. The machinery is of the best quality employed for electrical purposes. Its officers and agents are shown to be skillful, and acting in good faith. Efforts have been made with considerable success, and are still being made, to prevent injury and annoyance to the occupants of adjoining dwellings. One of the chimneys is 80 feet high and the other 70,—40 or 50 feet higher than the roof of complainants' residence, and sufficiently high to discharge the smoke in the air, so as not to incommode complainants unless in abnormal conditions of the atmosphere, which occur only occasionally. Though the locality in which the plant is situated may not be of such nature as to defeat its abatement, if its operations cause substantial injury to neighboring dwellings or material annoyance to the occupants, yet when, by the application of scientific appliances, or by the expenditure of a reasonable amount of labor and money, the evils can be obviated or diminished, so as to amount to no more than are ordinarily incident to a city life, the rights of the parties will be preserved, the infliction of heavy loss prevented, and the public interest subserved by withholding equitable interference, and leaving the complaining party to pursue the legal remedy. By the settled rule in this state a case must be proved which establishes the necessity of a preventive remedy,—a case within that class of cases of irreparable or continuous injury which can be adequately redressed only by injunction. And in all cases where the right is doubtful, and the exercise of the power would interfere with industries promotive of public utility, it becomes the duty of the court to abstain from interfering. In such cases the proof should be clear and convincing, and the power "should be cautiously and sparingly exercised." Ray v. Lynes, 10 Ala. 63; Rouse v. Martin, supra. A careful examination and review of the mass of evidence forces the conclusion that complainants have failed to establish clearly and convincingly a case of imperative necessity. The evidence leaves the mind in doubt whether complainants have suffered, since the alterations and improvements were made, any substantial injury or material discomfort, more than is usually incident to a residence in a city, or which could not be prevented by the application of labor or money, that may be adequately redressed at law. Affirmed.

(94 Ala. 159)

ESPALLA v. RICHARD *et al.*

(*Supreme Court of Alabama.* Nov. 5, 1891.)

DECLARATION AND ADMISSIONS — ACTION AGAINST ADMINISTRATOR—WITNESS.

1. In a suit for the price of goods sold to one on the credit of defendant's decedent, it was error to admit in evidence a conversation had between plaintiff and his salesman in relation to whom the goods were to be charged.

2. In a suit against an administrator in his representative capacity, it was not necessary to prove that defendant was such administrator where the point was not raised in the pleadings.

3. Where a witness was not a party to the suit, or interested in its result, his testimony as to an interview between plaintiff and defendant's decedent is not excluded by Code Ala. § 2765.

Appeal from city court of Mobile; O. J. SEMMES, Judge. Reversed.

Action by S. Richard et al. against Joseph Espalla, Jr., as the administrator of the estate of Mrs. Julia Ryan, deceased, to recover the price of goods sold and delivered by the plaintiffs to Mrs. Julia Ryan. The summons was against "Joseph Espalla, Jr., as the administrator of the estate of Mrs. Julia Ryan, deceased;"

and the return of the sheriff shows that a copy of the complaint and summons was served on, and the judgment was rendered against, Joseph Espalla, Jr., as the administrator of the estate of Mrs. Julia Ryan, deceased. The defendant did not plead *ne unques* administrator, but pleaded the general issue. The only assignments of error are to the court's rulings upon the admissibility of the evidence, and upon the court's refusing to give a charge requested by the defendant. There was evidence tending to show that the goods had been sold by the plaintiffs upon the credit of Mrs. Julia Ryan, but no testimony was offered as to the administerial capacity of the defendant. The defendant asked the court, in writing, to charge the jury as follows: "The court charges the jury that, if they believe from the evidence that there is no evidence to satisfy them that said Espalla is the administrator of the said estate of Julia Ryan, deceased, then the jury must find for the defendant." The court refused to give this charge, and the defendant duly excepted to such refusal. There was judgment for the plaintiffs, and the defendant brings this appeal.

W. E. Richardson and *Henry Chamberlain*, for appellant. *Gregory L. & H. T. Smith*, for appellees.

WALKER, J. The suit is on an account for goods which the plaintiffs claimed were sold by them to Mrs. Julia Ryan, deceased, the intestate of the defendant. The defendant contended that his intestate had not purchased or ordered the goods, and did not become responsible for the price thereof. There was evidence tending to show that Mrs. Ryan came to plaintiffs' place of business, and stated to a member of the firm that she was going to put her son, James Ryan, in her store to run it, and take charge of it for her, and requested plaintiffs to let him have whatever goods he wanted, as it was her business. Against the objection of the defendant the plaintiffs were permitted to introduce evidence to show that when James Ryan came into their store on a subsequent day a member of the plaintiff firm, who was waiting on him in selecting and ordering goods, on being called aside by a salesman who was standing off in the store, and asked if he was selling the goods to James Ryan, stated to the salesman that he was not selling the goods to James Ryan, but to his mother, Mrs. Julia Ryan. This conversation was not in the presence of Mrs. Ryan, nor was it brought to her knowledge in any way; and the statement as to who was the purchaser of the goods was not made in the course of any transaction with her. So far as the declaration could possibly be regarded as referring to any dealings of the firm directly with Mrs. Ryan, it was merely an allusion to a past transaction. She could not be bound by what one of the plaintiffs may have said to a third person, who was a stranger to her. So far as she was concerned, the statement was merely hearsay, and upon no possible theory was it admissible against her or against the defendant as the administrator of her estate. What was said on the occasion mentioned was as inadmissible against the defendant as any conversation that one of the plaintiffs may have had at any other time with a stranger to Mrs. Ryan. It is not conceived by what method of reasoning the statement could be regarded as part of the *res gestæ* of the transaction had with Mrs. Ryan on a former day. Stallings v. Hinson, 49 Ala. 92; Martin v. Hardesty, 27 Ala. 458; Lavender v. Hall, 60 Ala. 214; Smith v. Flagg, 46 Ala. 624; Tamplin v. Still, 77 Ala. 374; Hart v. Kendall, 82 Ala. 144, 3 South. Rep. 41; Railroad Co. v. Womack, 84 Ala. 149, 4 South. Rep. 618. It is suggested for the appellees that there was a failure to specify any particular ground of objection to the admissibility of this evidence. The illegality of the evidence was apparent upon its face. To ascertain this it was not necessary for the court to look to any fact that was not stated by the witness in detailing the conversation. No casting around to discover a ground of exclusion was required. It was obvious, without reference to any extrinsic fact, that Mr. Richard's statement to the salesman in his store was mere hearsay, so far as Mrs. Ryan was concerned. In such case the court should sustain the objection, without demanding a specification of what is already patent. The general rule requiring the ground of objection to be stated did not apply. Richards v. Bestor, 90 Ala. 352, 8 South. Rep. 30; Pool v. Devers, 30 Ala. 672; Cunningham v. Cochran, 18 Ala. 479. This case was tried before the adoption of the rule of practice now governing the mode of reserving exceptions to rulings on the introduction of testimony. Under that rule the trial judge can in all cases call on the counsel to specify grounds of objection. See rule printed in 90 Ala. and 9 South. Rep. iv. The evidence as to the statement referred to should have been excluded.

The witness Richmond was not a party to the suit, nor was there evidence to show that he was interested in the result thereof. He did not come within any of the exceptions to the competency of witnesses, and there was no error in the refusal to exclude his testimony as to what occurred in the interview between one of the plaintiffs and the intestate of the defendant. Code 1886, § 2765; Huckaba v. Abbott, 87 Ala. 409, 6 South. Rep. 48; Miller v. Cannon, 84 Ala. 59, 4 South. Rep. 204.

There was no error in refusing to give the charge in writing requested by the defendant. The suit is against the defendant in his representative capacity, and not as an individual. In the caption of the complaint the defendant is described "as the administrator of the estate of Julia Ryan, deceased." In each count of the complaint the cause of action stated is an account against the intestate of the defendant, and the defendant is charged as her personal representative. Harris v. Plant, 81 Ala. 639; Watson v. Collins, 87 Ala. 587; Christian v. Morris, 50 Ala. 585; Rhodes v. Walker, 44 Ala. 213. But the fact that defendant was sued as administrator does not necessarily impose upon the plaintiffs the duty of proving that the defendant was such representative. Such proof is not required, unless the pleadings present

an issue upon that point. It is contended that an issue as to the character in which the defendant was sued was presented by his plea of "not guilty." A plea in that form is not the appropriate method of presenting the general issue to a complaint on an account. Code 1886, § 2675. As, however, the plaintiffs, without objection, took issue upon the pleas in that form, we will treat them as amounting to the averment that the allegations of the complaint are untrue. In a suit by a personal representative the plea of the general issue admits the plaintiff's right to sue in that character, and renders proof of that fact unnecessary. Clarke v. Clarke, 51 Ala. 498; Worsham v. Goar, 4 Port. (Ala.) 441. So, in a suit against a personal representative, a plea which involves only a denial of the plaintiff's cause of action is an admission by the defendant of the character in which he is sued. A denial of such character is not involved in a mere denial of the plaintiff's cause of action, but must be specially pleaded. Code 1886, § 2675; Railroad Co. v. Trammell, (Ala.) 9 South. Rep. 870; 7 Amer. & Eng. Enc. Law, 381; Wilson v. Bothwell, 50 Ala. 378. No such special plea having been interposed, it was not incumbent upon the plaintiffs to offer proof of the defendant's appointment or qualification as administrator of the estate of Mrs. Ryan. The other assignments of error are in reference to matters which are not likely to be presented on another trial. As they do not bear upon the merits of the controversy, it is unnecessary to consider them. For the single error above noted, the judgment must be reversed. Reversed and remanded.

(94 Ala. 299)

HIGHLAND AVE. & B. R. CO. v. DONOVAN.

(*Supreme Court of Alabama.* Nov. 5, 1891.)

INJURY TO PASSENGER ON STREET-CAR—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. Plaintiff was riding on the front platform of a street-car, and, while passing around a curve, was thrown from the car. He testified that the rear platform was crowded, and he had to get on the front; that he had to stay there because the car seemed full. There was evidence for defendant that there was ample room to stand inside the car. *Held*, that an instruction was proper which authorized the jury to find plaintiff free from negligence in riding on the front platform if there was a reasonable necessity, real or apparent, for his doing so.

2. Where the evidence tended to show that riding on the front platform was not obviously dangerous; that the accident would not have happened if the defendant had used due care in operating the car,—the question of plaintiff's negligence was for the jury, to be considered in connection with his knowledge of the curve in the street, and of defendant's rule against riding on the front platform.

Appeal from city court of Birmingham; H. A. SHARPE, Judge. Affirmed.

Action by William Donovan against the Highland Avenue & Belt Railroad Company to recover for personal injuries. Verdict and judgment for plaintiff. Defendant appeals.

The bill in this case was filed by the appellee, William Donovan, by his next friend, against the appellant corporation, and sought to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant or its employes. The defendant pleaded the general issue and contributory negligence, and issue was joined thereon. The plaintiff's evidence was that he was about 17 years old, and that on the 30th of September, 1889, he got on a car of the defendant's at Avenue F and Twenty-Seventh street as a passenger, and a lady got on with him; that the rear platform of the car was crowded, and he had to get on the front platform; that on account of the crowd he was unable to enter the car by the rear platform, where he usually entered; that there were several persons standing on the front platform, and there were some railings running about the front window, and he had his left hand on one of these, and in his other hand he had his school-books and his umbrella; that he had but one leg; that, after he had gotten on, the conductor got on the same platform he was standing on, and pushed his way into the car through the persons who were standing on the platform; that the plaintiff looked into the car, and saw that the seats were crowded, and that the aisle between the seats was full of people standing; that he had to stay on the platform; that the seats ran along on both sides of the car, and the people were in the aisle holding on the straps; that the conductor collected his fare when he got on. The plaintiff further testified that he stood on the right-hand side of the car, there being two persons between him and the door; that at the corner of Avenue E and Twenty-Seventh street there was a curve to the left, which placed him on the outside of the curve as the car went around the curve; that, as the train moved around the curve, the other persons standing on the platform were shoved against him, breaking his hold, and he was thrown from the car, and had his ankle broken; that he had heard that the rules of the company prohibited persons from riding on the platform. There was a conflict in the evidence as to whether the car was filled or not; the evidence for the plaintiff tending to show that it was full on the inside, and the evidence for the defendant tending to show that there was ample standing-room inside of the car. The plaintiff, after testifying as to the inside of the car being crowded, was asked: "What appearance did it have as they were standing in that way?" The defendant objected to this question, but the court overruled the objection, and the defendant excepted. As to the appearance of the aisle the plaintiff said that "near the door it was crowded more than at the center; there were people hanging on all along." Upon the introduction of all the evidence, the court, at the request of the plaintiff in writing, gave the following charge: "If the jury believe from the evidence that there was a reasonable necessity, either real or apparent, under the circumstances of the case, for the plaintiff to travel on the platform of the car, and that he made such effort to obtain accommodation inside the car as an ordinarily prudent man would under similar circumstances, then he would not be guilty of negligence by reason of standing

or traveling on the platform." The defendant excepted to the giving of this charge by the court, and separately and severally excepted to the court's refusal to give each of the following written charges at its request: "(1) That there is no evidence that the rate of speed at which the cars were run around the curve at Twenty-Seventh street and Avenue E was dangerous or negligent. (2) That if the plaintiff with knowledge that the car was so crowded that he could not get a seat, and could not get into the car, got onto the platform with knowledge that the rules of the company prohibited his standing there, then this would be negligence on his part which would defeat a recovery. (3) If the jury believe all the evidence, they should find a verdict for the defendant. (4) If the jury believe from the evidence that when the plaintiff boarded the car it was filled with passengers, and the platforms were also filled with passengers, and the plaintiff, when he got on the car, knew that he could not get a seat, and could not get into the car, then his getting on the platform with this knowledge, and remaining there, was voluntary, and would defeat a recovery on his part. (5) The plaintiff having testified that he knew of the existence of the curve at Twenty-Seventh street and Avenue E, then he would be presumed to know the effect of the car going around the curve: and if with this knowledge the plaintiff stood upon the front platform, on the outside of the curve, which was the most dangerous place, then he would be guilty of negligence which would defeat a recovery. (6) If the jury believe from the evidence that the plaintiff saw the crowded condition of the cars and platforms, as testified by the plaintiff, and that the plaintiff knew that the rules of the company prohibited him from standing on the platform, and with this knowledge he got upon the car, and stood upon the platform, and failed to request the conductor to give him a place in the car, and by reason of being on the platform he contributed directly to the injuries he sustained, the plaintiff cannot recover. (7) That the existence of an apparent necessity to the plaintiff for him to stand upon the platform will not excuse the negligence of the plaintiff for being on the platform." There was verdict for the plaintiff, and in accordance therewith the court rendered judgment for the plaintiff in the sum of $1,000. On this appeal, brought by the defendant in the court below, the rulings of the court in giving the charge asked by the plaintiff, and in refusing to give the several charges requested by the defendant, are assigned as error.

Alex. T. London, for appellant. *Weatherly & Percy*, for appellee.

MCCLELLAN, J. 1. What constitutes the exercise of due care, and, conversely, what amounts to negligence, depends in all cases, of course, upon the circumstances surrounding the person whose conduct, in these respects, is under investigation. A man may be negligent in failing to ascertain his environments, no less than in the omission of that course of action, with respect to a situation known to him, which prudence dictates. But having been duly careful to acquaint himself as best he may with all the facts which should have a legitimate influence in shaping his conduct, his subsequent action is to be gauged with respect to the observance or lack of care and caution; not by the real facts which, or some of which, his circumspection may have failed to disclose to him, but by the appearance of things as uncovered by that degree of effort to ascertain the real facts which men of ordinary prudence would put forth in the premises. In other words: "He is not bound to see. He is bound to make all reasonable efforts to see that a careful, prudent man would make in like circumstances. He is not to provide against any certain results. He is to make an effort for a result that will give safety,—such an effort as caution, care, and prudence will dictate." Greany v. Railroad Co., 101 N. Y. 419, 5 N. E. Rep. 425. There is evidence in the record going to show that when the plaintiff boarded defendant's car—there being only one in the train—every seat and the aisle were occupied; that the rear platform was also fully occupied, and that there were several people on the front platform. Plaintiff, finding he could not get on the rear, went to and took a position on the front platform. From this position, which afforded a view through an open window of the whole interior of the car, it appeared to him that there was no available space for him on the inside. If the jury found the facts in line with these tendencies of the testimony, they would have been justified in finding further that the plaintiff exercised due diligence and caution in ascertaining the situation, and hence had a right to act upon the facts which such diligence and caution disclosed, whether they were the real facts or not. It follows that, assuming proper circumspection to have been observed by plaintiff, evidence as to whether the car presented the appearance of being entirely full was pertinent and properly received, and the charge requested for plaintiff, which authorized the jury to find plaintiff free from negligence in taking a position on the platform, if there was a reasonable necessity, real or apparent, for his doing so, correctly stated the law. The application of this principle to charge 7 requested by defendant must lead to its condemnation, as being misleading in itself, and affirmatively bad, when read in the light of the evidence.

2. It is insisted for the appellant that the assumption of a position on the front platform was negligence, as a matter of law, in the plaintiff, for that a rule of the carrier, which was known to him, forbade his doing so. Ordinarily, no doubt, this would be true but in this instance it is not, on one phase of the evidence, for the reason that there was no other position on the train open to plaintiff, and he was impliedly invited by the conductor to take this position, accepted as a passenger while occupying it, and his safe carriage while occupying it was assumed by the defendant. A tendency of the evidence

goes to show that the position was not obviously a dangerous one, and would have been unattended by danger or injury in this instance had the carrier exercised due care in operating its train. On these tendencies of the evidence the whole question of negligence *vel non* on the part of the plaintiff, so far as the known rule of the company and the supposed inherent danger of the position bear upon it, was one of fact for the determination of the jury. Charges 3 and 5 asked by defendant involved the determination of this question by the court, and were properly refused. Railway Co. v. Walling, 2 Amer. & Eng. R. Cas. 20, and notes; Willis v. Railroad Co., 34 N. Y. 670; Nolan v. Railroad Co., 3 Amer. & Eng. R. Cas. 463; Railroad Co. v. Miles, 13 Amer. & Eng. R. Cas. 10; Railroad Co. v. Werle, 21 Amer. & Eng. R. Cas. 429; Railway Co. v. May, (N. J. Sup.) 5 Atl. Rep. 276; 2 Amer. & Eng. Enc. Law, p. 766, note 5. The judgment of the city court is affirmed.

(95 Ala. 137)

SAVANNAH & W. R. CO. v. MEADOWS.

(*Supreme Court of Alabama.* Nov. 5, 1891.)

DEATH OF TRESPASSER ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—PLEADING.

1. In an action against a railroad company for damages for killing plaintiff's intestate, where the evidence shows that decedent was, at night, walking along the track through a long cut that could not be used at any place as a crossing, in a sparsely settled neighborhood, and was killed by a train coming up from behind, the decedent became a trespasser when he entered the cut, and was *per se* guilty of contributory negligence.

2. Evidence showing the custom of people to walk on the track of a railroad company in sparsely settled neighborhoods and at other places than public highways or crossings is inadmissible.

3. Where defendant was not shown to have discovered the danger of decedent in time to have avoided the injury by the exercise of due care, and that such care was not exercised, the proof that defendant's train was running at a high rate of speed within the corporate limits of a city having no ordinance regulating speed of trains; that the engine carried no head-light, though after dark; that the engineer failed to blow his whistle or ring the bell on approaching the crossing, a short distance behind and away from which decedent was walking at the time of the accident, as required by Code, § 1144,—is not sufficient to overcome the defense of contributory negligence.

4. A count alleging negligence in not blowing the whistle or ringing the bell before entering a cut on a curve within less than one fourth of a mile from a public crossing, when the engineer could not see one-fourth mile in front of him, is defective, under section 1144, providing for blowing the whistle and ringing the bell on entering a curve, for the reason that when the pleadings show the plaintiff to have been a mere trespasser he must show that the negligence of defendant was wanton, reckless, or intentional, to entitle him to recover.

Appeal from circuit court, Lee county; J. M. CARMICHAEL, Judge. Reversed.

Action by Fannie Meadows, administratrix, against the Savannah & Western Railroad Company, to recover for the alleged negligent killing of plaintiff's husband. Verdict and judgment for plaintiff. Defendant appeals.

The complaint contained four counts. The first count alleged negligence on the part of defendant in failing to blow the whistle, or ring the bell, or give other notice while moving within the city of Opelika, at the time plaintiff's intestate was killed. The second count alleged negligence in failing to give a signal one-fourth of a mile before reaching a public crossing near which plaintiff's intestate was killed. The third count alleged negligence in not ringing the bell or blowing the whistle before entering the cut on a curve within less than one-fourth of a mile from a public crossing, where the engineer could not see one-fourth of a mile in front of him. The fourth count alleged negligence in having no head-light at the time of the accident, and that the engine was being run at a high rate of speed. Demurrers to each of these counts were overruled.

Harrison & Ligon, for appellant. *A. & R. B. Barnes*, *W. J. Samford*, and *J. M. Chilton*, for appellee.

COLEMAN, J. This action was brought by Fannie Meadows, administratrix of her deceased husband, Robert Meadows, to recover of the defendant railroad company damages for the alleged unlawful and negligent killing of her husband. We will consider the case upon the hypothesis that the facts are as contended for by the plaintiff. According to this assumption, Robert Meadows was run over and killed by an engine of the defendant within the corporate limits of the city of Opelika, about 8 o'clock P. M. on the 13th of September, 1888. At the time he was struck by the engine he was on his way home, walking up the railroad track of the defendant, and within a cut, about twenty feet deep and some four or five hundred yards in length. Behind him, in the direction from where the engine was coming, there were street crossings and public road crossings, and one not very far from the entrance to the cut; and deceased came to his death after he had gone about 100 or 150 yards in the cut. There were curves in the road, which obstructed the view for less than a fourth of a mile. The engineer did not blow the whistle or ring the bell before reaching the crossing, and did not blow the whistle or ring the bell at short intervals, while moving within or passing through the city, as required by section 1144 of the Code; and defendant's engine had no head-light. The negligence of the defendant in one or more of these requirements, it is contended, caused the death of the decedent. Conceding that the proof of these facts shows negligence on the part of the defendant, does the proof, as admitted to be true, show that the deceased was guilty of such contributory negligence as to deprive the plaintiff of the right to maintain this action? There was no city ordinance regulating the speed of trains running within the corporate limits. The duties imposed upon railroads by section 1144 of the Code were intended to protect persons or property rightly at or approaching public crossings or stopping places of the trains, but have no application to places or conditions not within its provisions. In the case of Rail-

way Co. v. Chewning, (Ala.) 9 South. Rep. 461, it is said: "While a person intending to take a train, awaiting its arrival, should not be regarded as a trespasser, should he merely cross or inadvertently step on the track in the dark, at or about the usual stopping place, plaintiff, having walked up the track beyond the limits of the usual stopping place, to meet the train, and having knowingly and voluntarily stepped and stood on the cross-ties, where he was not invited, and had no right to be, must be regarded as a *quasi* trespasser; or, as we have said, was guilty of negligence contributing to his own injury. In the case of Railroad Co. v. Womack, 84 Ala. 150, 4 South. Rep. 618, it was declared to be the settled doctrine in this state, supported by the great weight of authority in England and America, that ordinarily the right of way of a railroad company is its exclusive property. Its free and unobstructed use is essential to the transaction of the business of the company. Mere acquiescence in the use of its right of way does not confer on the public a right to use it, nor create any obligation to look out for persons using it, other than the general duty to look out for obstructions, and that it was not competent to introduce evidence of the custom of people to walk on the track. When a railroad track runs through part of a city, town, or village, thickly populated, and the demands of trade and public intercourse necessitate the frequent crossing of the track, it is the duty of those operating an engine along the track in such places to keep a lookout. This duty to keep a lookout is not specially imposed by statute, but arises from the likelihood that in such places there are persons on the track, and the bounden duty to duly guard against inflicting death or injury, in places and under circumstances where it is likely that injury may result, unless care be observed. The duty arises when the circumstances exist which call for its exercise. The mere usage or custom of crossing the track at any particular place does not give rise to the duty to keep a lookout. The population and intercourse of a city, town, or village must co-exist with the usage to the extent that it is likely there are persons upon the track at the particular time or place. We do not think the track of a railroad can be converted into a road for ordinary travel, and one who undertakes to make such use of it becomes a trespasser. This we understand to be the extent of the rule declared in Railroad Co. v. Womack, supra, and, as thus qualified, the case of Railroad Co. v. Donovan, 84 Ala. 146, 4 South. Rep. 142, is reaffirmed.

Under the evidence as it appears in the record we do not doubt that at the time Robert Meadows came to his death he was a mere trespasser. The neighborhood where he was killed was sparsely settled, as much so as many country neighborhoods. The long cut into which he entered was not used, and could not be used, as a place for crossing the track. Its only use by the public was that of personal convenience for travel as a road, and was not at all necessary for this purpose. When the deceased entered this long cut at night, to use it as a road in going home, he became a trespasser, and was *per se* guilty of contributory negligence. Such being the case under the evidence as it appears in the record, the right of plaintiff to recover is narrowed down to the inquiry whether the defendant was guilty of reckless, wanton, or intentional negligence. Did the defendant discover the danger of plaintiff's intestate in time to avoid the injury by the exercise of due care and exertion, and did it fail to exercise such care? Such negligence must be shown to overcome the defense of contributory negligence. We deem it unnecessary to consider in detail the several assignments of error based upon the charges given and the refusal to charge as requested. The trial court evidently proceeded upon the idea that the use of the railroad track in a city or town as a road for travel was not a trespass, or that the law imposed upon the defendant the duty to keep a vigilant lookout, even for trespassers upon its track, so long as it was inside the corporate limits, without regard to population and public intercourse and usage, and without regard to the fact that the deceased was using the track as a road for travel for his personal convenience, at a time and in a place where there was no likelihood that any one would be. This, we have seen, is not a proper construction of the law. The statute requires in express language that the engineer shall blow the whistle or ring the bell at short intervals while moving within and passing through the city or town, and we hold this duty is co-extensive with the city or town, as we have explained. The mere failure to comply with these statutory requirements has never been held to constitute more than simple negligence.

Under our system of pleading, under a count for simple negligence, a recovery may be had upon proof of wanton negligence. The first, second, and fourth counts present a sufficient cause of action. The negligence of the defendant is averred in each of these counts. Applying the rule that the pleadings must be construed most strongly against the pleader, the third count is defective. It is averred that the injury occurred in a deep cut of the road. Although in a city, from the description of the place (in a cut) *prima facie* we would conclude from all that is stated in the pleadings that he was there without invitation, and was a trespasser. When the pleadings show that plaintiff is a trespasser he must aver more than simple negligence to authorize him to recover. The negligence must be wanton, reckless, or intentional. The complaint contains no such averment. Railway Co. v. Chewning, (Ala.) 9 South. Rep. 460. We have considered only the testimony of the plaintiff, because all the principles of law which govern the case are sufficiently raised by this evidence. Reversed and remanded.

(94 Ala. 536)

KINNEY *et al.* v. ENSMINGER, (two cases.)

(*Supreme Court of Alabama.* Nov. 6, 1891.)

VENDOR'S LIEN.

A vendor of land, who takes the vendee's notes with a third person as surety, is presumed to have waived the vendor's lien.

Appeal from city court of Decatur; W. H. SIMPSON, Judge. Reversed.

Separate actions by George Ensminger and Mary L. Ensminger against F. M. and P. H. Kinney to enforce a vendor's lien. Judgment for plaintiffs. Defendants appeal.

Noble Smithson, for appellants. *Wert & Speake*, for appellees.

STONE, C. J. The two appellees, father and daughter, jointly owned a tract of land in Morgan county, but in unequal interests. Through a real-estate agent they agreed upon a sale of the land to F. M. Kinney at the price of $11,000,—$3,000 cash paid down, and the balance on time. They executed a deed to said F. M. Kinney, conveying him the land with full covenants of warranty, and received from him his two notes to secure the balance,—one for $2,000 due at 12 months, payable to Mary L. Ensminger; and the other for $6,000, due at 2 years, payable to George Ensminger. Each of these notes was signed also by P. H. Kinney, surety for F. M. Kinney. The deed was read to and signed and acknowledged by the Ensmingers, father and daughter, and delivered to F. M. Kinney. The notes, signed by F. M. Kinney and P. H. Kinney, were delivered to the payees respectively. The contract was made, and the papers bear date, in March, 1888. The notes do not express the consideration, and the deed conveys the land "for and in consideration of the sum of eleven thousand dollars, to us in hand paid by F. M. Kinney, the receipt whereof we do hereby acknowledge." The two bills, one by the father and the other by the daughter, were filed in August, 1890, against F. M. Kinney and P. H. Kinney. Their object is to assert and enforce a vendor's lien upon the land for the payment of said two promissory notes. Among other charges made in the bills, it is averred that one Harrison was the appointed agent of complainants to effect the sale; that he was instructed to so frame the contract as to secure and preserve a vendor's lien on the land for the payment of the purchase money; that he (Harrison) did effect the sale, and "that neither the note to said Geo. or Mary expressed in the face thereof, nor did the deed on its face, that the vendors retained a vendor's lien on said land for the balance of the purchase money; yet it was distinctly understood between complainant and respondents that said deed and notes should so show on their face." The answers deny every averment that there was any agreement or understanding that a vendor's lien was to be retained. George Ensminger testified that he did give instructions to Harrison, the agent, to retain a vendor's lien to secure the payment of the purchase money. He is not corroborated by any other witness on this point. He testified further that he read and spoke the English language, and that the deed was read over to him before he executed it. On the question of retaining a lien Harrison's testimony is diametrically in conflict with that of Ensminger. He testified that Ensminger desired personal security, and expressed distrust of the land as a sufficient security; that he even went so far as to say he did not desire to retain a vendor's lien. F. M. Kinney, the purchaser, testified that he purchased the land for sale again, and that he would not have purchased if a vendor's lien had been retained. There is testimony that each of the Kinneys was solvent when the contract was made, and P. H. Kinney was reputed to be wealthy. It was testified that they were, each of them, solvent when the testimony was taken in the case, and there was no testimony to the contrary. In the decree of the city court is this language: "After a careful investigation of all the evidence, the court is left in doubt whether the lien created by law by the sale of the real estate described in the bill has been intentionally disposed of or waived by consent of the parties, express or implied. The lien, therefore, must be held to attach under the authority of Tedder v. Steele, 70 Ala. 347." We hold it to be clear beyond all question that the attempt to establish by testimony outside of the writings that a lien on the land was retained to secure the payment of the purchase money was a failure. We think we might go further, if necessary, and hold that the *allunde* testimony against the retention of such lien outweighs that in support of it. Taking the writings alone for our guide, what are the implications? It must not be overlooked that this question never arises, unless there has been a conveyance of the title. If the title has been retained by the vendor, the land remains bound for the purchase money. In 4 Wait, Act. & Def. 323, it is said this lien "is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention. Thus, taking the bond or note of the vendee with a surety." In Foster v. Trustees, 3 Ala. 302, this court said: "On this side of the Atlantic, by a strong and decisive current of authorities, it appears to be settled that, where the vendor takes a distinct and independent security of the property, or the responsibility of third persons, the lien on the land is waived." In Walker v. Carroll, 65 Ala. 61, it was said: "Bell sold and made a deed to Walker, taking personal security for the unpaid purchase money. This was, at least *prima facie*, a waiver of the vendor's lien." In Walker v. Struve, 70 Ala. 167, it was said: "It cannot be doubted, presumptively, that the lien is abandoned where a vendor, who has conveyed the title, accepts a distinct and separate security for the purchase money; as, for example, a mortgage on other property, or a bond or note with surety or indorser, or a deposit of stock or personal property." In Donegan v. Hentz, Id. 437, the same doctrine was asserted, and emphasized in the following language: "That such security will operate as a waiver of the lien, *prima facie*, liable, of course, to rebuttal by legal evidence

which is sufficient to overcome the presumption, was also decided by this court in Walker v. Carroll, 65 Ala. 61, and is fully sustained by the following authorities;" citing many. The city court was no doubt misled by the following language, found in the opinion in Tedder v. Steele, 70 Ala. 347: "The whole question of waiver is conceded to be purely one of fact or intention, and the burden of proof is always on the purchaser to establish, in the particular case, that the lien has been intentionally displaced or waived by the consent of the parties, express or implied. If it remains in doubt, then the lien must be held to attach." This language is copied substantially from Story, Eq. Jur. § 1224, and, as a general proposition, is correct. We cannot say it was not correct in the case then in hand, for in making the sale and purchase out of which that suit grew the numbers of the lands purchased were set out in the notes given for the purchase money as the consideration upon which they were given. This we have always treated as a weighty circumstance in arriving at the intention of the contracting parties to retain a lien. Bryant v. Stephens, 58 Ala. 636, as modified in Tedder v. Steele. That it was not intended in that case to overturn the doctrine that taking personal security is *prima facie* a waiver of the lien is shown on the face of the opinion delivered. Speaking of such presumed waiver it was said: "This doctrine is certainly well settled by the past decisions of this court, and may be considered as a rule of property, never departed from since the case of Foster v. Trustees, 8 Ala. 302." During the same term Justice SOMERVILLE, who prepared the opinion in Tedder's Case, wrote the opinion in the cases of Walker v. Struve and Donegan v. Hentz, each of which asserts the doctrine that when a conveyance is made, and personal or other additional security is taken, and nothing else appears in the transaction, *prima facie* this is a waiver of the vendor's lien. As we have said, this case must be decided on the facts and presumed intention derived from the papers themselves. They raise the presumption that the vendor's lien was waived, and nothing is shown to overturn that presumption. A presumption not rebutted becomes a conclusion. The decrees of the chancellor are reversed, and decrees here rendered dismissing the bills, at the costs of the respective complainants in the court below and in this court. This controversy has been before in this court. Kinney v. Ensminger, 87 Ala. 340, 6 South. Rep. 72.

Reversed and rendered.

MCCLELLAN, J., not sitting.

(94 Ala. 629)

WOODSTOCK IRON CO. *et al.* v. RICHARDSON *et al.*

(*Supreme Court of Alabama.* Nov. 6, 1891.)

CONVEYANCE OF HOMESTEAD — ACKNOWLEDGMENT BY WIFE.

Where a wife's signature to her husband's conveyance of the homestead was "attested by two witnesses" in compliance with the requirements of Code, § 1894, for a relinquishment of her dower, but was not separately acknowledged by her, as required by section 2508, for the conveyance of a homestead by a married man, since the deed took effect only upon delivery, where after its execution, but before delivery, the grantor had acquired and taken possession of another homestead, it passed the title to the land described, which had then ceased to be a homestead.

Appeal from circuit court, Calhoun county; LEROY F. BOX, Judge. Reversed.

Action of ejectment by Lucy Richardson et al. against the Woodstock Iron Company et al. From a judgment for plaintiffs, defendants appeal.

This was a statutory action of ejectment, brought by the appellees, as the only heirs at law of W. B. Bonds, deceased, against the appellants, and sought to recover certain described lands. There were originally two suits, which by agreement were submitted to the court without the intervention of a jury, as one case. The defendants claim title by a deed of conveyance executed by W. B. Bonds and his wife, Lucinda Bonds, on January 5, 1880. All the other facts necessary to a full understanding of the case are sufficiently stated in the opinion. Upon the submission of the case, the court announced a special finding, holding that the deed made by W. B. Bonds and Lucinda Bonds, his wife, was void because not properly acknowledged by Lucinda Bonds, and therefore rendered judgment for the plaintiffs. This judgment is appealed from by the defendants, and the same is assigned as error.

Caldwell & Johnston and *Knox & Bowie*, for appellants. *Cecil Browne* and *Kelly & Smith*, for appellees.

COLEMAN, J. When this case was before the court at a former term, it was held that a conveyance of the homestead, in all respects effectual for that purpose, except that it was not acknowledged by the wife as required by law, was a nullity; and that a proper acknowledgment made by the wife after the death of the husband did not defeat or affect the title of the heirs. This conclusion necessarily resulted from well-settled principles of law, as declared by repeated decisions of this court, and many of them being referred to in the opinion. Richardson v. Iron Co., 90 Ala. 268, 8 South. Rep. 7. The question presented on this appeal was not considered in that opinion, and could not have arisen from the evidence as then stated in the record. The undisputed facts, as they appear in the present record, show that the instrument was signed and dated and properly attested by two witnesses, but not acknowledged by the wife in the manner required by law for the conveyance of a homestead,[1] and a few days prior to its delivery to the grantee. That, at the time it was signed, dated, and attested,

[1] Code Ala. § 1894, provides that, when a wife relinquishes her dower, "her signature must be attested by two witnesses, * * * or acknowledged by her," etc. Section 2508 provides that an alienation of a homestead by a married man shall not be valid "without the voluntary signature and assent of the wife, which must be shown by her examination, separate and apart from him," and prescribes the form of the certificate of her acknowledgment.

the grantor and his wife occupied as a homestead the land described in the instrument. The testimony further shows that at that time the husband and owner of the land contemplated and was preparing to change his homestead, and a few days thereafter actually removed and occupied another and different place as his homestead. The evidence further shows that, prior to his removal, the grantor and grantee were negotiating for the sale and purchase of the land then occupied as a homestead, and, in pursuance of the understanding between them, the instrument was prepared, signed, dated, and duly attested, as above stated. The evidence further shows that the grantor retained the instrument in his own possession and under his control until he had acquired a new homestead. That subsequent to his removal to the newly-acquired homestead the purchase money was paid for the premises conveyed, and the deed, without the acknowledgment by the wife, delivered to the grantee. These facts are not controverted. "Delivery is essential to give effect to a deed; * * * that, though signed, attested, or acknowledged, so long as the grantor retains control over it,—so long as he does not part with it,—with the purpose that it shall inure to the grantee, title will not pass from him." Jenkins v. Harrison, 66 Ala. 356; Elsberry v. Boykin, 65 Ala. 340. A deed or other writing only takes effect from its delivery. Stiles v. Brown, 16 Vt. 565. A deed duly signed and dated, but delivered at a subsequent date, takes effect only from the date of delivery, and the delivery cannot relate back, so as to vest title from the date of the deed. Mitchell v. Bartlett, 51 N. Y. 453. Notwithstanding there is a written date, the true date may be shown by extraneous evidence, even in the most solemn instruments, as deeds under seal. Lee v. Insurance Co., 6 Mass. 219. The deed only takes effect from the actual time of its delivery, and the actual date of delivery will always control the date mentioned in the deed. Tied. Real. Prop. § 812; Smith v. Porter, 10 Gray, 66; Newlin v. Osborne, 67 Amer. Dec. 269. Acceptance by the grantee is essential to pass title from the grantor and to the validity of the deed. Tied. Real Prop. § 814; 66 Ala. 356, supra. The writing and signing a note on Sunday is not the execution of it on that day, unless it be delivered on that day to the payee; delivery being essential to make it operative as a contract. If delivered on a subsequent day, not Sunday, it takes effect as a valid instrument from the day of delivery. Flanagan v. Meyer, 41 Ala. 135. It is legally impossible to have two homesteads at the same time. Boyle v. Shulman, 59 Ala. 569. If the wife had died after the husband acquired a new homestead, and before the delivery of the deed, according to all the principles of law cited in the foregoing authorities, the deed took effect from the day of its delivery. The principle involved in the present appeal is vitally different from that adjudicated on the former appeal. Under the facts stated, we do not doubt the purchaser received a good title. Reversed and remanded.

MOBILE & O. R. CO. v. GEORGE.

(*Supreme Court of Alabama* Nov. 4, 1891.)

RAILROAD COMPANIES — INJURY TO EMPLOYE ON TRACK—PLEADING—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad company to recover damages for personal injuries, an allegation that plaintiff was upon defendant's track "at the instance and request of the defendant," and that defendant, notwithstanding its duty to manage its engines and trains "so as not to injure the plaintiff, * * * negligently ran over and injured the plaintiff with one of its engines," was sufficient although it did not aver the particular acts or omissions constituting the negligence.

2. Proof that plaintiff was on the track while in the discharge of his duties as a brakeman was a fatal variance.

3. Code, § 2590, subd. 1, provides that a master shall be liable to a servant for personal injuries caused by any defective machinery used in the business of the master, but not "unless the defect arose from, or had not been discovered or remedied owing to, the negligence of the master." *Held* that, as such negligence must be averred, it was not sufficient to allege that defendant "negligently used" in its business a locomotive "which was out of order, so that it could not be stopped promptly" when making couplings and uncouplings.

4. The court erred in refusing an instruction that defendant could not recover under said count if "the locomotive engine * * * was not out of order, and was in suitable and serviceable condition."

5. Code, § 2590, subd. 3, gives such cause of action when the injury results from the negligence of any person in the service of the master, to whose orders the servant, "at the time of the injury, was bound to conform, and did conform, if such injuries resulted from having so conformed." *Held*, that it was sufficient to allege that plaintiff was injured while obeying the orders of defendant's yard-master, under whose directions plaintiff was, and who "negligently ordered the plaintiff to couple and uncouple certain cars;" it not being necessary to aver the particular acts or omissions constituting the negligence.

6. There being evidence that plaintiff was injured while between an engine and a car, in the act of uncoupling them, the court properly refused an instruction that he could not recover unless he was ordered to go in between the engine and car to uncouple the same, since there might have been circumstances under which plaintiff had a right to infer such order from a mere direction to uncouple the car and engine.

7. Code, § 2590, subd. 5, imposes such liability upon the master when the injury is caused by reason of the negligence of any one in his service, "who has control of any signal points, locomotive engine, switch, car, or train upon a railway." *Held*, that it was sufficient to aver that, while "plaintiff was uncoupling the said engine from one of defendant's cars, * * * said engineer negligently ran said engine forward, and knocked plaintiff down and injured him," without alleging that the engineer knew, or might by reasonable care and diligence have known, of plaintiff's position.

8. Evidence that the fireman was handling the engine when plaintiff was injured was admissible, as tending to show negligence on the engineer's part in permitting the fireman to be in charge of the engine.

9. It was not necessary for plaintiff to allege that he did not know, and could not by reasonable diligence have known, of the various acts of negligence charged.

10. Plaintiff alleged that defendant, disregarding its duty to provide for its employes an engine with a platform, upon which its brakeman could stand while coupling and uncoupling the engine to and from cars, "negligently used in its

said business an engine that was not provided with such platform or other device," and that plaintiff was injured because of his being thereby compelled to walk between the engine and cars to uncouple them. *Held*, that the court properly refused an instruction that, if plaintiff's injuries were the result of perils incident to the performance of his duties, he could not recover, since under the statute plaintiff could recover damages for injuries resulting from the negligence therein described, although such injuries were the result of risks assumed by plaintiff upon entering into defendant's employment.

11. Plaintiff accepted the issue tendered by defendant's plea in confession and avoidance, that, although plaintiff was injured by an engine that had no platform, it was safely and properly constructed, and in the manner that most of its engines were made, and that it was in good repair, and not defective; and that defendant had been compelled to use the engine by which plaintiff was injured as a yard-engine, because it had no other with which to replace the regular yard-engine while it was undergoing repairs. *Held*, that the court properly refused an instruction that plaintiff could not recover if he was injured by an engine "constructed upon a like standard and pattern, and in the same manner, as most of the engines are constructed and in use in the service of the defendant," since said instruction did not cover defendant's allegation that the engine "was in good repair and not defective."

12. Evidence was admitted that the engine usually used by defendant as a yard-engine had a step on each end, that the regular yard-engine was undergoing repairs, and that the necessity for the brakeman to stand on the ground while coupling and uncoupling was removed by attaching a flat-car to an ordinary road-engine. *Held*, that proper foundation was laid for the introduction of evidence that defendant customarily so used a flat-car.

13. A witness, who was shown to be *prima facie* an expert in such matter, was competent to testify as to the difference in danger between using an ordinary road-engine as a yard-engine, with and without a flat-car attached to it.

14. Evidence that railroad men considered the use of a road-engine as a yard-engine dangerous was hearsay and inadmissible.

15. The court erred in refusing an instruction that the burden of proving a cause of action within the statute was upon plaintiff. Railway Co. v. Holborn, 84 Ala. 133, 4 South. Rep. 146, followed.

16. The court rightly refused to instruct the jury that plaintiff could not recover under certain counts as to which the evidence was conflicting.

17. There was evidence that plaintiff stepped in between the engine and car to pull out the coupling-pin; that, failing to do so, he signaled to the engineer to "give slack;" and that, as the engineer did so, plaintiff stumbled, and fell across the pilot, the heel of his shoe having caught on the top of the guard-rail. *Held*, that the court erred in refusing an instruction that, if plaintiff's injuries "were the direct results of an accident incident to the business in which he was engaged," he could not recover.

18. Defendant requested instructions that it was plaintiff's duty to take into account the perils attendant upon the service in which he was engaged, and could not recover if, when he went in between the engine and car, he failed to bestow that degree of care, in respect to his own safety, in view of the surrounding danger, that an ordinarily careful person would have exercised, or if he did not take the necessary precautions to protect himself against obvious danger; and that, if "it was manifestly dangerous of itself to uncouple the engine from the car on account of its having been coupled with the drawbar," and plaintiff failed to exercise that degree of caution commensurate with the manifest danger at the time he received his injury, "or, if defendant used that which was dangerous in a careless manner, this would be contributory negligence on his part." *Held*, that said instructions were improper, as they assumed that plaintiff's want of care and prudence contributed to his injury, which the jury should have been permitted to determine.

19. The considerations that moved plaintiff to leave defendant's shops, and accept employment as a brakeman, were irrelevant, and not admissible in evidence.

Appeal from circuit court, Mobile county; W. E. CLARKE, Judge. Reversed.

Action by James George against the Mobile & Ohio Railroad Company to recover damages for personal injuries sustained while performing the duties of a brakeman for defendant. From a judgment for plaintiff, defendant appeals.

The complaint, as originally filed, contained 25 counts, and it was afterwards amended by the addition of 2 more counts. The defendant demurred to each count separately, and the court sustained the demurrers to all of the counts except Nos. 1, 19, 21, 23, 24, 26, and 27, and overruled the demurrers to these counts. The twenty-fourth count was stricken out by the plaintiff. The first count, after alleging that the defendant operated a railroad in this state, continued as follows: "The plaintiff was upon the defendant's said track at the instance and request of the defendant, and it was the duty of the defendant to manage and operate its engine and trains upon said track so as not to injure the plaintiff while so upon said track; but defendant, disregarding its said duty in the premises, negligently ran over and injured the plaintiff with one of its engines, and thereby caused plaintiff great pain and suffering," etc. The demurrers to this count were on the grounds that it did not show the violation of any legal duty due from the defendant to plaintiff, and because it failed to show with sufficient particularity the nature of the neglect, and the circumstances under which plaintiff was injured. The substance of the nineteenth count was that the plaintiff, while in the discharge of his duty as switchman, was run over by one of defendant's engines, by reason of the negligence of a switchman in the employment of defendant, to whose orders plaintiff was bound to conform, and did conform, and that said switchman negligently ordered the plaintiff to uncouple certain cars from the engine, "although said engine was so constructed that the plaintiff could not uncouple said cars without going between said engine and said cars, and the plaintiff conformed to said orders, and went between said cars, and in so doing was run over by said engine and injured." The demurrers sustained to this count were upon the grounds that it did not allege that when said switchman ordered the plaintiff to uncouple said cars he knew, or might have known, of the defective construction of said engine, by the exercise of reasonable diligence; that said count did not allege that plaintiff did not know that said engine was so constructed that he could not uncouple said engine without going in between said engine and said cars; and that it was not alleged that said engine was defectively constructed. The twenty-first count based its grounds of recovery upon the fact that

plaintiff was injured while obeying the orders of the defendant's yard-master, under whose directions plaintiff was; and alleged that "the defendant's yard-master negligently ordered the plaintiff to couple and uncouple certain cars; that he uncoupled same, and in so doing was run over by said engine and injured." The grounds of demurrer to this count were that it was not alleged in what particular the defendant's yard-master was negligent, and that the allegations contained in said count show that plaintiff's injuries were the direct result of an accident. The twenty-third count, after alleging that the plaintiff was a switchman in the employment of defendant, alleged "that while the plaintiff was uncoupling the said engine from one of defendant's cars, in performance of his duty as such switchman, said engineer negligently ran said engine forward, and knocked plaintiff down and injured him." The ground of demurrer to this count was that it did not allege that at the time the plaintiff was uncoupling said engine from one of the defendant's cars the engineer knew, or might have known, by the exercise of ordinary diligence, that said plaintiff was between said engine and cars. The twenty-sixth count, after stating that the defendant was a railroad corporation operating a railroad in this state, and as part of its business it was necessary to have cars taken in and out of its yards, and that brakemen were employed, whose duty it was to couple and uncouple the cars, alleged that it was the duty of the defendant "to use due care in furnishing for the use of its said employes in said business, and for their protection, fit and proper engines, and to exercise due care to keep such engines in fit and proper condition for such uses; but, wholly disregarding its duties in the premises, defendant negligently used in its said business a steam-engine or locomotive which was out of order, so that it could not be stopped promptly when making said couplings and uncouplings; and on, to-wit, the 23d day of February, 1889, plaintiff was in the employment of the defendant as one of its brakemen, and as such it became and was his duty to go between said engine and defendant's cars, and while so between them, and by reason of said negligently defective condition of said engine, it could not be and was not stopped in proper time, and by reason of said defect it ran over and injured plaintiff." The defendant demurred to this count, on the grounds that it failed to allege whether the said engine was out of order when first employed and used by defendant, or whether it afterwards became out of order; and because it did not allege that the defendant, or any person superior to the plaintiff, engaged in the employment of the defendant, knew of the defective condition of the engine, or might have known of the same, by reason of ordinary diligence, and because it did not allege in what particular said engine was defective. The twenty-seventh count, after alleging the operation of a railroad by the defendant, and the necessity of moving its cars from place to place in its yard, and the employment of brakemen and switchmen by the defendant to couple and uncouple its cars, alleged that it was the duty of the defendant "to use due care in furnishing for the use of said employes in its said business, and for their protection, an engine with a platform or other device upon which its brakemen could stand while coupling or uncoupling the engine to and from the car to be moved in and out of its said yard, and from place to place therein; but, wholly disregarding its duty in the premises, defendant negligently used in its said business an engine that was not provided with such platform or other device, and on, to-wit, the 3d day of February, 1889, plaintiff was in the employment of defendant as one of its brakemen, and as such it became and was his duty to couple or uncouple the said engine from its cars in its said yard, and by reason of said engine not being provided with a platform or other device, as aforesaid, plaintiff was obliged to walk between said engine and cars, and by reason of the said defective condition of said engine, in not being so provided with such platform or other device, and while between said engine and car, in the performance of his duty, as aforesaid, said engine ran over and injured the plaintiff." The defendant demurred to this count on the grounds that it was not shown therein that it was the custom of all well-managed railroads to furnish engines with platforms or other devices to its employes, engaged in coupling and uncoupling cars; that it was not alleged that the defendant agreed to furnish plaintiff exclusively an engine with a platform or other device attached to it, for the purpose of switching in said yard, and that no facts are stated in said count whereby it was shown that it was the legal duty of the defendant to furnish said plaintiff an engine with a platform or other device attached thereto, for the purpose of coupling and uncoupling cars. The overruling of all of the grounds of demurrer to each of the counts, as stated above, constitutes the first six assignments of error. The defendant pleaded the general issue, and two special pleas to the twenty-seventh count, the substance of which are stated in the opinion.

The evidence introduced by the plaintiff tended to show that on February 3, 1890, while he was at work in the yard of the defendant at Mobile, and in the discharge of his duty as switchman, under the direction of one Matt Eagan, an older switchman, he went between a regular road-engine, which was being used as a switch-engine in the yard of the defendant, and a car, to uncouple them; that just as he pulled the pin the pilot or cow-catcher ran upon him, threw him down, and the front wheels ran over him, cutting off both of his legs at unequal distances from his body. It was further shown that up to Friday before the accident, which occurred on Sunday, there was used before the engine a flat-car, "which made it less dangerous to couple and uncouple the cars in the yards, and that the yard-master ordered the flat-car, which had been used for this purpose, to be carried out on the road, and thereafter a regular road-engine

was used alone, for switching purposes. It was further shown that the danger of coupling and uncoupling cars was greatly increased by the use of a road-engine instead of a regular switch-engine, and especially so by the use of such engine without the flat-car in front of it. There was also evidence tending to show that the throttle-valve of the engine and one of the flues leaked, and that the effect of the leak in the throttle-valve was to cause the lever to jerk away from the engineer, and make the engine move in a direction opposite to that desired, whenever the engineer undertook to shut the throttle or stop the engine. There was also evidence tending to show that when the engine caught the plaintiff the engineer, without stopping the engine, jumped down to assist the plaintiff, and the fireman seized the lever and stopped the engine, "but it was working backwards and forwards for some time before the engine could be stopped." The engineer in charge of the engine claimed that the plaintiff tried to pull the pin out, and failed, and then gave him the signal to give "slack;" that he shoved the engine forward in response to this signal, and that as he did so the plaintiff fell; but the plaintiff denies that he failed to pull the pin out, or that he gave the signal to give "slack," but claims that as he pulled the pin out the engine was shoved upon him, and he fell. The engineer claimed that the engine was stopped within the distance of 10 feet, and it was proved that if the engine was stopped within that distance it was a good stop. And the engineer also testified that neither the throttle-valve nor the flues leaked, so as to affect its stoppage in any way. Such other evidence as may be necessary to the full understanding of the opinion of this court is sufficiently stated therein. There was no evidence whatever of contributory negligence on the part of the plaintiff. The rulings upon the evidence, which are assigned as error, are sufficiently shown in the opinion. There was a general exception taken by the defendant to two separate portions of the court's general charge to the jury, which the rulings of this court render it unnecessary to notice.

Upon the introduction of all of the testimony, the defendant requested the court to give the following written charges, and separately and severally excepted to the court's refusal to give each of said charges as requested: (1) "The defendant ask the court to instruct the jury that if they believe from the evidence that there was no switchman superior to the plaintiff in the service of the defendant, whose orders the plaintiff was bound to obey, who ordered plaintiff to go in between the engine and car to be uncoupled, and if they further believe from the evidence that said engine was not defectively constructed, then, under count nineteen of the plaintiff's complaint, the jury will return a verdict for the defendant." (2) "The defendant asks the court to instruct the jury that if they believe from the evidence that the yard-master in the service of the defendant, to whose orders plaintiff, at the time of the injury, was bound to conform, did not order plaintiff, at the time of his injury, to go in between the engine and car to uncouple the same, and if they further believe from the evidence that it was a part of plaintiff's duty, when entering the service of the defendant, to uncouple cars from an engine constructed similar to the one to which was attached the car he was attempting to uncouple when injured, then, under the twenty-first count of plaintiff's complaint, you will return a verdict for the Mobile & Ohio Railroad Company." (3) "The defendant asks the court to instruct the jury that if they believe from the evidence that at the time the plaintiff received his injury, while engaged in uncoupling a car from an engine, the engineer in charge and control of said engine did not negligently run said engine forward and over the said plaintiff, and thereby injure him, then, under the twenty-third count of plaintiff's complaint, you will return a verdict for the defendant." (4) "The defendant asks the court to instruct the jury that if they believe from the evidence that the locomotive engine, at the time the plaintiff sustained an injury, was not out of order, and was in suitable and serviceable condition, then the court instructs you, under the twenty-sixth count of the plaintiff's complaint, to return a verdict in favor of the defendant." (5) "The defendant asks the court to instruct the jury that if they believe from the evidence that the locomotive engine in use at the time the plaintiff sustained his injury was constructed upon a like standard and pattern, and in the same manner, as most of the engines are constructed and in use in the service of the defendant, to which cars are coupled and uncoupled on its line of railroad from Mobile, Alabama, to East St. Louis, Illinois, and frequently in its said yards, then the court instructs you that, under count number 27 of the plaintiff's complaint, you will return a verdict in favor of the defendant." (6) "The defendant asks the court to instruct the jury that although they may believe from the evidence that it was the legal duty of the defendant to furnish the plaintiff a locomotive engine to be used in its yards at Mobile, Ala., to which was attached a platform or other device, upon which the plaintiff, as brakeman, could stand while coupling and uncoupling cars to and from said engine when moving said cars from place to place in said yard, and if they further believe from the evidence that the defendant did furnish a locomotive engine to which was attached a platform or other device upon which plaintiff could stand while coupling and uncoupling cars from said engine, and moving said cars from place to place in said yard, and that said engine, with the platform or other device upon which the plaintiff could stand while coupling and uncoupling cars, became out of repair and unserviceable, and that it was necessary to place said engine in the repair-shops to be put in order and made serviceable, and that defendant did not have any other engine, constructed as the one out of repair, that it could spare from its other yards, to be used in said Mobile yard, and that defend-

ant furnished to its employes in its said yard, in lieu of said locomotive engine constructed with a platform which was sent to the shops for repair, an engine which was constructed of the same pattern or standard of most of the engines used in the service of the defendant, and which were frequently used in the service of the defendant, and which were frequently used in and about its said yards, then, in that event, the court instructs you, under the twenty-seventh count of the plaintiff's complaint, to return a verdict for the defendant." (7) "The defendant asks the court to instruct the jury that if they believe from the evidence that the plaintiff, James George, in entering the service of the defendant as brakeman, assumed to perform as a part of his duties the coupling and uncoupling of cars to an engine made and constructed upon the pattern of the engine in use at the time he received his injuries, namely, with a pilot and draw-bar, and if you further believe from the evidence that he performed this part of his duty without any protest or notice to his superior officers that it was dangerous, and if you further believe from the evidence that while performing such duties, namely, uncoupling a car attached to the engine in use at the time he received his injuries, and that his injuries were the result of the perils and dangers incident to the performance of that portion of his duties, then you will find a verdict for the Mobile & Ohio Railroad Company." (9) "At the request of the defendant the court instructs the jury that, if they believe from the evidence that the injuries received by James George were the direct results of an accident incident to the business in which he was engaged, then, in that event, you will return a verdict for the Mobile & Ohio Railroad Company." (10) "The defendant asks the court to instruct the jury that if they believe from the evidence that the injuries sustained by James George resulted from the ordinary dangers incident to the service he was performing in defendant's employment, then you will return a verdict for the Mobile & Ohio Railroad Company." (12) "The court charges the jury that it was the duty of the plaintiff, James George, to take into account the surroundings and perils attendant upon the nature of the service in which he was engaged at the time he claims to have received his claimed injuries, and to bestow such care and watchfulness as an ordinarily prudent person would have exercised under like circumstances in reference to their own safety; and, if the jury further believes from the evidence that the plaintiff, James George, failed and neglected at the time he went in between the engine and car, in the yard at Mobile, Ala., for the purpose of uncoupling the car from the engine, to bestow that degree of care, watchfulness, and caution in respect to his own safety, in view of the surrounding danger, that an ordinarily careful and prudent person would have exercised under like circumstances, then the jury must find in favor of the Mobile & Ohio Railroad Company." (13) "The court charges the jury that if they believe from the evidence that it was apparently and obviously dangerous for the plaintiff, James George, to go in between the engine and car for the purpose of uncoupling a car from said engine in view of the surrounding circumstances unless the plaintiff, James George, took the necessary precautions to protect himself against the apparent danger, and if the jury further believe from the evidence that the plaintiff did not at the time take the necessary steps and precautions to protect himself against the said apparent and obvious danger in view of the surrounding circumstances, they are instructed to find a verdict for the defendant, unless the jury further believe from the evidence that he received his said injuries from the negligence of the engineer, or the negligence of the yard-master, or the defective condition of the engine." (14) "The court charges the jury, at the request of the defendant, that to entitle the plaintiff, James George, to recover by virtue of the employers' statute of the state of Alabama, he must aver and prove a case within the provisions and operations of the statute. In this respect the plaintiff holds the affirmative of the statutory provisions relied upon in his complaint, and on which his right of recovery depends. And the court further instructs the jury that the general rule is that the burden of proof is on the party holding the affirmative." (15) "The defendant asks the court to instruct the jury that, if they believe from the evidence that it was manifestly dangerous of itself for James George to uncouple the engine from the car on account of its having been coupled with the draw-bar, then it was the duty of the plaintiff to exercise that degree of care and caution commensurate with such manifest danger of uncoupling the draw-bar from the car; and, if you further believe from the evidence that the plaintiff failed and neglected to exercise that degree of caution and prudence that was commensurate with the manifest danger at the time he received his injury, then the court instructs you to return a verdict for the Mobile & Ohio Railroad Company." (16) "The defendant asks the court to instruct the jury that, if they believe from the evidence that James George used that which was dangerous in a careless and negligent manner, this would be contributory negligence on his part to such an extent as to defeat his right of recovery, and you will return a verdict for the Mobile & Ohio Railroad Company." (17) "The defendant asks the court to instruct the jury that, before they can return a verdict in favor of the plaintiff under the first count of plaintiff's complaint, they must believe from the evidence that James Lyons, locomotive engineer, in charge and control of the engine that ran over James George, the plaintiff, was incompetent to properly handle said engine by reason of some physical defect, and that said physical defect was known to the Mobile & Ohio Railroad Company, or might have been known to the Mobile & Ohio Railroad Company, by the exer-

cise of reasonable diligence; and you must further believe from the evidence that the said physical defect of said James Lyons, in control of said engine, was unknown to the said James George, and could not have been learned by him by the exercise of reasonable diligence." (18) "The defendant asks the court to instruct the jury that, under the first count of plaintiff's complaint and the evidence submitted in said cause, the plaintiff, James George, and the locomotive engineer, James Lyons, were fellow-servants engaged in one common employment and under one common employer; and the court instructs you that, before you can return a verdict in favor of the plaintiff under the first count of said complaint, you must believe from the evidence that said James Lyons, locomotive engineer, was incompetent to safely handle said locomotive engine, and that said incompetency of said James Lyons, engineer, was unknown to the said James George, and could not have been discovered or ascertained by the said James George, plaintiff aforesaid, by the exercise of reasonable diligence." (19) "The defendant asks the court to instruct the jury that if they believe from the evidence that the said James Lyons was incompetent from any cause to safely handle the locomotive engine at the time said James George was injured, and said incompetency was known to the plaintiff, and he continued in the service of the defendant, then the court instructs you that, under the first count of said complaint, you will return a verdict in favor of the Mobile & Ohio Railroad Company." (19a) "The defendant asks the court to instruct the jury that, under the evidence submitted in this cause, they will return a verdict in favor of the Mobile & Ohio Railroad Company under the first count of plaintiff's complaint." (20) "The defendant asks the court to instruct the jury that, under the evidence submitted in this cause, they will return a verdict in favor of the Mobile & Ohio Railroad Company under the nineteenth count of plaintiff's complaint." (21) "The defendant asks the court to instruct the jury that, under the evidence submitted in this cause, they will return a verdict in favor of the Mobile & Ohio Railroad Company under the twenty-third count of plaintiff's complaint." (22) "The defendant asks the court to instruct the jury that, under the evidence submitted in this cause, they will return a verdict in favor of the Mobile & Ohio Railroad Company under the twenty-sixth count of plaintiff's complaint." (23) "The defendant asks the court to instruct the jury that, under the evidence submitted in this cause, they will return a verdict in favor of the Mobile & Ohio Railroad Company under the twenty-seventh count of plaintiff's complaint." (24) "The defendant asks the court to instruct the jury that if they believe from the evidence that James Lyons, locomotive engineer in charge of and controlling the engine at the time it ran over James George, the plaintiff in this case, had previously to that time been examined and licensed by a board of engineers, appointed by the governor of the state of Alabama, under an act to require locomotive engineers in this state to be examined for license by a board to be appointed by the governor for the purpose, then the court instructs you that this is *prima facie* evidence of the qualification of the said James Lyons to perform the duties of a locomotive engineer in the state of Alabama." (25) "The defendant asks the court to instruct the jury that, under the evidence submitted in this cause, they will return a verdict in favor of the Mobile & Ohio Railroad Company." (26) "The court instructs the jury for the defendant that, if they believe from the evidence that the plaintiff was injured by reason of a defect in the engine as laid in the first count of plaintiff's declaration, and if they further believe from the evidence that said defect was known to plaintiff as well as defendant, and that said plaintiff continued in the service without making any complaint about said defect, and was injured, then they must find for the defendant under said first count."

At the request of the plaintiff in writing, the court gave the following charge: "If the jury believe from the evidence that the plaintiff, on the 3d day of February, 1889, was in the employment of the defendant as a yard switchman, and that as such yard switchman it was his duty to go in between defendant's engine, having a pilot in front, and one of its cars, and uncouple them, while in motion, and while so between said engine and car, in the performance of his duty, and without any negligence on his part, the engineer in charge of the engine negligently and suddenly sent the engine forward at a quicker rate, and thereby caused the pilot of the engine to catch the plaintiff's leg or foot, or to strike him, and throw him down, and that the engine then ran over and injured plaintiff, the jury ought to find a verdict for the plaintiff." There was a verdict for the plaintiff for $19,547.20.

E. L. Russell, for appellant *Gregory L. & H. F. Smith* and *R. I. Smith*, for appellee.

CLOPTON, J. The first six assignments of error go to overruling the demurrers to the 1st, 19th, 21st, 23d, 26th, and 27th counts of the complaint; the 24th count having been struck out by amendment, and the demurrers to the others sustained. In each count the averment of negligence is general. In actions based on misfeasance or non-feasance, the rule, as settled by our decisions, is that, when the complaint avers the facts from which the duty arises, a general averment of negligence is sufficient under our system of pleading. The pleader is not required to specify the particular acts or omissions from which the conclusion of negligence is deducible. Leach v. Bush, 57 Ala. 145; Railway Co. v. Chewning, (Ala.) 9 South. Rep. 458. The nineteenth and twenty-first counts are framed under subdivision 3 of section 2590 of the Code, which gives a right of action to an injured employe, "when such injury is caused by reason of the negligence of any person in the service or employment of the master or employer to whose orders

or directions the servant or employe, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from having so conformed." On the principles stated above, it is not necessary, in a complaint founded on this clause of the section, to aver in what particular or respect the orders or directions were negligent. It may be that good pleading requires the name of the person to whose orders the employe is bound to conform to be stated, so as to give the defendant notice thereof, and present as an issuable fact whether such person was in the service or employment of defendant, or whether plaintiff was bound to conform to his orders. This, however, not being assigned as ground of demurrer, we do not decide, and allude to it merely to prevent any inference of approval of a complaint omitting the name. On the same principle in a complaint framed under subdivision 5 of section 2590, "when such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has charge or control of any signal points, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway," it is not essential to aver that the engineer knew, or might have known by the exercise of reasonable diligence, that plaintiff was between the engine and car, or any other particular acts or omissions constituting the negligence complained of. Neither need the complaint negative the fact that plaintiff knew, or by reasonable diligence might have known, the defect or negligence charged. Contributory negligence is defensive matter, which must be pleaded and proved by defendant. Railroad Co. v. Hawkins, (Ala.) 9 South. Rep. 271. The demurrers to the 19th, 21st, and 23d counts were properly overruled.

The first count of the complaint is not framed under any clause of the statute. It avers that plaintiff was on the track at the instance and request of defendant; that is, by invitation. From this fact springs the duty to exercise reasonable care and precaution to avoid injuring him. The facts being stated from which the duty legally arises, a general averment that the defendant negligently ran over and injured the plaintiff with one of its engines is sufficient. The count sets forth a substantial cause of action.

The third ground of demurrer to the twenty-sixth count is that it fails to allege that defendant, or any person superior to plaintiff, engaged in the employment of defendant, knew of the condition of the engine, or might have known of the same by reasonable or ordinary diligence. This count is framed under subdivision 1 of the section, which gives a right of action "when the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in, the business of the master or employer." The statute, however, further provides: "Nor is the master or employer liable under subdivision one, unless the defect arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." In Railway Co. v. Bradford, 86 Ala. 574, 6 South. Rep. 90, this provision was held not to relate to defensive matter, but to the negligence of the defendant, and that facts would probably have to be averred which would show that the defect was within the statutory limitations. In this as in the other enumerated classes of cases arising under the statute, negligence on the part of the employer is the essential basis of liability to answer in damages to an injured employe; without negligence there can be no recovery. A complaint drawn under this clause, which does not allege in the words of the statute, or in substance, that the defect arose from, or was not discovered and remedied owing to, the negligence of defendant, or of some person intrusted with the duty of seeing that the ways, works, machinery, or plant were in proper condition, fails to set forth a good and substantial cause of action. As to the particularity with which the facts should be averred, it is said in Railroad Co. v. Hawkins, supra: "There is no reason, however, for requiring a greater degree of particularity in the averment of negligence under this statute than is required with respect to any other negligence counted on for a recovery of damages; and the facts to be alleged in either class of cases are little, if any, more than the mere conclusions of the pleader, leaving the factors which enter into and support the conclusions to be adduced in evidence." An allegation pursuing the words of the statute, or substantially the same, is sufficient; but this much is requisite. The averment in the count that "defendant negligently used in its business a steam-engine or locomotive which was out of order, so that it could not be stopped promptly," cannot be regarded as the equivalent of the statutory language. The engine may have been negligently used in the business, and yet the defect complained of not have arisen from, or been discovered and remedied owing to, the negligence of defendant, or of some person intrusted with the duty of seeing that the works and machinery were in proper condition. The adverb "negligently," as employed in the count, qualifies the manner in which the engine was used, and, fairly construed, does not relate to the origin of the defect, or to the failure to discover and remedy it; and, even when taken in connection with the subsequent averment, that plaintiff was injured on account of "the negligently defective condition of the engine," is not the equivalent of an averment that the defect arose from, or was not discovered and remedied owing to, the negligence of defendant, or of any person in its employment,—is insufficient to bring the case within the statutory limitations. Manufacturing Co. v. Woodson, 10 South. Rep. 87, (present term.) The demurrer to the twenty-sixth count should have been sustained. The twenty-seventh count, which is framed under the same clause of the statute, is not

obnoxious to any of the objections made in the assignments of grounds of demurrer.

The next 14 assignments of error go to the rulings on evidence. If the evidence objected to by defendant is admissible under any count of the complaint, there is no error in refusing its exclusion. The twenty-seventh count avers that the engine used in the yard at the time of plaintiff's injury was not provided with a platform or other device on which brakemen could stand to couple and uncouple. The evidence tends to show that defendant ordinarily used in the yard a regular switch-engine, having a step in front and rear, on which brakemen could stand. The switch-engine, being out of order, was at the shops for repairs, and a road-engine, with pilot attached, substituted. In front of the road-engine, and attached thereto, a flat-car was used until Thursday or Friday evening before plaintiff was injured, on Sunday. This flat-car had been removed from the yard by the yard-master. There is also evidence that the use of a flat-car obviated the necessity of brakemen standing on the ground when coupling or uncoupling. It was manifestly the duty of defendant to furnish as safe and suitable appliances as was practicable and reasonable, under the circumstances, for the protection of brakemen. In view of the other evidence, and this duty, testimony that defendant ordinarily used a particular kind of engine in the yard, and customarily used a flat-car, when a road-engine was substituted therefor, and that a flat-car was attached to the road-engine for a time, was admissible.

The eleventh assignment of error, to the effect that plaintiff was allowed to testify that the fireman was handling the engine at the time he was injured, does not seem to be sustained by the record. As we understand his evidence, he did not testify that the fireman was handling the engine, but simply that he stopped it. On the contrary, he testified that Lyon, the engineer, was in charge of the engine. However, if conceded that he did so testify, the evidence was admissible under the twenty-third count, as tending to show negligence on the part of the engineer in permitting the fireman to handle the engine at such time and under such circumstances.

The testimony as to the consideration which moved plaintiff to quit the shops and take employment as a brakeman was properly excluded. It does not throw light on any proper or material inquiry. The witness Davis, who is *prima facie* shown to be an expert in such matter, was competent to testify to the difference in danger between using a road-engine with and without a flat-car, especially when he states the facts on which his opinion is based. But it was not admissible for the plaintiff to testify that the railroad men considered a road-engine dangerous for uncoupling. This is mere hearsay; the experts themselves should have been called. The record discloses exceptions to other portions of the evidence, but they are not assigned for error.

The remaining assignments of error, 28 in number, go to charges given, and the refusals of charges asked by defendant. In considering them, we shall not regard the order in which they are numbered. The general principles regulating, in all the classes of cases defined by the statute, the rights and duties of the employe, and the liability of the employer, and also the defenses available to him, as declared by our former decisions, may be summarized as follows: Though the statute has no application to the known risks and dangers of the service or employment against which human skill and caution cannot provide, when an employe sustains injury by reason of any defect in the ways, works, machinery, or plant, or the injury is caused by the negligence of any of the persons mentioned, and under the circumstances provided by the statute, it abrogates the common-law rule that the employe impliedly contracts to assume the known and ordinary risks incident to his employment. In neither of the classes of cases, however, does any liability for injuries, caused by the known and ordinary risks, arise without negligence on the part of the employer, or of some person intrusted with superintendence or authority to give orders or directions, or having charge or control of some signal point, locomotive engine, car, or train upon the track of the railway, or by reason of the act or omission of some person done or made in obedience to the rules, regulations, or by-laws of the employer, or to particular instructions of a person delegated with authority in that behalf. The scope and operation of the statute is to make the employer answerable in damages for an injury caused by his own negligence, or the negligence of a co-employe of the same or superior grade, in the enumerated classes of cases. In all cases, the employe is bound to use ordinary care for his own protection. If there are two ways of discharging the service apparent to the employe, one dangerous, and the other safe or less dangerous, he must select the safe or less dangerous way; and cannot recover for an injury sustained when the danger is imminent, and so obvious that a careful and prudent man would not incur the risk under the same circumstances. Railroad Co. v. Walters, 91 Ala. 435, 8 South. Rep. 357; Railroad Co. v. Orr, 91 Ala. 548, 8 South. Rep. 360; Railway Co. v. Holborn, 84 Ala. 133, 4 South. Rep. 146. There is evidence tending to show that plaintiff could have stood on the ground and uncoupled the car without going between the engine and car. If this be true, and it was apparent to plaintiff, and he nevertheless went between the engine and car, this was negligence, sufficient to defeat a recovery, if it contributed to his injury, notwithstanding there may have been negligence on the part of defendant, unless his injury was caused by reckless, wanton, or intentional negligence. Under such circumstances, it cannot be said that plaintiff used ordinary caution to avoid injury.

To entitle plaintiff to recover by virtue of the statute, he must both aver and prove a case coming within one of the enumerated classes of cases. Under the nineteenth and twenty-first counts, it is incumbent on plaintiff to show (1) that the

person who gave the orders or directions was in the service or employment of defendant; (2) that he was bound to conform to the orders of such person; (3) that he did conform to such orders, and that his injuries resulted from having so conformed; and (4) that the person was negligent in giving the orders or directions. The clause under which these counts are framed evidently refers to special orders or directions, in respect to the particular service in which the employe is engaged at the time of the injury, as distinguished from a general order or direction, in reference to the discharge of his general service growing out of the nature and scope of his employment. But, in case of a special order to uncouple, there need be no express order "to go between the engine and car." Such direction will be implied from a special order to uncouple at a time and under circumstances rendering going between the engine and car necessary to conform to the order. There being no evidence that the yardmaster gave plaintiff any order or direction to uncouple the car from the engine at the time of his injury, he has failed to establish one of the essential statutory propositions, and is not entitled to recover under the twenty-first count. But charge 2, requested by defendant, proceeds on the theory that an express order, at the time of the injury, to go between the engine and car to uncouple, is requisite, and also that defendant may set up in such case the defense that plaintiff assumed the ordinary risks incident to his employment, though his injury may have been caused by the negligence of the yardmaster. For this reason the charge was properly refused. The same observations apply to charges 7 and 10; also, if the evidence fails to show that plaintiff was bound to conform to the orders of the switchman, he is not entitled to recover under the nineteenth count. Charge 1 should have been given if not objectionable in form, which we shall notice hereafter.

The twenty sixth count alleges that the engine was so out of order that it could not be stopped promptly. The pleader having specified the particular defect, it becomes matter of description, which it is incumbent on plaintiff to prove with equal particularity, as also that he was injured by reason of such defect. If, therefore, the evidence fails to satisfy the jury that the particular defect existed or that plaintiff was injured by reason thereof, he is not entitled to recover under that count. Railroad Co. v. Coulton, 86 Ala. 129, 5 South. Rep. 458. This is the legal proposition asserted in charge 4.

While charges 12, 13, 15, and 16 may assert correctly general legal propositions, they are defective in assuming, as matter of law, that plaintiff's want of care and caution contributed to his injury. Plaintiff may have been guilty of negligence as hypothesized, and yet such negligence not have contributed to his injury. Whether it did or not so contribute was a question of fact for the determination of the jury.

Charges 5 and 6 are founded on the predicate that the manner in which most of the engines used by defendant in coupling and uncoupling cars on the line of its road, and frequently in its yards, is the standard of defendant's duty to furnish safe and suitable appliances for the protection of its employes. This is not the law. But appellant insists that these charges should have been given under the issue joined on the two special pleas numbered 2 and 3, —pleas of confession and avoidance. The first alleges, in substance, that, while it was true that the engine which was in use at the time plaintiff was injured did not have a platform or other device upon which plaintiff could stand while coupling and uncoupling, the engine in use at that time was constructed in the same manner as most of the engines were constructed in use by the defendant to which cars were coupled and uncoupled along its line of railroad; that the engine used at the time of plaintiff's injury was properly and safely constructed, and of the same pattern and standard as most of the engines used by defendant; was not defective or out of repair, but was in good condition and proper repair, at the time plaintiff received his injuries. The third plea alleges substantially the same facts, and contains the additional averments that the switch-engine used in the yard had become out of repair and useless for switching purposes, whereby it was necessary to send it to the shops for repair, and that defendant had no other engine to put in the yard. Whether these pleas presented valid and substantial defense it is unnecessary to inquire. Plaintiff did not demur to them, but accepted the issues tendered by the pleas. Though they may have presented informal or immaterial issues, plaintiff having joined issue thereon, it would have been a reversible error to refuse to give charges framed in reference to such issues, and the tendencies of the evidence to establish the truth of the pleas. If the material averments be established, defendant is entitled to a verdict, whether the pleas are sufficient or insufficient. But charges 5 and 6 omit from the hypothesis the facts alleged in the pleas, that the engine was properly and safely constructed, and was in good condition and proper repair, and could be safely used in its yards in coupling and uncoupling cars. For this reason they were properly refused.

There is evidence tending to show that plaintiff stepped in between the engine and the car to pull the pin, and, failing to pull it, gave the engineer the signal to slack, in response to which the engineer, the engine having been reversed, threw the lever ahead, and as he did so plaintiff stumbled, and threw himself across the pilot, the heel of his shoe having caught on the top of the guard-rail. If such be the facts, the engineer was without negligence, and the injury to plaintiff accidental. It does not require argument or the citation of authorities to support the proposition that defendant is not responsible for an injury the direct result of an accident incident to the business in which plaintiff was employed. This is the proposition asserted in charge 9, which should have been given.

In Railway Co. v. Holborn, supra, we laid down the rule that, in cases under

the statute, the plaintiff holds the affirmative of each of the statutory propositions on which his right of recovery depends, and the general rule applies, that the burden of proof is on the party holding the affirmative. The same rule was subsequently declared in Railroad Co. v. Davis, (Ala.) 8 South. Rep. 552. Charge 14 asserts this rule, but is objectionable because argumentative.

It being undisputed that plaintiff was an employe of defendant, and a fellow-servant of the engineer in charge of the engine which it is alleged was negligently run over him, he is not entitled to recover under the first count, as we have construed it to be a suit by a person not in the employment of defendant, but lawfully on the track. The liability for an injury to an employe caused by the negligence of a fellow-servant rests on entirely different principles from the liability to a stranger on the track by license or invitation. In the case of an injured employe, the complaint must contain other and distinct averments, whether seeking to enforce the common-law or statutory liability of the employer. The variance between the allegations of the first count and the proof is fatal.

Charges 20, 21, 22, and 23 are charges upon the effect of the evidence under separate and distinct counts, and charge 25 under the whole complaint. There being conflict in the evidence in some respects, and inferences to be drawn therefrom, these charges were properly refused. While some of the charges, such as 1, 3, and 4, assert correct legal propositions, they conclude with a direction to "return a verdict in favor of defendant" under the special and separate count in reference to which they are framed. The complaint, as amended, contains six counts, as to each of which a similar charge was separately asked. Had there been but one count, or, being several, had the charge upon the effect of the evidence applied to the whole complaint, there could be no objection to such conclusion of the charge, but, when there are two or more counts, the phraseology is subject to criticism. It is calculated to impress the jury with the idea that a separate verdict must be returned as to each count, though under some they may find for the plaintiff. Its tendency is to mislead or confuse, and requires explanation. As this objection may be obviated on another trial, we shall express no opinion whether it authorized the refusal of the charges, and merely suggest that the safer practice would be to adopt the usual form of expression in such cases. On the principles we have heretofore stated, the charges given at the instance of plaintiff assert a correct legal proposition. Charges 17, 18, 19, 24, and 26, asked by defendant, are abstract. The principles of law therein asserted have no application to the first count. Charge 13 is somewhat involved and argumentative.

Where the injury is permanent, the plaintiff, in actions of this character, may recover compensation for the disabling effects of the injury, past and prospective. In estimating the damages, the loss of time, and the incapacity to do as profitable labor as before the injury, as well as the mental and physical suffering caused by it, are pertinent and legitimate factors. Railroad Co. v. McLendon, 63 Ala. 266; Railroad Co. v. Yarbrough, 83 Ala. 241, 3 South. Rep. 447. It may be that the portion of the general charge, to the effect that plaintiff is entitled to recover "what his services have been proven to be worth from the time of the injury, or what he could have earned but for the injury, from the time of such injury to such time as he may reasonably expect to live, less what he may earn, if he earn anything in his present condition," does not accurately state the necessary and legal damages; but the exception is taken to two separate and distinct propositions of the general charge as a whole, the last of which is a correct proposition. Where such is the case, the exception is not available. Reversed and remanded.

(90 Ala. 79)

JEFFERSON COUNTY SAV. BANK *et al.* v. MCDERMOTT *et al.*

(*Supreme Court of Alabama.* Nov. 6, 1891.)

WRITS — AMENDMENT OF RETURN — ATTACHMENT LIEN.

1. The court cannot, on motion, amend a sheriff's return so as to show a different date of service of process from that certified in the return, where the sheriff is now deceased, and his representatives are not in court.

2. Where process in an action by creditors to set aside a fraudulent sale of a stock of goods was served before defendant's attachment was levied, the attachment lien is subordinate to the creditors' lien.

Appeal from city court of Birmingham; H. A. SHARPE, Judge. Affirmed.

Bill by McDermott et al. to set aside for fraud a sale of a stock of goods by B. F. Eborn to Jefferson County Savings Bank. From a judgment for plaintiffs, defendants appeal.

The bill was filed by the appellees against B. F. Eborn and the Jefferson County Savings Bank, and sought to set aside, as fraudulent, a sale of a stock of goods. The original bill in the present case was filed on September 15, 1886, and the return of the sheriff shows that the service of process in the present suit was made on the Jefferson County Savings Bank and B. F. Eborn on September 15, 1886. The complainants are creditors of Eborn subsequent to the execution of said bill of sale to the Jefferson County Savings Bank, as first made on May 30, 1886; and the city court of Birmingham rendered a decree dismissing complainant's bill, on the ground that said bill of sale was not void as to subsequent creditors. On appeal the judgment was reversed. After this reversal, the cause coming up again to be heard in the city court of Birmingham, the Jefferson County Savings Bank filed an answer in the nature of a cross-bill and amended sheriff's return, so as to show the priority of the lien of the defendant, and the Jefferson County Savings Bank also filed motions to so amend the sheriff's return. The complainants filed a motion to dismiss the cross-bill, and demurred thereto, and also moved to strike from the files the amended motion of the Jefferson County Savings Bank. The complainants' de-

murred both to the cross-bill of the Jefferson County Savings Bank and to its motion to amend the sheriff's return. The complainants' demurrer to both the cross-bill and the amended motion was sustained The cause then being submitted on the pleadings and proof, a decree was rendered in favor of the complainants. Defendants appeal.

W. C. Ward and *E. K. Campbell*, for appellants. *Mountjoy & Tomlinson*, for appellees.

WALKER, J. When this case was here on a former appeal, it was decided that the bill of sale to the Jefferson County Savings Bank was fraudulent and void as against the complainants, and that, if the process in this suit was served on the defendants prior to the levy of the attachment sued out by the bank against Eborn, then the lien of the complainants would be superior to that of the bank. No disposition having been made by the trial court of the motion which had been made for the amendment of the sheriff's return of the process in this case, so as to show a priority in the levy of the attachment, the cause was remanded, in order that some action might be taken on that motion. McDermott v. Eborn, 90 Ala. 258, 7 South. Rep. 751. After the remandment of the cause, the defendant bank amended its motion to set aside and correct the sheriff's return on the process in this case, and alleged in the amended motion that the sheriff whose return was sought to be corrected was then dead. The same relief as to the correction of the return indorsed on the process was also sought by a cross-bill interposed by the bank. The complainants' demurrers to the amended motion and to the cross-bill were sustained. That action of the trial court is now assigned as error. The practice in the courts of this state of granting leave to a sheriff to amend his return of process, so that it may conform to the facts, is well established and is approved. Wilson v. Strobach, 59 Ala. 488; Daniels v. Hamilton, 52 Ala. 105; 3 Brick. Dig. p. 745; 2 Brick. Dig. p. 456. A different question is presented when it is sought to compel the sheriff to change his return as to a matter of fact, or to have the court substitute its finding as to the facts of the service of process in the place of the officer's return. When the officer does not consent to the proposed correction, and the application is contested, a separate issue is presented for trial. It seems that the courts have regarded it as a matter of necessity to give credence to the official return of the service of process, in order to avoid the embarrassment of turning aside to try such collateral issues; and that a party who has been injured by a false return cannot dispute it in that case, but must seek redress by proceedings against the officer. Brown v. Turner, 11 Ala. 752; Crafts v. Dexter, 8 Ala. 767; Martin v. Barney, 20 Ala. 369; Boas v. Updegrove, 5 Pa. St. 516; Vastine v. Fury, 2 Serg. & R. 426; Bolles v. Bowen, 45 N. H. 124; 2 Freem. Ex'ns, §§ 358–369; Murfree, Sher. § 868. It is not necessary to determine whether or not such absolutely conclusive effect must always be accorded to a sheriff's return in the case in which it is made; for, without deciding that question, the action of the city court in refusing to disturb the return in this case may be sustained. By whatever procedure a return is impeached, if the attack against it is sustained, the result is to render the officer who made it liable in damages to the party who may have suffered injury in consequence of its falsity. In the present case, for instance, if it is a fact that the process was not served on the defendants until after the service of the writ of attachment sued out by the bank, the sheriff would be liable to the bank for any injury resulting to it from the falsity of the return; and, if the correction is made in this case, he might also be liable to the complainants for the failure to serve their process with proper diligence. The issue presented was one in which the sheriff was materially interested. He was a necessary party to any proceeding for the determination of the question. He was dead when the amended motion and the cross-bill were filed and submitted. His representative was not brought into the case. The controversy sought to be presented could not have been settled because of the absence of an indispensable party. The grounds of demurrer addressed to this defect in the amended motion and in the cross-bill should have been sustained. Brooks v. Harrison, 2 Ala. 209; 3 Brick. Dig. p. 368. If the sheriff or his personal representative could not have been made a party to the proceedings for the purpose of trying the question of the truth or falsity of the return, then that consideration alone would support the conclusion that the issue is one not determinable in this cause; for that cannot be a proper method of procedure from which must be omitted a necessary party to the question to be settled. It is unnecessary to determine whether or not the personal representative of the sheriff could have been made a party to the proceeding so as to be bound by the result thereof. The fact in this case, that a necessary party was not before the court, suffices to support the ruling on the demurrers pointing out that defect.

The contention of the complainants was that they were entitled to have the debts due to them from Eborn paid out of property which, it was alleged, was claimed by the bank. The bank at first claimed that property under the bill of sale, and afterwards claimed a prior lien by virtue of its writ of attachment. The former claim has been disallowed as fraudulent. The latter claim is subordinate to the lien in favor of the complainants, for, according to the sheriff's return which has not been amended or set aside, the attachment was not sued out until after the process in this case was served on the defendants. But it appears from the answer of the bank to the bill as amended that the property in question has been sold under its writ of attachment, and that it has received as proceeds of the sale an amount greater than the aggregate of the complainants' claims. There being in this case no claimant to that property

or the proceeds of its sale besides the complainants and the bank, and it having been clearly ascertained that the complainants were entitled to priority, and that the bank was chargeable with more than enough to satisfy their debts, there was no necessity of a reference to the register to state an account of the amount with which the bank was chargeable, or to calculate the interest on the complainants' demands. The bank admitted that its receipts from the sale amounted to more than the complainants' demands. No further inquiry on this subject was necessary. The simple computation of interest was properly made by the judge himself, without a reference. 3 Brick. Dig. p. 396, § 476 et seq. The other questions sought to be raised by the assignment of errors are concluded by the decision on the former appeal. We have discovered no reason to disturb that determination. Affirmed.

(94 Ala. 420)

POLLAK *et al.* v. HARMON.

(*Supreme Court of Alabama.* Nov. 10, 1891.)

WRONGFUL ATTACHMENT—EVIDENCE.

Where plaintiff, in trespass for attaching goods claimed to have been purchased by him from the attachment debtors, relies on his own testimony to prove that he was a purchaser in good faith, it is not error for the court to refuse to charge that the failure of plaintiff to produce the sellers as witnesses to prove the consideration is a circumstance of suspicion for the jury to consider.

Appeal from circuit court, Bullock county; J. M. CARMICHAEL, Judge. Affirmed.

Action of trespass by J. F. Harmon against Ignatius Pollak and others. Judgment for plaintiff. Defendants appeal.

Roquemore, White & McKenzie, Norman & Son, and *A. A. Wiley,* for appellants. *Cabaniss & Weakley* and *Watts & Son,* for appellee.

CLOPTON, J. On the trial of an action of trespass, brought by appellee against appellants, for levying an attachment against Harmon Bros. on a stock of goods which plaintiff claimed to have purchased from the defendants in attachment, both the vendors were sworn, and, with other witnesses, placed under the rule. The consideration alleged to have been paid was plaintiff's assumption of a debt of Harmon Bros. to Lehman, Durr & Co., for which he had become personally liable as surety, and to secure which he had mortgaged his real estate. Also his obligation to hold Harmon Bros. harmless against the payment of the debt. The vendors were not examined, plaintiff choosing to rely upon his own testimony to prove the consideration and the *bona fides* of the transaction. Defendants requested the following charge: "The failure of the plaintiff, if such is the fact, to introduce the grantors of the bill of sale as witnesses to prove the consideration of the instrument, if they were present in court, is a circumstance of suspicion that the jury may look to in determining their verdict, if there were any suspicious circumstances surrounding the transaction of making the sale." The refusal to give this charge is the only error assigned. There is a rule of evidence that, when a party has it in his possession or power to produce the best evidence of which the case, in its nature, is susceptible, and withholds it, the fair presumption is that he withholds it from some sinister motive, and that its production would thwart his evil or fraudulent purpose. This rule "excludes that evidence which itself indicates the existence of more original sources of information." There is also another rule, that, when a party has the means of producing a witness who possesses peculiar or higher knowledge of the transaction, and fails to produce him, this affords ground for suspicion that the testimony of such better informed witness would be unfavorable to his claim. Also, when any material circumstance is left unexplained, or there is an irreconcilable conflict of testimony preponderating on either side, and the party has, or is presumed to have, the means of explaining or contradicting, the failure to introduce the explanatory or contradictory testimony raises a presumption against the party on whom is the burden of proof, and is a circumstance to be weighed against him. 2 Whart. Ev. § 1267. Neither of the foregoing rules requires the production of the greatest amount of evidence which it is in the power of the party to produce as to any given fact. In the language of an eminent jurist, the rule is not infringed "where there is no substitution of evidence, but only a selection of weaker, instead of stronger, proofs, or an omission to supply all the proofs capable of being produced." 1 Greenl. Ev. § 82. Similar charges have been considered and disapproved. In Jackson v. State, 77 Ala. 18, the charge requested was: "If there were but two witnesses to the difficulty which resulted in the death of the deceased, and the prosecution has only called one of them, the presumption is that the testimony of the other witness would not be favorable to the prosecution, and the jury would be authorized to predicate a reasonable doubt on the failure to introduce the other witness." And in Carter v. Chambers, 79 Ala. 223, the charge asked was: "If a party has a witness within his power to produce, and fails to produce him, the presumption is fair that the witness, if produced, would not support the right of the party." In respect to the refusals of the court to give these charges, respectively, it was said in the first case: "All the law requires is sufficient proof, and a party is not bound to produce all the witnesses to the facts. No presumption unfavorable to the prosecution arises from an omission to examine all the witnesses to the transaction." And in the case last cited, it is said: "The second charge is too general and comprehensive in its terms. Carried to its extent, it would require of a suitor that he should produce all the witnesses, no matter how numerous they might be, who knew anything of the transaction, and, failing to do so, to have the presumption indulged against him that such witnesses, if produced, would not support his right."

The proposition of the charge under consideration reaches beyond the extent and purpose of either of the above-stated rules, which are designed to prevent fraud. It requires a party to produce and examine all the witnesses to the transaction in his power, though all the evidence may be primary, or of equal grade, and no circumstance to contradict or explain,—merely cumulative evidence. On the principle that, when a transaction assailed by creditors as fraudulent is between relatives, clearer and more satisfactory proof of the fairness of the transaction and explanation of every suspicious circumstance is required than when the transaction is between strangers, appellants insist that a party who holds clearer and more satisfactory evidence of the matter in dispute than that offered, and which he has power to produce, and fails to do so, subjects himself to the imputation of withholding such evidence from sinister motives. The same principle was contended for in Patton v. Rambo, 20 Ala. 485. The contention there was that, when all the evidence introduced is primary or original in its character, still, if that which is offered is less satisfactory and conclusive than that which might have been, but was not, introduced, this is a circumstance that makes against the party, and should be considered by the jury in weighing the testimony actually introduced. It is said: "But if it were admitted that the distinction does or ought to exist, yet it is very certain that before the court should instruct the jury that the failure to introduce the more conclusive proof was a circumstance against the party, it should clearly appear to the court that the proof withheld or not introduced could more clearly or fully explain the point in issue than the proof relied on did. Unless this should be made distinctly to appear, no one could say what the evidence withheld could explain or show; and certainly no party is bound to introduce every witness to a fact that might be called; he need only prove the fact sufficiently." Both the grantors in the bill of sale were in court, and equally in the control of both parties. In such case the jury, being in duty bound to determine the case upon the facts shown and the evidence actually introduced, have no right to presume what would have been shown had the grantors in the bill of sale been examined as witnesses. The failure to examine them may have been the proper subject of comment before the jury, but furnishes no ground for any unfavorable presumption against either party. Scovill v. Baldwin, 27 Conn. 216. In the opinion of the jury, as appears from their verdict, the plaintiff established his case by evidence of requisite certainty. This is all the law requires, and, if plaintiff chose to rely on the evidence of the consideration and *bona fides* of the transaction actually introduced, the failure to examine the grantors in the bill of sale to prove its consideration is not a circumstance of suspicion to which the jury may look in determining their verdict, and does not authorize, under any recognized rule, a presumption against him. Affirmed.

WIMBERLY v. MAYBERRY *et al.*

(*Supreme Court of Alabama.* Nov. 25, 1891.)

MECHANICS' LIENS — PRIORITY OVER MORTGAGE — ENFORCEMENT.

1. Code Ala. § 3018, provides for a mechanic's lien on the building or improvements, and the land on which the same is situated, to the extent of the interest of the owner. Section 3019 declares that the lien as to the land shall have priority over all other liens created subsequently to the commencement of the work on the building; and as to the building it shall have priority over all other liens, whether existing at the time of the commencement of such work or subsequently created. In an action to enforce a lien against mortgaged premises for materials and labor, it appeared that the premises were insured for the benefit of defendant mortgagee, and, after a loss by fire, by agreement between the mortgagor and defendant, the insurance money was used by the mortgagor in rebuilding; that after the money was expended the mortgagor, without defendant's knowledge, contracted with plaintiffs for the material and labor which created the lien sought to be enforced. *Held*, that defendant's mortgage lien was superior and prior as to the property covered by the mortgage before plaintiffs' lien attached, and subordinate to plaintiffs' lien for what he added. STONE, C. J., and CLOPTON, J., dissenting.

2. The rights between the holders of mortgage and mechanics' liens can only be adjusted by a court of equity.

Appeal from city court of Birmingham; W. W. WILKERSON, Judge. Reversed.

Action by H. H. Mayberry and others against T. P. Wimberly to enforce a mechanic's lien for materials furnished and labor performed. Plaintiffs had judgment, and defendant appeals.

Garrett & Underwood, for appellant. *Cabaniss & Weakley*, for appellees.

COLEMAN, J. The agreed facts, as we construe them, are substantially as follows: On the 26th day of October, 1889, one R. M. Mulford, being then the owner in fee of a lot and dwelling and other improvements thereon in the city of Birmingham, obtained a loan of $4,000 from T. P. Wimberly, and secured the same by a mortgage of the lot, dwelling, and improvements, and, as a further security, the mortgage provided that the dwelling should be insured for the benefit of the mortgagee. The mortgage was regularly acknowledged and recorded. Before the 2d day of June, 1890, the dwelling was partly destroyed by fire, and from the policy of insurance $2,664 was realized. By agreement between Wimberly, the mortgagee, and Mulford, the mortgagor, Mulford was permitted to use the insurance money in rebuilding his dwelling; it being expressly agreed that the new building should stand in the place of the burned dwelling, and be subject to the mortgage in the same manner. Mulford expended the insurance money without completing the dwelling, and, without the consent or knowledge of his mortgagee, incurred the indebtedness sued upon, for its completion. Complainants Mayberry and others, whose claims aggregate about $600, filed their bill to enforce a lien for material furnished for the completion of the building. The city court granted relief to the complainants, holding that their lien for materials extended to the entire building,

and was superior and prior to that of the mortgage. The decree of the court is assigned as error.

Section 3018, Code, declares that every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, * * * for, any building or improvements upon land, or for repairing the same, * * * shall have a lien therefor on such building or improvement, and on the land on which the same is situated, to the extent in ownership of all the right, title, and interest owned therein by such owner or proprietor, etc. The lien for repairs, by this section, is as extensive as that given for materials or fixtures furnished for the building or improvement. Section 3019 of the Code, fixing the priority of liens, declares: "Such lien as to the land shall have priority over all other liens, mortgages, or incumbrances created subsequently to the commencement of the work on the building or improvement, or repairs thereto; and, as to the building or improvement, it shall have priority over all other liens, mortgages, or incumbrances, whether existing at the time of the commencement of such work or subsequently created." The terms "building or improvement," as here used, are not necessarily synonymous, and have a different signification from "repairs thereto," although repairs ordinarily may be an improvement. The term "building" refers to an independent erection upon the land. An improvement may be an independent structure or addition, and it may be an addition to or mere betterment of a building or improvement already made, and not included in "repairs thereto."

The statute contemplates different conditions of the realty at the time of the commencement of work by the mechanic, or when the materials are furnished, or repairs thereto are made: *First*, when there is no lien or incumbrance upon the land at the time the building or improvement or repairs are commenced; *second*, when there is a lien upon the land, and other and independent buildings or improvements are subsequently commenced; *third*, when there is a lien upon the land, and building or improvements thereon, and further improvements or repairs are subsequently commenced. The word "land," as used in sections 3018 and 3019, has its common-law meaning, and includes all buildings or improvements on the land at the time of the commencement of the work, or when materials are furnished. Under the first condition, by virtue of section 3018 of the Code, a lien is given upon the building or improvement and land, not only for the work done and materials furnished, but for repairs made; and, by section 3019 of the Code, this lien has preference over all subsequent liens or mortgages. The lien may be enforced, if necessary, by a sale of the entire property. Under the second condition, for the erection of an independent building or improvement, a mechanic's or material-man's lien is given upon the building or improvement, which is declared to be superior to any existing lien upon the land. The statute provides that this lien may be enforced by a sale of the building or improvement, and, if necessary, the purchaser has authority to remove it from the land. The other condition is when there is a lien for an improvement, which is a mere betterment of a building or improvement, or when there is a lien for "repairs thereto," upon which there is an existing mortgage or lien, before or at the time the improvements or repairs are commenced. The statute as clearly declares the lien for an improvement which is a mere addition or betterment of a building or improvement, or for repairs thereto, as it does upon a building or improvement wholly erected; and it is the duty of the courts to protect and enforce the lien as far as it can be done legally, and without interfering with vested interests or impairing the obligation of contracts.

To determine the respective rights of the holders of the different liens in the cases last enumerated is the question presented by the record for adjudication. Section 3019, supra, fixing the priority of the liens, uses the term "such lien." The lien given to which the words "such lien" refer, and its extent, is declared and defined in the previous section, 3018, in the following words: "Shall have a lien therefor on such building or improvement, and on the land on which the same is situated, *to the extent in ownership* of all the right, title, and interest owned therein by such owner or proprietor." The italics are ours. "Such lien," the priority of which is fixed, and provision for its enforcement made in section 3019, is limited by section 3018 to the right, title, and interest of the owner or proprietor in the "building or improvement, and the land on which the same is situated." This must necessarily be correct; otherwise the owner of a life-estate in a block of buildings, by a contract for improvements or repairs, might have all the buildings sold and removed from the premises, to the entire destruction of the property of the remainder-man; or a vendee, who retains the vendor's lien, might be improved out of his security, without fault or neglect on his part. Under this view, the question arises, what operation will be given to that part of section 3019 which provides, "as to the building or improvement, it shall have priority over all other liens," etc.? The lien can have no force beyond its extent, and its extent is upon the whole building or improvement, except as declared and limited by section 3018. There are many conditions in which the lien can be enforced by a sale of the buildings or improvements, as provided in the statutes, and without injury to any creditor or owner of the land or remainder interest. To have a proper understanding of the statute, the two sections must be construed together, and with reference to the existing law intended to be changed, and the protection to mechanics and material-men intended by the statute. At common law, a mortgage or lien upon land carried with it not only the buildings or improvements erected thereon at the time, but all subsequent buildings, improvements, or repairs thereto, merged into the realty, and became subject to the mortgage, and this is the law now, except so far as changed by statute or agreement

of parties. The lien of mechanic or material-men is purely statutory, and its operation and extent is defined and limited by statute. Copeland v. Kehoe, 67 Ala. 597.

There was no injustice or injury in giving to mechanics and material-men a prior lien upon buildings or improvements wholly erected by them against existing mortgages or liens, or in declaring a prior lien upon the land as against the mortgages and liens subsequently obtained. As against a prior mortgage or incumbrance of the land, the equity and policy of the statute which secures the mechanic's and material-man's lien rest upon the principle that no injustice is done in preventing the holder of the older lien from appropriating the labor and material of others, by which his security is enhanced, without compensation. It would be inequitable to hold that a mechanic or material-man can appropriate, as compensation for his labor and material, the estate of an innocent prior mortgagee; or, as was forcibly stated in Welch v. Porter, 63 Ala. 232, "to hold that a subsequent contractor or material-man could acquire a lien which would take precedence over an intervening incumbrance * * * would shock the moral sense of the profession, and fail to carry out the intention of the legislature." The purpose of the act was to intervene in favor of the mechanic or material-man, and secure to him a paramount lien upon what he put upon the land in the way of "buildings or improvements or repairs thereto," and prevent the operation of the common law, which, without the act, would give an existing mortgage or lien a priority over it. The property improved in such cases merges into the realty, but subject to the mechanic's lien to the extent of the value of the improvements. It was to protect those by whose labor and materials the value of the property was increased, as far as possible, to the extent of the enhanced value of the property. When a building or improvement, as an entirety, is placed upon or added to land under mortgage, such building or improvement may be sold and removed without affecting the mortgage security. Where the improvement is a mere betterment, or where repairs are made upon a building or improvement upon which there is a valid lien, and the owner has only a qualified right, it would be unjust and inequitable in many cases, and against the plain provision of section 3018, to enforce the lien, and give it priority on the entire building or improvement. It would be appropriating one's man's property to pay the debts of another, without his knowledge and consent.

The statute of Iowa, in regard to mechanics' liens, is very similar to the statute of this state. See Revision Iowa, §§ 1846, 1855. In the case of Getchell v. Allen, 34 Iowa, 559, it was held a mechanic's lien for work or material furnished in making additions or repairs to a building is not entitled to preference, as against the entire building, over a prior mortgage on the premises; that the word "improvement," as used in the statute, did not apply to an addition or betterment of a building, but to some independent structure on the land. This ruling was afterwards affirmed in Neilson v. Railroad Co., 44 Iowa, 77. In the case of Insurance Co. v. Slye, '45 Iowa, 615, it was held that a mechanic's lien for materials furnished for the improvement or enlargement of a building does not take priority over an existing mortgage, and this rule prevails, even though the building be changed so that very little of the original structure remains. The Iowa courts have not given to the word "improvement" the same extensive definition as that given to it by this court. We do not see that the difficulty of construing and applying the statute is in any way relieved by confining "improvement" to independent structures or erections. The Iowa statute provides a lien for "repairs" to the same extent as our statute, and the lien given for repairs like ours is the same as that for "building or improvements."

The Missouri statute is also substantially the same as that of this state. In the case of Crandall v. Cooper, 62 Mo. 478, the facts were that Cooper, a mortgagor, contracted for improvements in putting up a fence on the mortgaged premises. The question arose as to the priority of the mortgage lien and the mechanic's lien. The court held the mechanic acquired no greater interest in the realty than Cooper, the mortgagor, possessed, viz., the equity of redemption, or a right to the premises after the trust lien was paid off. The court further held that the mechanic might have enforced his lien upon the fence, and recovered it. The case is cited to show that the mechanic's lien is limited to the extent of ownership of the owner of the land as against a prior mortgage. In the case of Haeussler v. Thomas, 4 Mo. App. 463, the same question was directly involved. The different sections of the Missouri statute are set out in the opinion, and we find no material difference in the statutes quoted from that of this state. The second section of the Missouri statute, as section 3018 of the Code of Alabama, limits the mechanic's lien "to the extent, and only to the extent, of all the right, title, and interest owned therein by the owner or proprietor of such building, erection, or improvement," etc. The third section of the Missouri statute declares that "the lien for the things aforesaid or work shall attach to the buildings, erections, or improvements, for which they were furnished or the work was done, in preference to any prior lien upon the land upon which said buildings, erections, improvements have been erected or put," etc. The statute goes on to prescribe for the sale and removal of the buildings or improvements in the same language as that used by our statute. The court held that the two sections must be construed together, and that the second section could not be set at naught in construing the third section, giving priority to the lien, and to hold otherwise would impair the obligation of a contract. The conclusion of the court is that the third section does not give a mechanic's lien for repairs upon an existing building, to the prejudice of rights previously acquired by a mortgagee, though it does give him a lien upon a build ng erect-

ed by him subsequent to the mortgage. We approve of the conclusion of the court, as we have stated that conclusion above. The same general principle is recognized in the case of Steininger v. Raeman, 28 Mo. App. 594.

The supreme court of Minnesota, in the case of Meyer v. Berlandi, and of Manufacturing Co. v. Jameson, 40 N. W. Rep. 513, held the statute of the state, in so far as it assumes to give a mechanic's lien precedence over prior incumbrances, to be unconstitutional and void. The reasoning of the court in this opinion is to the effect that such an act impairs the obligation of contracts, and divests settled rights of property. The view we take of our statute, as applied to the facts of this case, do not require a decision of this question, as we are of opinion that the lien may be enforced without divesting vested rights, or impairing the obligation of a contract. We hold the meaning and intention of our statute is to give the anterior incumbrance priority upon what it embraced when the mechanic's lien commenced, and the mechanic's or material-man's lien or for "repairs thereto" priority over what is added, either as a building or improvement or repairs. It would be in violation of the plain language of the statute to permit a mortgagee to appropriate to the payment of his debt not only the property covered by his mortgage, and upon which he relied as security, but also the additional security furnished by the mechanic or material-man; and it would be inequitable and contrary to law to apply the mortgagee's prior security to the payment of the mechanic's or material-man's claim. The rights of both may be adjusted and preserved in a court of equity. This conclusion is entirely consistent with the case of Turner v. Robbins, 78 Ala. 592. The facts in that case show that the mortgage was upon a naked lot, and the mechanic's lien was given a preference upon a building subsequently erected. The same principle applied in the case of Stockwell v. Carpenter, 27 Iowa, 119, to which we have been referred. There the vendor's lien was upon a naked lot, and the buildings afterwards erected.

Cases will arise under our construction which involve difficulty in the adjustment of the equities of the parties, and enforcing their respective priorities; but the statute is plain in declaring the lien for materials and repairs and fixing its priority. The statute is not unconstitutional, as we construe it, and should be enforced in all cases where it can be done within constitutional limits. The statute makes no provision for adjusting priorities of liens in courts of common law, and the power of a court of law, without additional legislation, is not sufficient in all cases. If the building or improvement is a separate, independent erection or structure, it may be sold under execution from a court of law, and removed. If the mechanic's lien be for a mere betterment of a building or improvement, or for repairs thereto, upon which there is an existing mortgage, the priority of the lien cannot be adjusted and protected in a court of law. A purchaser at a mortgage sale, foreclosed by a power contained in the mortgage, would not destroy the mechanic's lien, further than as to his right to redeem. Any other lien the statute gives him would continue and follow the property. There is no doubt but that the mortgagee may also redeem the property from under the mechanic's lien which is prior to his lien. The mortgagee's lien is superior and prior as to the property covered by the mortgage before the mechanic's or material-man's lien attached, and subordinate to the lien given to the mechanic or material-man for what he added, and so the lien of the mechanic or material-man is upon the whole property, but subordinate to the mortgage as to the property covered by the mortgage when his lien attached. This is the condition of the property, and the relative rights of both are fixed by statute, and the only question is as to the power of a court of equity to preserve, adjust, and enforce the respective rights of all.

When the jurisdiction of a court of equity is invoked, all parties in interest may be made parties, and the court of chancery, by reason of its elastic power, has authority to so frame its orders and decrees as to ascertain, adjust, and protect every interest and priority. In adjusting the equities between a prior *bona fide* mortgagee of the land, as we have defined "land," and the holder of a mechanic's or material-man's lien for betterment of or repairs to a building or improvement, the court is not bound by the contract between a contractor or the owner of the land and the mechanic or material-man. As between the latter, judgment will be rendered according to contract, but as to the mortgagee this contract is *res inter alios acta*. It is clear, under general principles, the mortgagee, by paying the mechanic's lien, could subject the whole property to his lien; and there is no reason why the mechanic or material-man could not redeem the property from under the mortgage, so as to subject the entire property to his claim. Under the rule declared, to adjust the equities of the mortgagee and mechanic or material-man, the court should order a reference, to ascertain the value of the building or improvement, without estimating the increased value added by the improvements or repairs which are subject to the prior lien of the mechanic or material-man, and also its value including that added by the material or repairs. If the proof shows the value has not been enhanced by the material furnished or repairs made, the material-man or mechanic gets nothing as against the prior mortgage. On the other hand, if the proof shows that without the improvements or repairs the property would not be so valuable as with them, the mechanic's or material-man's lien has priority on the increased value, and, in proportion as the building or improvement is increased in value by the material furnished or repairs made, the rule is furnished for declaring the relative rights and interest of the parties in the building or improvement. If the building or improvements are sold by the decree of the court, the proceeds can be easily adjusted. As

stated before, the power of the chancery court is not limited to a sale of the property. In some cases, as where the mechanic's claim was due, and the property was covered by a mortgage of prior date, but which did not mature until some time in the future, or where the owner had only a life-time estate in the building, it might be more equitable and necessary, in order to protect the interest of all parties, to adopt the rule laid down in Hoot v. Sorrell, 11 Ala. 386, and rent out the property. The refusal of a mortgagee to foreclose his mortgage cannot operate to defeat the power of a court of equity to take care of the prior lien of a mechanic or material-man. The form of the decree enforcing the liens will depend more or less upon the proof as to the particular estate of the owner, the condition of the property, and the character of the conflicting liens. All these must be considered, and perhaps cases will arise into which other considerations will enter. Ware v. Shoe Co., 92 Ala. 145, 9 South. Rep. 136. Where the mortgage has been legally foreclosed by a power of sale contained in the mortgage, it would seem the better time for fixing the respective valuations would be at the date of the foreclosure. Ordinarily, when there has been no foreclosure, it would seem the better time would be when the reference is ordered by the court; but we lay down no inflexible rule on this point, as we cannot anticipate circumstances. A mortgagor in possession before foreclosure is an owner or proprietor, within the meaning of the statute, and authorized to contract for building or improvements or repairs. The description of the property in the bill of complaint is a substantial compliance with the statute. The demurrer to the bill was properly overruled. The cause is reversed, and remanded, that the trial court may proceed in accordance with the principles of law herein declared. Nothing in this opinion is to be construed as having reference to the statute as amended by the act of 1890-91, p. 578, passed by the last legislature. The rights herein involved had vested before the passage of that amendatory act. Reversed and remanded.

Since the foregoing opinion was prepared, the chief justice has written a dissenting opinion, and we do not deem it improper to notice the argument adduced by him for holding to a contrary conclusion. If the learned chief justice, in his able dissenting opinion, had explained how it is that the lien for a building wholly erected upon land under a mortgage is prior and superior to the mortgage, and the lien for an improvement or "repairs thereto" is secondary and subordinate to the mortgage, his conclusion would be much more satisfactory. The statute which declares and fixes the priority of the former is that which declares and fixes the priority of the latter, and the statute makes no distinction as to the extent and priority of either. The lien for either stands upon the same footing, and both liens are of equal dignity and entitled to the same priority as to existing mortgages. The authority for holding that one is senior and superior to the mortgage, and the other junior and subordinate to the mortgage, and as attaching only to the equity of redemption of the mortgagor, we submit cannot be found in the statute itself. That this is true is clearly manifest from the statute, and from its extent and operation upon the property of the owner when there are no intervening incumbrances. In such case the lien for repairs may be enforced against the whole building and the land. It is the qualified interest of the owner, or the prior incumbrance, which limits the priority of the mechanic's lien to that which was added by his material or labor, and prevents it from operating on the whole property. The court has not conceded, as stated by the chief justice, that the lien of complainant for materials is subordinate to that of the mortgagee. We expressly hold, in the language of the statute, that it has priority to the extent of the value of the improvement, and is secondary only as to the property covered by the mortgage before the materials were added. The facts that the building wholly erected may be sold and removed goes merely to the remedy. This in no way enlarges or diminishes the force and extent of the lien as declared by the statute, nor can the mere right to remove the building operate to prevent the common-law principle from applying which would subject buildings subsequently erected to a prior mortgage. It is the statute which has this effect, and, if available to protect a building from the operation of the common-law principle, which would subject it to a prior mortgage, it is equally effective to protect additions to the realty, whether by way of "improvements or repairs thereto." If the one is constitutional, the other is, for the same principle is involved in both, and the language of the statute as to both is the same. At common law, a building is merged into and becomes as much a part of the realty as "repairs thereto;" no more, no less. No fair construction of the statute will lead to any other conclusion. The fact that one may be severed and the other not, has nothing to do with the principle of law. Whether the powers of the court are competent to protect and enforce both liens is a different question. If a case should arise in which the courts would be unable to afford relief, it would be simply a case of a right without a remedy. We cannot yet see that this case is one of that character. It is conceded that if $600, for which the material-man's lien is claimed, had been expended in the erection of an independent building, the statute would prevent the appropriation of the building to the payment of the mortgage in preference to the payment of the material-man's claim. Now, if, by reason of the material added, the property will sell for more, by $600, than it would have sold for without the material, why should the mortgagee in the one case, any more than in the other, be permitted to appropriate the additional $600? How is the mortgagee injured, if he gets all he would have received if the material had not been added, and what injustice is there in the rule which secures to the material-man compensation for his labor and

materials by which the value of the property was enhanced. Suppose in this case there had been no insurance, and after the almost total destruction of the mortgage security by fire the mortgagor had procured by contract the rebuilding of the house, expending over $3,000, for which the mechanic's lien attached, could the mortgagee, in the face of the statute, have appropriated the whole property to the payment of his mortgage? Such a construction would convert the statute into a snare to catch the unwary mechanic. This is the rule which seems to apply in the state of Illinois. The statutes are not exactly alike, but there is no difference so far as the application of the principle is involved. Code Ill. p. 665, c. 82, § 1, is as follows: "That any person who shall, by contract * * * with the owner of any lot or piece of land, furnish labor or materials, * * * in building, altering, repairing, any house, building, or appurtenances thereto, shall have a lien upon the whole of such lot, and upon such house or building and appurtenances," etc. Section 2 extends the lien to the interest of the owner, etc. Section 17: "No incumbrances upon the land created before or after making of a contract, under the provisions of this act, shall operate upon the building erected or material furnished until the lien in favor of the person doing the work shall have been satisfied; and, upon questions arising between previous incumbrances and creditors, the previous incumbrance shall be preferred to the extent of the value of the land at the time of making the contract, and the court shall ascertain by the jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest." In the case of Bradley v. Simpson, 93 Ill. 93, construing the mechanic's lien law, the court declared that, "where land is sold under a decree for a mechanic's lien upon which there is a prior incumbrance, and the proceeds of the sale are not sufficient to pay both the claims as found by the decree, they will be apportioned, and the mortgagee will take such a share of the net proceeds of the sale as the value of the property before the improvements were put upon it bears to the total value of the property after the improvements were made, and no more;" "the parties have the same proportionate interest in the proceeds that they had in the property before it was sold." In the case of Croskey v. Manufacturing Co., 48 Ill. 483, the court uses this language: "If, for example, the owner of unincumbered realty, with a building upon it, executes a mortgage thereon, and afterwards has repairs made upon the building, for which a mechanic's lien is enforced, such lien would take priority over the mortgage only to the extent of the additional value given to the property by the improvements. Thus, if a house and lot worth fifteen thousand dollars, and, subject to a mortgage, additions or improvements are made by the mortgagor in such mode as to make the premises worth eighteen thousand dollars, the mechanics and material-men * * * would have a prior lien to the extent of three-eighteenths of the proceeds of the sale, and the increased market value added to the property would measure the extent of the priority of their lien, without reference to the cost of the materials or labor actually furnished." We think these are adjudged cases, direct in point and by respectable authorities, and are conclusive, as far as that court can be regarded as authority, that our construction of the statute does not impart to the lien given for the materials or repairs a force or right which affects vested rights, or in any manner conflict with *Magna Charta*. The fact that the Illinois statute made special provision that the relative rights of the parties might be ascertained "by a jury or otherwise, as the case may require," in no way affects the question of the extent and priority of the respective liens, as given by the statute; nor does the declaration in the statute that, upon "questions arising between previous incumbrances and creditors, the previous incumbrance shall be preferred to the extent of the value of the land at the time of making the contract." This is the legal effect of sections 3018 and 3019 of the Code, when construed together, and each part of the act is given some effect, and our courts of equity are fully competent to afford the same relief.

The construction contended for by the chief justice would render entirely nugatory the lien given for the betterment to a building, or repairs thereto, upon which there was a prior incumbrance. We all agree the statute is not unconstitutional. It must have some operation. It cannot be controverted that the powers of a chancery court, as exercised in this state, are sufficient to ascertain the proportionate rights of the parties, and by appropriate decrees, either by a sale or by renting, or permitting the one or the other to redeem, according to the circumstances of the case, protect the respective interests of all parties. Each of the cases cited by the chief justice, including the case of Getchell v. Allen, 34 Iowa, 559, so largely quoted from, were cases where the whole property upon which there was a prior lien at the time of the commencement of the work or when the materials were furnished, was subjected by the decree of the lower court to the payment of the mechanic's lien. We hold the same conclusion, and have cited those cases to that point, as showing the court erred in giving complainant a prior lien upon the whole building. Furthermore, in the Iowa cases, we are not informed whether the court in which those cases originated had equitable jurisdiction and power to apportion the priorities of the respective liens, as has the chancery court. If, in the case before us, it was pending in the circuit court, and no remedy afforded except the statutory remedy, we would hold the circuit court had no authority to have the property sold, and apply the entire proceeds to the mechanic's lien. It would present a case in which the remedy could not be found in a court of law. But, even if those authorities held to a different rule, we feel constrained to construe our statute as we have, and to hold that, where

our statute says "such lien shall have priority," it means "priority" in its usual sense, and not "junior liens" or "subsequent incumbrance," as assumed in the dissenting opinion, and upon which assumption his argument entirely rests. We think it is the duty of the court to protect and enforce their respective priorities as fixed by the statute, in all cases where the power of the court is competent for this purpose.

The chief justice asks in his opinion why it was the legislature conferred jurisdiction upon courts of equity when the amount claimed is not less than $100. We have made no investigation of the reasons which influenced the legislature. We take the law as it is, and we find that section 3048 provides that "any lien provided for under the provisions of this chapter, where the amount claimed is not less than one hundred dollars, may also be enforced by bill in equity." The act confers the jurisdiction generally upon a court of equity, and, having jurisdiction, it may enforce the lien according to its own powers. In the present suit the sum involved exceeds $100, and the only question is whether the chancery court is competent to adjust the equities of the different liens. When the present act was originally adopted the legislature may have thought that, under the authority of Montandon v. Deas, 14 Ala. 33, the chancery court had jurisdiction without having it specially conferred by statute. It may have been supposed that, under the authority of the case of Westmoreland v. Foster, 60 Ala. 448, a decision rendered by the present chief justice, where it is held that chancery court had jurisdiction to enforce the landlord's lien, independent of the statutory remedy furnished by a court of law. Be this as it may, this court decided in Walker v. Dalmwood, 80 Ala. 246, and Chandler v. Hanna, 73 Ala. 392, that the chancery court did not have jurisdiction to enforce the mechanic's lien, "in the absence of some special ground of equitable interposition, such as would render inadequate the remedy prescribed in a court of law;" and after these decisions were rendered the legislature saw proper to confer jurisdiction generally upon a court of equity to enforce the lien, "without alleging or proving any special gound of equitable jurisdiction." It is impliedly conceded in both the authorities (80 Ala. and 73 Ala., supra) that cases might arise in which the remedy prescribed in a court of law would be inadequate, and it would be necessary to resort to a court of equity. When these decisions were rendered, it would seem the court had in view that the necessity to adjust different equities and conflicting liens might arise under the statute. The chief justice states as follows: "Under the opinion of the majority of the court, the right and remedy for repairs put on a building which was on the premises at the date of the mortgage would be much more compensating—much more nearly adequate—than if the claim were for an improvement entirely new. Can the legislature have intended this advantage to him who only repairs an old building, over the material-man and mechanic who furnishes materials and constructs a new one? Did the legislature intend to give to the builder this inadequate compensation for an improvement entirely new, and leave it to the courts to secure to the repairer, by interpretation, a full *quantum valebat* for what he may have added?" We would reply by asking, did the legislature intend to compensate, in whole or in part, one who constructs a new building, by permitting him to remove it from the premises, and did the legislature intend to deny all compensation to one who makes the repairs thereto? If so, in what part of the statute is this intent to be found which makes this difference? Why were liens for repairs put upon the same plane as liens for building a structure, if it was expected that the courts would give the two liens, by judicial interpretation, a different plane, making the one a prior lien and the other secondary and subordinate,—a mere "well without water?" The opinion further proceeds: "Can it be that the legislature intended to grant the special relief my brothers have awarded to complainant in this case when the value of the repairs amounts to one hundred dollars or upwards, and to withhold it when it falls below that sum? Would there be any justice in such discrimination?" If the act is plain, it is not for this court to impugn the intent of the legislature. But we call attention to the statement of the chief justice when he summarizes his conclusion under the third proposition. It is as follows: "The only remedy or resource left to the material-man and mechanic was the right to redeem from Wimberly by paying off the older incumbrance, and then enforcing the collective liens for their benefit; or they could enforce their claim against Mulford's equity of redemption, or await Wimberly's foreclosure, and claim payment out of the surplus, should anything be left." We ask, in what court can "the collective liens for their benefit" be enforced? or in what court can they "enforce their claim against Mulford's equity of redemption?" The statute itself furnishes no such remedy. A chancery court alone has jurisdiction of these questions, and we reply, in the language of the chief justice: "Can it be that the legislature intended to grant the special relief the chief justice contends for where the collective liens amount to one hundred dollars or upwards, and without it when it falls below that sum? Would there be any justice in such discrimination?" The summary of the chief justice necessarily concedes that the rights granted to the mechanic and material-man are, as we hold, independent of the statutory remedy, "specially provided for its enforcement in the statute," as stated in another part of his opinion; and without regard to the limitation of $100, as prescribed in section 3048 of the Code, may enforce in a court of chancery, under section 720 of the Code, which gives jurisdiction to the chancery court "in all civil cases in which a plain and adequate remedy is not provided in other judicial tribunals."

The second proposition of the chief jus-

tice in his summary is "that the material-man's and mechanic's lien is inferior to Wimberly's lien, [the mortgage,] and bound only Mulford's equity of redemption." As to the property covered by the mortgage when the materials were added or a building wholly erected, this is true; but this is not true, and is directly in the face of the statute, as to a new building, or materials furnished or repairs made. As to these, the statute directly declares this lien "shall have priority over all other liens, mortgages, whether existing at the time the materials are furnished or subsequently created." To hold that the words "such lien," as used in section 3019, refers only to the lien given upon a building wholly erected, would impute to the legislature a want of knowledge of the ordinary meaning of words, and resolve the section into an absurdity; for, unless the words "such lien" includes the lien for material and repairs, then there is no provision in the statute for enforcing the lien for material and repairs, even in cases where the mortgage was subsequently created. No one contends that this would be a proper construction of the statute. We have given the statute a great deal of study. It should be so construed as to give some effect to every clause, and a construction which leaves to a sentence or clause no field of operation should be avoided as far as possible. Lehman v. Robinson, 59 Ala. 219; Ex parte Dunlap, 71 Ala. 73. Our conclusion is the only solution of the difficult question involved, as we understand the purpose of the statute. It does no injustice to either party; it rests upon equitable principles, and does not violate *Magna Charta*.

STONE, C. J., (*dissenting.*) Our statute (section 3018, Code 1886) provides that mechanics and material-men, "who shall do or perform any work or labor upon, or furnish any material, fixtures, * * * for any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, * * * shall have a lien therefor on such building or improvement, and on the land on which the same is situated, to the extent in ownership of all the right, title, and interest owned therein by such owner or proprietor." Section 3019: "Such lien, as to the land, shall have priority over all other liens, mortgages, or incumbrances created subsequently to the commencement of the work on the building or improvement, or repairs thereto; and, as to the building or improvement, it shall have priority over all other liens, mortgages, or incumbrances, whether existing at the time of the commencement of such work or subsequently created; and the person entitled to such lien may, when there is a prior lien, mortgage, or incumbrance on the land, have it enforced by a sale of the building or improvement, under the provisions of this chapter, and the purchaser may, within a reasonable time thereafter, remove the same." Section 3021: "When a lien attaches under the preceding section, [section 3020, which relates to buildings or improvements on land held under lease,] the lessor, at any time before a sale of the property, shall have the right to discharge the same by paying to the holder the amount secured thereby." The purpose of this section is to enable the lessor to prevent the removal of the building or improvement from the land, by paying off the lien upon it. The foregoing are all the statutory provisions which are material to a correct decision of this case. The facts of this case are all clearly shown in the pleadings and in the agreed statement of facts. There is no dispute of fact about anything this court need decide. R. M. Mulford occupied as a residence a lot adjoining the city of Birmingham, on which were a dwelling-house and other improvements necessary for its occupancy as a dwelling. Mulford had executed a mortgage on the lot, "together with all and singular the tenements, hereditaments, and appurtenances thereto belonging," to T. P. Wimberly, to secure the payment of a note of $4,000, payable at a bank. The mortgage was executed in October, 1889, and was properly recorded in the probate office of Jefferson county, the county in which the lot is situated. At the time the mortgage was executed Mulford was the owner of the property in fee, and resided on it. The dwelling was almost destroyed by fire in 1890, but the kitchen part of the dwelling was only partially consumed, and outhouses in the yard were left unharmed. At and before that time the property was under insurance for the benefit of Wimberly, the mortgagee; and when the amount of the loss was adjusted in August, 1890, the sum of $2,664 was ascertained to be the amount of the loss suffered by the fire, and this was paid by the insurance company. It was then agreed between Wimberly and Mulford that the said insurance money should be expended in restoring the dwelling-house to a habitable condition, the house, when restored, to still continue under the mortgage; and, if any sum beyond the $2,664 was expended on the building, Mulford was to supply it, and was to continue in the occupancy of the house subject to the mortgage. Under this agreement the house was rebuilt on the site of the one burned, and the $2,664 were exhausted in the erection. The house not being completed, or not being finished up to the satisfaction of Mulford, he incurred additional expense in material and workmanship which went into the body of the house. The debt thus incurred is some $600. This additional expense was incurred on credit, without the knowledge or consent of Wimberly, and the act has never been ratified by him. It is not shown that he even knew that the expense being incurred was in excess of the $2,664. The verified statement of materials and workmanship required under sections 3022–3024, Code, were made out against R. M. Mulford, without any notice whatever of Wimberly's claim or mortgage. The mechanics who did the work, having acquired the ownership of the material-men's claim, filed the present bill to enforce both claims by a sale of the property on which the house was erected,—properly, in the present case, on which the house

was repaired or completed. The bill was filed January 29, 1891, and sets forth that Mulford was a citizen of Jefferson county, —the county in which the property is situated,—and that Wimberly resided in Lee county, a hundred miles or more away. While the suit was pending, and after Wimberly had answered the bill, to-wit, on March 28, 1891, he sold the property under the power of sale contained in the mortgage, having previously given the requisite notice, and one Hyde was set down as the purchaser at $4,910.41, the amount of the mortgage debt, and the expense of the foreclosure. A deed was made to Hyde, and on the same day the property was reconveyed by Hyde to Wimberly. No money was paid, and it was practically a purchase by Wimberly at his own sale. The mortgage gives to the mortgagee no right to purchase at his own sale.

There are two reasons why the sale under the power can exert no influence in this case: *First*, when the bill was filed (January 29, 1891) no attempt to foreclose the mortgage by sale under the power had been made. If the bill, when filed, contained no equity, the subsequent act of Wimberly cannot give it equity. To authorize a suit in chancery for relief, the facts on which complainant relies for recovery must be existent. It is not enough that they come into existence afterwards. Planters' & M. Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585; Rapier v. Paper Co., 64 Ala. 330; Banks v. Thompson, 75 Ala. 531; Malone v. Marriott, 64 Ala. 486; Peevey v. Cabaniss, 70 Ala. 253; 3 Brick. Dig. p. 679. *Second*. Wimberly, for all equitable purposes, being the purchaser at his own sale, the sale and conveyances made did not in the slightest degree impair or change the equitable rights, or the manner of their assertion, that any third person may have had. Subsequent incumbrancers had precisely the same equitable rights after the said sale as they could have asserted before. The statutes under consideration do not attempt to secure to mechanics or material-men a lien paramount to older valid liens. If it did so attempt, we would be forced to deny such relief, for the attempt would be to deprive the owner of his property without "due process of law." The lien the statute confers is only "to the extent in ownership of all the right, title, and interest owned therein by such owner or proprietor;" that is, the one who procures the materials to be furnished, or the mechanic's labor to be performed, thereby gives a lien co-extensive with his ownership, and no more. If he have only a leasehold estate, a part interest less than the whole, an equity of redemption, or an equitable right to demand, or receive title on payment of the purchase money, the mechanic or material-man acquires a lien on that title or right, and nothing more. He does not and cannot acquire a larger right or interest than his employer owned. It is axiomatic that no one can convey or incumber property beyond the extent of his ownership. I understand Justice COLEMAN in his opinion to concede what is stated above.

If the employer (owner or proprietor, as he is designated in the statute) own the unincumbered fee, then no difficulty will be encountered in enforcing the lien. The statute gives a lien, not only on the building or improvement erected, or added to or repaired, but also on the lot on which it stands. The entire property, lot and all, if necessary, can be sold in discharge of the lien, even though that lien be only for repairs put on the building. Such is the statute. If, however, the owner or proprietor, procuring the work to be done or materials furnished, have not an unincumbered title to the lot, then the statute provides a different rule. If the workmanship and materials are employed in the erection of a new building or improvement, which can be removed and leave the property as it was before the building or improvement was commenced, then there is a first and paramount lien on the building or improvement, which can be enforced by a sale of such building or improvement, "and the purchaser may, within a reasonable time thereafter, remove the same." And, in such case, the mechanic and material-man each has an additional lien on whatever title to or interest in the lot the owner or proprietor owned at the time the lien commenced to attach. In the two categories stated above, the rights and remedies of the several parties are clearly defined in the statute, and are easy of enforcement. Cases arise in which the claim of the mechanic or material-man is for labor done or materials furnished for the completion of an unfinished building or improvement, or for repairs on such building or improvement, at a time when the fee-simple title is not in the person who procures the materials to be furnished or the services to be rendered, and yet both the material and services become so incorporated in the building as not to be separable from it, so as to leave it in the condition it was in before the repairs were made. That is this case. It is manifest that neither a sale of the entire property, nor of the building on which the repairs were put, nor a removal of the building, can be resorted to in such case. Either course would deprive the older lienee, the mortgagee, of his property, without due process of law. It results that for the case we have in hand the statute points out no specific mode of enforcing the lien. It must therefore be determined on equitable principles. The claim of a mechanic or material-man is, at least, but a lien,—a right to have the claim enforced as a charge. The statute makes it subordinate to all older valid liens; and, if it did not, the constitutional barrier would have made it so. *Magna Charta* made it so. Except to the extent the statute provides specially for its enforcement, it stands on no higher plane than other valid liens; and we have seen there is no statutory provision which points out the remedy in a case like this. We have simply the case of a junior lienee attempting to collect his claim out of property that is subject to an older valid lien. In the opinion of my Brother COLEMAN, it is admitted that Wimberly's claim is the older, and its

bona fides is not questioned. Suppose the complainants in this case filled the position of a junior mortgagee, and, to make the analogy striking, suppose the consideration of such junior mortgage had been for money which was expended in repairs on the house covered by the senior mortgage. Or suppose the case of a vendor's lien for unpaid purchase money, no title being made, and a mechanic asserting a lien against the vendee in possession for repairs put upon and incorporated in a dwelling that was on the premises before the agreement of sale. Can ingenuity draw a distinction in principle between either of the cases supposed and the case we have in hand? And would any one contend, in either of the cases supposed, that any other principle was involved than that which always obtains when there is a junior and a senior mortgagee?

I hold the following propositions are so clearly established that not a respectable authority can be found in opposition to either of them: *First.* The mortgage to Wimberly being duly spread on the records of the county in which the lot was situated, and that mortgage being the older lien, this, in law, was and is the equivalent of actual notice to the mechanic and material-man of the existence of that older lien. 3 Brick. Dig. p. 679, §§ 8, 9. *Second.* The complainants in this case, being only subsequent incumbrancers, had no right, either at law or in equity, to compel that older mortgagee to enforce his lien, either by foreclosure or otherwise, in order that their junior interests might be carved out of it. Their only right, like that of any other junior incumbrancer, was to redeem the property from the older lienee, and thereby secure their subrogation to his rights. Kelly v. Longshore, 78 Ala. 203, and authorities cited. *Third.* There is not an adjudged case, not even excluding those cited by my Brother COLEMAN, which holds that a junior incumbrancer, although his labor or money may have enhanced the value of the security, can coerce the enforcement of the lien, as a means of carving his alleged interest or lien out of it, unless there is a statute conferring the right. Our statute giving to mechanics and material-men a lien was approved March 6, 1876. Before that time we had no statute on the subject that was like the present one. Code 1867, §§ 3101–3104. Its provisions, so far as the principles necessary to be decided in this case are concerned, are identical with those of Code Iowa, §§ 2130, 2139, 2140, 2141. The Iowa Code was adopted in 1873, three years before our statute was enacted. The complete identity of language found in each of the systems, on the points material to this case, demonstrates that our statute, being the latter, must have been copied from the Iowa statute. Such identity of expression could not be accidental. The substantial re-enactment of a statute which has been construed, and has acquired a fixed judicial construction, is a legislative adoption of the construction. 3 Brick. Dig. p. 749, § 16. Seven of our decisions are cited in favor of this principle. Getchell v. Allen, 34 Iowa, 559, was decided in 1872, four years before our statute was enacted. The Iowa statute was of force before that time. Code Iowa, 1851, § 981 et seq. The Iowa case was not distinguishable in purpose or principle from the one we have in hand. The court said: "In the case of a mortgage upon land and the buildings thereon, made before the mechanic's lien attaches, the mortgagee will hold the property as against the mechanic. How is it when improvements in the way of additions or repairs to the building are made after such mortgage? The mortgage binds the house; the improvements of the character indicated become a part of the house, and are, as it were, incorporated with it. After the improvements are made, they do not remain separate and distinct from the building. They have lost their distinctive character; the house includes them; they are a part of the house; the mechanic's lien cannot defeat the mortgagee's right; and, for the same reason, section 1855 does not apply to such a case. That section simply provides that a mechanic's lien for work or materials furnished to erect buildings, after the execution of a mortgage on the land, is a paramount lien against the buildings, but is not a lien on the land. But, if the mortgage covers the building, the mechanic cannot enforce his lien against it, and cause it to be sold and separated from the land. These views, we think, are based upon sound principles, and lead to equitable results. Should a contrary doctrine prevail, it would be within the power of a mortgagor to ruin the security of his creditor, by making improvements upon the building covered by his mortgage, which, in fact and in law, would but become a part of the building itself. The case before us serves to illustrate the injustice of such a rule. Another story is added to a house already bound by the mortgage. The story cannot be separated from the house; it is a part of it. It would be a great hardship to the mortgagee to permit his security to be defeated or impaired by the act of the mortgagor in thus adding to his building. The mechanic or material-man cannot complain. He had notice of the mortgage, and knew, or was bound to know, the purposes for which the materials were furnished or work was done by him."

The language copied is taken entirely from Chief Justice BECK'S opinion, on a statute from which ours was in substance copied, and in a case from which ours is not distinguishable in principle. Is there any hitch or faulty link in the reasoning of Chief Justice BECK? Can it be answered? As I undertand the opinion of my Brother COLEMAN, he concedes that Wimberly's mortgage has an older and paramount lien; and he does not contend that the mechanic or material-man can claim a lien for the value or agreed price of the materials and work put into the house. Their lien extends, according to his views, only to the enhancement of price caused thereby, which the house and other property covered by the mortgage will bring when put to sale. Now, how is this to be ascertained? The house must needs be sold as an entirety, and hence the sale will furnish

no *data* for determining the enhancement of price. Is it to be ascertained by a reference, and on opinion evidence? Is it just to a paramount lienee, nay, is it lawful, to carve out of his security a junior incumbrance, placed there without his knowledge, and without his consent, and to fix its value or amount on testimony such as this? The statute gives a lien—a junior lien—for the value of the materials and mechanical labor, and it gives it for the whole value. It gives it in no other form. In a case like this, that lien is on the equity of redemption,—Mulford's ownership of the property. On what principle can that lien be transformed into a lien on the whole property for the enhanced value imparted to it by the material and workmanship furnished, and that lien made enforceable *pari passu* with the older mortgage lien? The statute confers no such lien, and provides no machinery for carving it out. No adjudged case can be found which justifies such proceeding under a statute like ours. The Illinois cases cited by my Brother COLEMAN are rested on the express language of their statute, which directs in what manner the lien for repairs must be enforced. That court simply followed the statute of that state. We have no such statute, and yet the majority opinion of my brothers supplies the omitted clause, and construes our statute as if it were a copy of the Illinois statute.

An additional argument: When an entirely new building or improvement is erected at the instance of the mortgagor, on land previously mortgaged by him, the statute declares a lien in favor of the mechanic and material-man, and the extent of it. It is on the building or improvement so erected which may be sold and removed from the premises. This is the remedy given by statute, and it gives no other, except a lien on the mortgagor's equity of redemption. It is manifest that the lien on the building, with the right to sell and remove it, would in most cases be very inadequate security. All men know that the sale of a building,—even of a frame building,—if the purchaser be required to remove it from the premises, would yield only a fraction of the value of the materials and workmanship employed in its construction; and, if the building were of brick, this disparity would be much greater. Yet it is manifest that in case of an entirely new building, on land previously mortgaged, sale and removal would be the only means of enforcing the lien of the mechanic and material-man. This, because this statute which secures the lien gives this remedy for its enforcement. Now, under the opinion of the majority of the court, the right and remedy for repairs put on a building which was on the premises at the date of the mortgage would be much more compensating—much more nearly adequate—than if the claim were for an improvement entirely new. Can the legislature have intended this advantage to him who only repairs an old building over the material-man and mechanic who furnish materials and construct a new one? Did the legislature intend to give to the builder this inadequate compensation for an improvement entirely new, and leave it to the courts to secure to the repairer, by interpretation, a full *quantum valebat* for what he may have added? The present proceeding is in equity. The very nature of the relief granted in the majority opinion in this case forbids that it shall or can be awarded in any court other than one having chancery jurisdiction. Liens secured to mechanics and material-men, under our statutes, are enforceable in equity only "when the amount claimed is not less than one hundred dollars," unless a special ground of equity jurisdiction is alleged and proved. Code 1886, § 3048. I have shown that the complainant is without semblance of equitable right to compel Wimberly to foreclose his mortgage, and have thus shown that the present bill is without "special ground of equitable jurisdiction." Can it be that the legislature intended to grant the special relief my brothers have awarded to complainant in this case, when the value of the repairs amounts to $100 or upwards, and to withhold it when it falls below that sum? Would there be any justice in such discrimination? We presume the legislature intended to deal equally and fairly, and hence should not, by interpretation, stretch this purely statutory, yet beneficial, system to consequences the legislature did not express and could not have intended.

I summarize my own conclusions: *First.* At the time when the materials and workmanship were furnished in this case, Wimberly's mortgage was on record. This, in law, was the same as if the material-man and mechanic had had actual notice of the mortgage, and that Mulford's ownership was only an equity of redemption. *Second.* The material-man and mechanic each acquired a lien, but it was inferior to Wimberly's lien, and bound only Mulford's equity of redemption. *Third.* The only remedy or recourse left to the material-man and mechanic was the right to redeem from Wimberly by paying off the older incumbrance, and then enforcing the collective liens for their benefit; or they could have enforced their claim against Mulford's equity of redemption; or they could await Wimberly's foreclosure, and claim payment out of the surplus, should anything be left. It is my conclusion that the decree in this case should be reversed, and the bill dismissed.

CLOPTON, J., concurs in this opinion.

(94 Ala. 602)

LOUISVILLE & N. R. CO. v. ORR.

(*Supreme Court of Alabama.* Nov. 6, 1891.)

NEGLIGENCE OF MASTER—PLEADING—EVIDENCE—INSTRUCTIONS.

1. In an action against a railroad company for damages resulting in the death of a brakeman in defendant's employ, the complaint, averring the nature of the defect in the appliances by which the injuries were caused, and that the injury was caused by the negligence of a person in defendant's employ, intrusted with the duty of superintendence, and that plaintiff's intestate was employed by defendant, and was in discharge of his duty at the time he was killed, sufficiently states a cause of action, and it need not aver the nature of the superintendency intrusted to the person by whose negligence the in-

juries were caused, or of the employment of the person to whose orders deceased was bound to conform, or of the orders from conforming to which his injuries resulted.

2. Oral testimony will not be admitted in regard to a rule of the railroad company, printed in a book, when the book is not produced, or its absence accounted for.

3. A general charge which, considered as a whole, and construed in connection with the evidence, states the law correctly, will not work a reversal because some of its provisions are too abstract, when it does not affirmatively appear that the jury was misled.

4. Where the record does not show that the charges refused by the court below were offered in writing, as required by Code Ala. § 2756, the supreme court will not presume that they were.

Appeal from city court of Decatur, WILLIAM H. SIMPSON, Judge. Affirmed.

Action by Horace Orr, administrator, against the Louisville & Nashville Railroad Company for damages for the killing of plaintiff's intestate. Judgment for plaintiff. Defendant appeals. For former hearing, see 8 South. Rep. 360.

This action was brought by Horace Orr, as the administrator of Henry Griffin, deceased, and sought to recover damages for injuries resulting in the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. There were several grounds of demurrer interposed to the complaint, one of which was sustained by the court, and the others overruled. These grounds are sufficiently stated in the opinion, as are also the averments of the complaint. The circumstances of the accident were that the plaintiff's intestate, while in the employment of the defendant as a brakeman, and discharging his duty as such, was going from one portion of a moving train to another, and in jumping from a gate of a car, called a "gondola," to another car loaded with rock, the gate from which he jumped fell back, and he fell in between the cars, and was run over and killed. It was the custom of the defendant to have the gates of these cars fastened by hooks, but in this instance the gate was not so fastened, and from the place from which the plaintiff jumped he could not see or discover that such gate was not thus properly fastened. All the material facts, as disclosed by the bill of exceptions on this appeal, are substantially the same as when the case was here at a former term, and special reference is here made to the report of the case as found in 91 Ala. 548, and 8 South. Rep. 360. As bearing on the question of negligence, the plaintiff offered in evidence certain printed rules and regulations of the defendant corporation. The defendant objected to the introduction of these rules in evidence, and duly excepted to the court's overruling his objection. These rules are the same as those offered on the former appeal, as shown in the statement of facts in the report of said case. The defendant reserved many exceptions to segregated portions of the court's general charge, which was given in writing; but it is not deemed necessary, in view of the opinion of this court on the present appeal, to state these portions of the general charge excepted to. At the request of the plaintiff in writing, the court gave the following charge: "If the jury believe from the evidence that Henry Griffin was in the discharge of his duty as brakeman when he fell between the cars and was killed, and that the cause of his fall was a defect in the fastenings of the gate of the car, which had not been discovered and remedied owing to the negligence of the defendant, or of some person in defendant's employ, and intrusted by it with the duty of seeing that the ways, works, machinery, or plant of defendant were in proper condition, and if they further believe from the evidence that said Henry Griffin did not know of such defect, if any, and that he exercised due care in passing from car to car, and his said fall was not the result of his own negligence or carelessness, and that his own negligence did not contribute to his injury, then the verdict of the jury must be for the plaintiff." The defendant excepted to the giving of this charge, and also separately and severally excepted to the refusal of the court to give many charges asked by it, but it is not stated that the charges asked by the defendant were in writing. The plaintiff had verdict and judgment for $1,583. The defendant prosecutes this appeal, and assigns as error the various rulings of the court upon the pleadings, evidences, and charges.

Brickell, Harris & Eyster, for appellant. *Wert, Speake & Callahan* and *E. W. Godbey*, for appellee.

CLOPTON, J. The grounds of demurrer, the overruling of which constitutes the first five assignments of error, are (1) that the complaint does not state with certainty the act or omission of defendant, or of its servants or employes, which caused the injury to plaintiff's intestate; (2) that it does not show the nature of the superintendency intrusted to a person other than the conductor; nor (3) the nature of the service or employment of the person to whose orders deceased conformed; (4) that it does not show what the orders were; and (5) that it shows the injury was caused by the negligence of deceased. The complaint avers that the defect in the works and machinery by reason of which the injury was caused consisted in the failure to provide fastenings to the gate or drop-door of a car, over which deceased passed in the discharge of his duty as brakeman. It further avers that Price, the conductor, or some person (afterwards averred to be Sullivan) in the employment of defendant, intrusted with the duty of seeing that the works and machinery were in proper condition, was required by the rules and regulations of defendant to see that all gates or drop-doors of the cars were kept fastened and provided with proper fastenings in such way that it would be safe for a brakeman to pass over a train of cars from brake to brake. It also avers that plaintiff's intestate, who was employed by defendant in the capacity of brakeman, and subject to the orders of the conductor, while in the discharge of his duties as brakeman, and passing from car to car in obedience to special instructions given by the conductor, or such other person to whom superintendency had been intrusted, stepped on

the gate or door at the end of a flat-car, which gave way, whereby plaintiff's intestate was thrown under and between the cars and killed. Under the rule laid down in Railroad Co. v. George, 10 South. Rep. 145, (present term,) which followed our former rulings, it is not necessary to aver the nature of the superintendency intrusted to the person by whose negligence the injury was caused, nor of the service or employment of the person to whose orders the deceased was bound to conform, nor of the orders or directions from conforming to which his injuries resulted. The complaint avers the other facts essential as a basis of liability under section 2590 of the Code, under which it is framed. It is true, it proceeds to set forth in the alternative two or more of the causes or acts of negligence, thereby imparting uncertainty whether it was intended to aver that the injury was caused by reason of the defects in the works and machinery, or by the negligence of a person intrusted with superintendence, or of a person to whose orders deceased was bound to conform. This was bad pleading, but this ground of demurrer was sustained; in all other respects the complaint is sufficient.

When this case was before us on a former appeal, (91 Ala. 548, 8 South. Rep. 360,) rules 149, 150, and 155 were held relevant and admissible in evidence. Nothing appears from the present record justifying a departure from the ruling then made. The testimony of the witness Price as to the rule requiring brakemen to see that everything connected with the cars is in a safe and proper condition was properly excluded, it having been shown on cross-examination that the rule was printed in a book, which was not produced, nor its absence accounted for. Railway Co. v. Propst, 90 Ala. 1, 7 South. Rep. 635. The general charge must be considered as a whole, not in disconnected parts. Though the segregated parts may state the legal propositions too broadly or may not express all the essential elements of a recovery, yet if the general charge, when considered as an entirety, and construed in connection with the evidence, asserts the law correctly, a disconnected paragraph, though too broad or too narrow, will not work a reversal. Williams v. State, 83 Ala. 68, 3 South. Rep. 743; Gibson v. State, 89 Ala. 121, 8 South. Rep. 98. The general charge was written at length. It seems to have been prepared with care, and was intended to present, and does present, the case in all its phases in which it should be considered by the jury. Considered as a whole, it declares correctly the law on each phase of the facts which the evidence tends to establish; the duty of defendant to provide safe and suitable appliances for its employes; the principles on which the liability of the employer depends when the injury is caused by any defect in the works, ways, machinery, or plant, and as to the contributory negligence of plaintiff's intestate, whether it arose from the duty of examining and seeing that the gate or door of the car was in proper condition, or from the want of ordinary care and caution. Counsel, however, do not contend that the disconnected parts of the general charge excepted to state the law incorrectly, but that some of them are abstract. A charge cannot be considered abstract when there is any evidence tending to support its hypothesis, and if abstract, the giving of such charge is not a reversible error if it asserts a correct legal proposition, and it does not affirmatively appear that the jury were misled. As to whether the duty was devolved on the brakeman of seeing that the car was in proper condition, or whether he selected a dangerous when a safe way was apparent to him, or whether he was acting in the discharge of his duty, and exercised due care in passing over the car to his post of duty, the evidence is not undisputed, and inferences are to be drawn therefrom. There is evidence tending to show that the switch upon the main track was the deceased's post of duty in order to uncouple the rear car so that it could remain on the main track and the empty cars push back on the spur track, and that he was going to this post of duty when he was killed. The only error we discover in the general charge is in that part which instructs the jury that a preponderance of the evidence is sufficient to authorize a verdict. This, however, was not excepted to, and is not assigned as error. The statute[1] requires that all charges moved for by either party must be in writing. If asked verbally, they may be properly refused. The record does not show that the charges requested by defendant were in writing, and the court will not presume them to be in writing. Myatts v. Bell, 41 Ala. 222. For this reason we cannot consider the charges asked by defendant. Affirmed.

(43 La. Ann. 1093)

STATE *ex rel.* CURTIS v. STEVEDORES' & LONGSHOREMEN'S BENEVOLENT ASS'N. (No. 10,820.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

ASSOCIATION—EXPULSION OF MEMBER—CONSTITUTION AND BY-LAWS.

1. When persons enter into a voluntary agreement and incorporate themselves into an association for the purpose of carrying out the objects and purposes of the association, and one of the members violates the rules of the association, and is fined, and dismissed for non-payment of the fine, he cannot complain if the objects for which the association was created are not contrary to public policy, or some statute regulation, and the fine and dismissal were in pursuance of the rules and regulations of the association.

2. When two labor organizations, in the same line of business, meet in conference, and adopt rules for the government of their members, and these rules are afterwards adopted by each association, and are not in conflict with the constitution and by-laws of the association adopting them, they will be considered as additions to its constitution and by-laws.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge. Affirmed.

H. H. Bryan, for appellant. *Henry P. Dart*, for appellee.

MCENERY, J. This is a proceeding for a

[1] Code Ala. § 2756.

mandamus, brought on the relation of Thomas Curtis against the Stevedores' & Longshoremen's Benevolent Association, on the allegations, in substance, that relator is a resident of the city of New Orleans; that he was a member of the Stevedores' & Longshoremen's Benevolent Association of New Orleans from the time of its organizaton until April 14, 1890; that said association is a body corporate under the laws of the state of Louisiana; that said corporation has adopted a constitution and code of by-laws under its charter for the government and control and notice of its members, a copy of which is annexed to and filed with the petition; that the franchise as a member is valuable, as shown in said copy, a member being entitled to money relief when sick, to be buried at death, and other benefits set forth therein; that by article 18 of the said constitution, and section 3, art. 6, of by-laws, no member can be expelled for any offense without having an opportunity of defending himself, which opportunity shall be written or printed notice from the recording secretary that he must appear at a stated meeting to answer the charge or charges brought against him, and he shall also be furnished a copy of the charges preferred; that, notwithstanding these provisions, and notwithstanding the fact that relator was not indebted to said association in any amount, and although no charge or charges of any kind had ever been made against him of any violation of the law, rule, or regulation of said corporation, and no notice of any kind ever served on him, said association illegally and without any warrant, either in law, or in their laws, adopted for the notice of their members, expelled relator from his membership in said corporation; that by said illegal and unwarranted expulsion and deprivation of his rights of membership relator has already been damaged in a sum more than $100, and that he will be damaged each and every day, to the extent of $6 per day,—his wages; that he is excluded from his franchise because he can no longer obtain employment at his occupation as longshoreman, nor can he follow said occupation until he is restored to membership; that he is not only damaged, as aforesaid, by his expulsion, but his membership is worth at least $1,000; that, though relator has been a member of said corporation from its organization up to the time of his expulsion, no charge of any violation of its laws has ever been made against him, nor has he ever been tried or found guilty of any violation of its laws; that the action of said corporation at its meeting held April 14, 1890, expelling said relator, is absolutely null and void, and can produce no force and effect; that relator sought redress at the hands of said corporation, which refused him any relief, and his only adequate remedy is a *mandamus*. Alternative writs issued, and the corporation responded in substance: First, a general denial of all the allegations in the petition. It then charges that relator was dropped from his membership for a failure to pay a fine inflicted for a violation of the general rules of the association, and more especially of the conference rules of the labor associations, which form part of the laws and regulations of respondent association; that relator was properly tried, and legally convicted and fined, and acquiesced therein, and failed to pay, and was legally dropped; that when the conference rules were made relator was a party to them, has acted thereunder, and is estopped to deny their validity; and that said conference rules are now legally part and parcel of the laws, rules, and regulations of the respondent association. The matter was heard, and the lower court refused the *mandamus*, and plaintiff and relator appealed.

The defendant association is incorporated under the laws of the state. The constitution and by-laws of the defendant corporation are made a part of the record. There is no rule or regulation in the constitution and by-laws which prohibits the corporation from entering into an agreement for the purpose of carrying out the object for which the corporation was created. Therefore any such agreement, made with the consent of its members, duly ascertained, will be legal and binding upon said members. There is another labor organization in the city of New Orleans, called the "Longshoremen's Protective Union." In order to put an end to a "strike," the two associations entered into an agreement to regulate the conduct of their members working on the levee. These regulations are called "Conference Rules," and were established and adopted by all the members of each association. In adopting these rules the two associations met in joint conference, each presided over by its president, and its organization preserved. It is alleged that the relator was not present when these rules were adopted, but he never protested against them, worked under them, and thus approved them, and is therefore bound by them. Rule 11 of these rules is as follows: "Any member who shall leave a ship at which he is working to go to another ship to work, unless said work has been stopped for the space of five hours, shall be fined the sum of ten dollars for each offense." Rule 8 of said rules is as follows: "All violations of these conference rules shall be tried by the conference committee, and all fines inflicted for violations of conference rules shall be collected by the violating member's association, and one-half of his fine shall be paid over to the other association, through the conference committee, fifteen days from the date of conviction." This conference committee is composed of 24 members, 12 from each association. The relator violated rule 11, and was tried and convicted and sentenced to pay the penalty. He received no notice, in accordance with the rules of the association to which he belonged, but he appeared voluntarily, and submitted to the jurisdiction of this *quasi* tribunal. He therefore waived the notice. Having neglected and refused to pay the penalty, he was dropped from the roll of membership, in accordance with the provisions of section 2, art. 2, of the constitution, which is as follows: "Any member who does not pay up the full amount of his indebtedness

to this association on the second Mondays in January, April, July, and October shall be suspended from all pecuniary benefits for three months; and any member who neglects or refuses to pay up his arrears for six months shall be considered as having renounced the association, and his name [shall be] stricken from the roll." The fine thus imposed became due the association of which relator was a member. It then fell under the rules of the association for collection. It is urged by the relator that this regulation agreement between the two associations was in conflict with and contrary to the constitution and by-laws of the defendant association; that the agreement did not become a part of the constitution and by-laws of the Longshoremen's Benevolent Association; and that he cannot be deprived of his right of membership, as said agreement and conference rules are null and void. But as we have said, there is nothing in the constitution and by-laws prohibiting such an agreement. Conceding, therefore, that they were enacted outside of any provision made by the constitution and by-laws of the association, it is evident that the relator consented to them, and they became at least the by-laws of a voluntary association of which he was a member. He was instrumental in creating the *quasi* tribunal which inflicted the penalty, and voluntarily submitted to its jurisdiction. He has therefore no right to complain, unless it is shown that the agreement thus entered into by him was contrary to public policy, immoral, unjust, and oppressive, or that the penalty was arbitrarily inflicted, contrary to the rules and regulations prescribed by the rules for the infliction. It appears, however, that these "Conference Rules" were adopted separately by each labor organization at a separate meeting. In adopting them each organization expressly repealed all laws and regulations in conflict with them. It was new matter. There was no rule or regulation changed, altered, or amended, and these conference rules were in reality additional by-laws, made for the government of the members of each association. The by-laws enacted by the association were binding on all of its members. They are positive laws for their government so long as they are members. They are, in fact, a contract between all the members, and must be enforced, like other contracts, unless it appears they are in contravention of some law, contrary to public policy, or immoral. The rules under which the relator was tried were observed. He had an opportunity of being heard, and the conference committee, in inflicting the penalty, was not influenced by malice. The judgment was not against natural justice. Judgment affirmed.

(43 La. Ann. 1097)

AUGUSTI *et al.* v. LAWLESS *et al.* (No. 10,748.)

(*Supreme Court of Louisiana.* April 27, 1891. 43 La. Ann.)

TAXATION — ASSESSMENT — DESCRIPTION OF PROPERTY — VALIDITY OF SALE.

1. Property assessed must be described with sufficient certainty to identify it, so that the owner cannot be misled by the description.

2. When there has been no valid assessment of property, a sale under Act 82 of 1884 is a nullity.

ON REHEARING.

The showing made by appellees justifies a reconsideration of our final decree against them, and a remanding of the cause.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge. Reversed.

W. S. Benedict, for appellants. *Moise & Titche*, for appellees.

MCENERY, J. The plaintiffs purchased at tax-sale, under the provisions of Act 82 of 1884, certain property situated in the city of New Orleans. They brought suit to be put in possession of said property. A writ of "seizure and possession" issued. The execution of the writ was enjoined by Edward J. Lawless, who alleged that his minor children were owners of the property, having inherited it from their mother.

Several reasons are alleged for the nullity of the same. Some of them do not require consideration as they have already been passed upon by this court adversely to the claim of the plaintiffs in injunction.

But among the grounds for the nullity of the sale it is averred that the property was not assessed in the name of the owner, and the assessment was illegal for want of certainty in the description of the property. The plaintiffs rely upon the cases of Lake and Douglas, reported, respectively, in 40 La. Ann. 142, 3 South. Rep. 479, and 41 La. Ann. 765, 6 South. Rep. 675. In both of these cases certain indispensable prerequisites were enumerated as being essential to the validity of a tax-sale under said Act 82 of 1884. Among these essentials it was declared that the property must have been assessed. In the case of In re Douglas it was said: "The doctrine is that the legislature may make the tax-deed conclusive evidence of compliance with every requirement which the legislature might originally, in the exercise of its discretion, have dispensed with." The assessment is the foundation for the collection of the tax. The legislature cannot dispense with it. The property assessed must be so described as to identify it, and not mislead the owner. The tax for which the property was sold was for the year 1878. It appears that all subsequent taxes have been paid. It is reasonable to suppose that the tutor of the minor children has been misled by the description of the property on the assessment rolls. The property was described as one lot, "No. 26," or 7 and 8 in square 331, measuring 68 feet front on Canal street, by a depth of 114 feet. The plan of the property and the deed of the property to the defendants vary so radically from the description that it cannot be identified, either by numbers or by measurement. There was, in fact, no assessment of the property. This was essential to a valid sale under Act 82 of 1884. In re Douglas; In re Lake. There was no irregularity in the assessment which was cured by said act, because there was no assessment of the property. It is

therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and the injunction herein be perpetuated.

BREAUX, J., takes no part.

ON REHEARING.

FENNER, J. On the showing made by plaintiffs and appellees in this application, we conclude that the interests of justice will be subserved by remanding this case for fuller proof as to the facts concerning the assessment and description of the property. It is therefore ordered and decreed that our former decree be amended by rescinding that portion thereof which perpetuated the injunction, and by inserting in lieu thereof our order that the case be remanded to the lower court for further proceedings according to law, costs of this appeal to be paid by appellees, and those of the lower court to abide the final result; and that in other respects our former decree remain undisturbed.

(43 La. Ann. 1135)

STATE *ex rel.* COLTHARP v. HOLMES *et al.* (No. 10,856.)[1]

(*Supreme Court of Louisiana.* May 19, 1891. 43 La. Ann.)

WRIT OF PROHIBITION — WHEN GRANTED — TITLE TO OFFICE — RIGHT TO EMOLUMENTS.

1. Unless it is made evident that jurisdiction has been usurped, the court will not exercise its prohibitive authority.

2. The successful claimant has a right to the emoluments and perquisites, where an incumbent illegally held possession by means of judicial proceeding.

3. An allegation predicated upon that right, accepted by the court of appeals as sufficient, in a matter of jurisdiction, will not be declared insufficient, and the proceeding treated as absolute nullity, by issuing a writ of prohibition.

MCENERY, J., dissenting.

(*Syllabus by the Court.*)

Application of the state ex rel. Albert S. Coltharp for a writ of prohibition. Denied.

F. P. Poché, *Thos. P. Clinton*, and *Charles J. Boatner*, for relator. *W. H. Rogers* and *J. G. Hawks*, for respondents.

BREAUX, J. The state ex rel. H. B. Holmes brought suit in the parish of Madison, before the eighth judicial district court, against A. S. Coltharp, under the intrusion into office act, contesting his right to hold the office of commissioner for that parish on the board of commissioners of the fifth Louisiana levee district. He (Holmes) avers in his petition that he was commissioned on the 10th day of July, 1890; that he duly qualified by taking the oath of office, and fulfilling every requirement of the law, and is now, and has been since said appointment, ready and willing to serve in said office, to which he has a *de jure* right; that the defendant usurps, intrudes into, and unlawfully holds and exercises the duties thereof. He also avers that the perquisites and emoluments of said office, during the term of said appointment expiring about 1st of May, 1892, are worth annually about $60. The defendant in said suit, the relator in the application for a writ of prohibition, filed a peremptory exception of no cause of action. It was sustained by the district court, and the suit was dismissed. The relator, Holmes, appealed to the court of appeals, second circuit. The defendant, Coltharp, moved to dismiss the appeal, on the ground that the appellate court was without jurisdiction, *ratione materiæ*, for the reason that the amount in dispute was less than $100. The motion was overruled in March last, and the judgment of the district court was reversed, and the case remanded for trial. In May the trial was stayed by a rule to show cause issued in matter of the application under consideration. For the purpose of the trial before the district court, also on appeal, the plaintiff in exception admitted the verity of relator's petition, not one of the allegations of which is traversed. A question of law was presented. The plaintiff in exception now contends that, by referring to section 3 of Act 44 of 1886, it will be found that no fixed salary, either per month or per annum, is attached to the office of commissioner on the board of said levee district, the provision on the subject being as follows: "The commissioners shall receive a salary of four dollars per day each during the period they are in actual attendance upon the board, and ten cents a mile going and coming, to be paid out of the funds of the levee district; * * * and a like salary shall be paid for each day the president and other commissioners shall serve in supervising the location, construction, and repairs of levees as now provided by said board." The presumption sought to be drawn, that, if the commissioner be not called upon to supervise the location, construction, and repairs of any levees during any given year, the emoluments would be considerably less than $60 per annum, cannot prevail against the admission made by the plaintiff in exception. The issue resolves itself into a question of time. If the emoluments and perquisites per annum should date, under the allegation of the petition, from December, 1890, *i. e.*, the day suit was brought, and not from July, 1890, *i. e.*, the date Holmes was commissioned, the court of appeals was without jurisdiction; but, if from the latter date, it properly exercised its jurisdiction. Only when it is made evident that jurisdiction has been illegally assumed this court will interpose its prohibitive authority.

With reference to the question raised about the right to recover any fees or emoluments at all, and the consequent insufficiency of an allegation founded on that right, to establish jurisdiction, we find an answer in two cases in which it has been decided that during the contest the contestant has a right to the fees and emoluments of the office, although no service has been rendered by the contestant, who was not permitted to discharge the functions of the office. Petit v. Rousseau, 15 La. Ann. 239; Sigur v. Crenshaw, 10 La. Ann. 297. We do not find cause to set aside the decree of the court of appeals, or to treat it as a nullity by granting the writ prayed for. Relator's application

[1] Rehearing denied November 16, 1891.

for writ of prohibition is rejected, and his petition is dismissed.

FENNER, J., (*concurring.*) The case involves the question of the jurisdiction of the court of appeals over an appeal taken to that court in a case involving the title to the office of member of the board of commissioners for the fifth Louisiana district. In such case the jurisprudence is uniform that the test of appellate jurisdiction is the pecuniary value of the office, which means the amount of salary, fees, or emoluments attaching thereto. State v. Jastremski, 33 La. Ann. 110; State v. Hayles, 32 La. Ann. 1135; Hubert v. Auvray, 6 La. 598; State v. Lagarde, 21 La. Ann. 18; State v. Judge, Id. 108; State v. Markey, Id. 743; State v. Judge, 22 La. Ann. 49. The petition in the suit alleged that Holmes, the plaintiff, "was on the 11th day of July, 1890, duly commissioned by the governor, * * * and has duly qualified under said commission, by taking the oath and fulfilling every requirement of the law, * * * and is now, and ever since said appointment has been, ready and willing to serve in said office;" also "that said Coltharp, without any legal right thereto, unlawfully possesses said office, and refuses to deliver up the same, although amicable demand has been made for the same." The petition contained the further averment "that the perquisites of said office during the term of said appointment, expiring about May 1, 1892, are worth annually about sixty dollars." This allegation is not contradicted in any manner. The case in the district court was met by an exception of no cause of action, which admitted the allegation of the petition. From a judgment sustaining that exception the appeal was taken to the circuit court of appeals; and the question before us is whether that court exceeded the bounds of its jurisdiction in taking cognizance of the appeal. If the perquisites of the office during the term in contest exceed $100, the circuit court had jurisdiction. It is claimed, however, that the petition does not fix the date at which Holmes qualified. The allegation is that he "had duly qualified by taking the oath and fulfilling every requirement of the law." The law required that he should qualify within 30 days after his appointment, under penalty of vacation of his office. Act 19 of 1878; State v. Beard, 34 La. Ann. 276. If he fulfilled this requirement as alleged, he qualified before August 11, 1890, and the interval between this date and the expiry of the term would be more than 20 months, and the perquisites, at $60 per annum, would exceed $100. As a matter of fact, the pleadings and admissions in Goldman v. Gillespie, (8 South. Rep. 880, decided by us at this term,) and to which we are referred by relator, indicate that he had qualified before August 16, 1890, when that suit was filed.

It is urged, however, that the nature of the perquisites allowed by the law, being only the *per diem* for actual attendance at meetings of the board, and for actual service in supervising levees, is such as to exclude Holmes from any interest therein when he had not actually rendered the service. This objection is disposed of by two cases, in which it is held that fees earned by the *de facto* incumbent of the offices of parish recorder and register of the land-office, being only fees for actual personal service performed, were recoverable by the successful contestant. Sigur v. Crenshaw, 10 La. Ann. 297; Petit v. Rousseau, 15 La. Ann. 240. We do not determine that Holmes, if successful, would have the right to recover these perquisites; but only that his asserted right thereto is serious and plausible, and that the jurisdictional allegations based thereon cannot be regarded as so manifestly fictitious and unfounded that they can be disregarded.

Finally, it is urged Act 44 of 1886 provides that the commissioners shall hold "during the term of the executive appointing them, and until their successors are appointed, qualified, and inducted into office;" whence it is claimed that Holmes' title to the perquisites could not begin until he had been "inducted into office." But this claim does not lie in the mouth of relator, who restrained Holmes from taking any steps to induct himself by a judicial injunction. If, in the final decision of this contest, it should be held that Holmes' title to the office was good, (on which point we insinuate no opinion,) the remarks of the court in Petit v. Rousseau would apply: "The defendant ought not to be permitted to derive any advantage from a contest which he provokes, and in which the result proves he was in the wrong. Were a contrary doctrine to prevail, it would be the interest of the incumbent in every lucrative office to contest the election of his successful opponent. We think that justice forbids that the contestant should derive this advantage from his position over his adversary. He ought to account to plaintiff for the emoluments which he has received pending the litigation. Holmes' failure to be inducted being not his fault, but owing to the act of relator, the latter could not be listened to urging it. We are bound to respect the discretion of the circuit court in determining questions affecting its own jurisdiction, and should not annul its judgments, except on the clearest possible showing of manifest error. Such showing is not made in this case. It is a satisfaction to know that this conclusion does not determine the contest, but only reinstates it for determination on the merits.

MCENERY, J., (*dissenting.*) The court of appeals has no jurisdiction *ratione materiæ* of this case. This court has enunciated the following principle, and, until this case, has invariably, without turning a hair-breadth from it, affirmed it: Jurisdiction must be tested by the pecuniary amount involved as shown by the pleadings, and as appearing from the nature of the action, and not by the jurisdictional allegations or affidavit of the appellant. The substantive allegations in the pleadings, not the alleged opinion of litigants, are to be considered in all questions of jurisdiction. No allegation and no affidavit can create an appealable amount of inter-

est in a litigation which, from its very nature and essence, cannot involve a pecuniary amount in dispute equal to the lower limit of the jurisdiction of the appellate tribunal. Buddig v. Baldwin, 38 La. Ann. 394; Hite v. Hinsel, 39 La. Ann. 113, 1 South. Rep. 415; Schwartz v. Association, 41 La. Ann. 404, 6 South. Rep. 652. In the last case cited, we said: "In construing jurisdictional allegations, we must be guided by the real pecuniary interest affecting the parties to the litigation, as disclosed by the pleadings taken as a whole, and not by strained allegations of pecuniary interests, which could never be judicially ascertained and determined." This is not a suit for fees or salary of an office, and in this respect differs materially from Sigur v. Crenshaw, 10 La. Ann. 297, and Petit v. Rousseau, 15 La. Ann. 239. This suit is under the intrusion into office act, in which the plaintiff, Holmes, seeks to recover an office to which no fixed fees or salaries are attached. The law creating the fifth levee district allows a *per diem* to the commissioner when he attends to the session of the board. The present incumbent may not attend any session of the board, and may not earn his *per diem*. Holmes, therefore, if successful, could only recover, if permissible, money for the number of days for the personal attendance of the present incumbent. This court can have, under the present proceedings, no means of ascertaining the number of days that the present incumbent may attend the session of the board, and the amount of money he may earn. Holmes prays to be put in possession of the office, with the revenues thereof. What are the revenues? We do not know. Holmes did not know when he brought his suit, for he does not ask judgment for them, but for reservation of his right to sue for them. When? When he shall have secured possession of the office, and ascertained the amount due the present incumbent for personal attendance. Under the authority quoted, Holmes' allegation that the office was worth about $60 a year could not give any jurisdiction, in the face of the law under which he claims, showing that it is utterly impossible to fix any determinate sum. On what basis were the jurisdictional allegations made? Why for $60 per annum? It could have been for $1,460 just as well, conjecturing and guessing that the board would sit every day in the year, and the commissioners would be in attendance. If it is worth $60 per annum, from what date is to be calculated the commencement of Holmes' service? Surely from the date he filed his suit to gain possession of the office. This would bring the amount below the lower limit of the jurisdiction of the court of appeals. It must be borne in mind that there are no fees or salary attached to the office which the present incumbent would have to surrender to Holmes. It will not be maintained that the present incumbent would have to surrender to Holmes the amount he collected for personal attendance. Legislators are paid *per diem*. Who ever heard of a successful opponent receiving the *per diem* of the ousted member? The present incumbent is a *de facto* member of the board, and under no circumstances would he be required to pay to Holmes his *per diem* for actual attendance on the sessions of the board. There is a wide difference between a salary or fees and payment *per diem*. Suppose Holmes should eventually be successful, and sue for the amount received by the present incumbent for his personal attendance. Could he obtain a judgment? No. The answer would be that the *per diem* is paid only for personal attendance. Holmes could not say that he attended the sessions of the board, and he could not assert, if he had been admitted to membership of the board, that his attendance would have been the same as that of the present incumbent. A salary goes on whether the office-holder is sick or well, present or absent. Fees accumulate to the office, and are a part of it, whether the incumbent is sick or well, present or absent. The very nature and essence of the case shows that the court of appeals was without jurisdiction. Therefore the jurisdictional allegations of the plaintiff could not give the court jurisdiction. Section 2 of Act 44 of 1886 is decisive of the whole question. This section recites that the commissioners appointed shall hold their offices until their successors are appointed, qualified, and inducted into office. The present incumbent was inducted into office in August, 1888. He is entitled to hold the office until his successor is inducted into office. He is therefore, under the act, not a usurper, and is entitled to the *per diem* and perquisites, if there were any, until his successor is inducted into office; that is, until he is in full possession of the office. Under the act creating the fifth levee district, Holmes could not claim any sum of money until he had been inducted into office, and given his personal attendance at the sessions of the board. That the court of appeals has no jurisdiction *ratione materiæ* of the appeal is, to my mind, too clear for argument.

(43 La. Ann. 1193).

STATE *ex rel.* MAXWELL v. MCDOWELL *et al.* (No. 10,858.)[1]

(*Supreme Court of Louisiana.* May 19, 1891. 43 La. Ann.)

WRIT OF PROHIBITION—JURISDICTION.

1. The court will not interpose its prohibitive authority, and issue a writ of prohibition, in a case in which relator fails to establish that jurisdiction has been usurped.

2. The correctness of a statement of facts respecting the amount which gives jurisdiction will be accepted, unless it be made clearly evident that an error has been committed.

(*Syllabus by the Court.*)

Application of State ex rel. F. L. Maxwell for writ of prohibition. Denied.

F. P. Poché, Thos. P. Clinton, and *Chas. J. Bontner,* for relator. *W. H. Rogers* and *J. G. Hawks,* for respondents.

BREAUX, J. The defendant, in the suit of State ex rel. James R. McDowell v. F. L. Maxwell, brought before the district court, parish of Madison, under the intru-

[1] Rehearing denied November 16, 1891.

sion into office law, questioning his right to hold the office of commissioner for the parish of Madison on the board of the fifth Louisiana levee district, filed a peremptory exception of no cause of action, which was sustained by the district court, and the suit dismissed. From that judgment plaintiff appealed to the court of appeals, second district. The defendant and appellee moved the court to dismiss the appeal, on the ground that the appellate court had no jurisdiction, *ratione materiæ*, for the reason that, on the face of the pleadings, the amount in dispute was less than $100. His motion was overruled, judgment was rendered reversing the judgment appealed from, and remanding the case for trial. After the judgment had been rendered, the relator, Maxwell, applied to this court for a writ of prohibition, directed to James R. McDowell, relator in the original action, and to the district judge, to restrain them from proceeding in the execution of the judgment of the court of appeals. The court of appeals has jurisdiction when the matter in dispute or the funds to be distributed exceed $100, exclusive of interest. In the statement of the case the court of appeals found that the amount involved is more than $100; that the case is within its jurisdiction. After a careful examination of the evidence upon which the statement is predicated, we discover no reason to question its correctness. On the further grounds stated in the case of State v. Holmes, 10 South. Rep. 172, (just decided,) we decline to issue the writ. Relator's application is rejected, and his petition is dismissed.

(43 La. Ann. 1121)

VIDALAT *et al.* v. CITY OF NEW ORLEANS. (No. 10,709.)[1]

(*Supreme Court of Louisiana.* May 28, 1891. 43 La. Ann.)

PRIVATE MARKETS—FARMER OF REVENUES OF PUBLIC MARKET.

1. It is settled beyond dispute that the distance of six squares within which no private market can be legally established must be computed by taking the far side of the streets around the public markets, and walking six squares the nearest way. This has been the rule since 1880, and during the term of the plaintiff's contract in 1884–86.

2. In case a farmer of the market revenues of the city of New Orleans seeks to recover damages, on account of losses he has sustained by reason of competition with private markets illegally established within prohibited limits, it is his duty to make clear and satisfactory proof of the existence of such interfering establishments in the mode required by law.

3. The city authorities must be held to a reasonable and proper discharge of duties devolving upon them by its ordinances and the law; but it cannot be mulcted in damages for violation of its contract, upon other than reasonably clear proof of dereliction of duty.

4. Such a case is one sounding in damages *ex contractu*, entitling plaintiff to reimbursement of loss actually sustained and the profit of which he has been deprived; that is, such as may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.

5. In the interpretation of the contract power of a municipal corporation, much the same tests must be applied as those which are applicable to private corporations and individuals.

6. Such inconveniences as fairly result from the making of needed public improvements must be submitted to by all citizens of incorporated towns and cities, without compensation; each individual citizen being supposed to be recompensed by the enhancement of the general welfare and good of the community.

7. It is only in case where there has been an unreasonable or unnecessary delay on the part of the city or contracter, whereby injury has been inflicted on such a lessee, that actionable injury results.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge. Reversed.

Carleton Hunt, City Atty., for appellant. *T. J. Semmes, Legendre, Leonard, Marks & Bruenn*, and *Frank N. Butler*, for appellee.

WATKINS, J. As assignee, S. Vidalat, the plaintiff, claimed of the city of New Orleans $100,000, on the averment that, by the acts and omissions of her officers and agents, his assignors, Vidalat & Co., suffered, during the term of its lease of the public markets, diminution of profits to that extent. His demand is founded on three different causes of action, of similar import, viz.: *First*, his claim is that, for an alleged diminution of market revenues, arising from competition with the private markets the city had failed to suppress and prevent, as she was in duty and in law obligated to do, he is entitled to demand and recover $75,000; *second*, that for and on account of eviction from certain spaces adjacent to certain of the market places he had sustained loss of custom and revenues aggregating $10,000; and, *third*, that on account of the *banquette* on the south side of Poydras street, in the immediate vicinity of the Pilie market, being torn up, and left in an impassable condition for many months, through the fault and negligence of the defendant, and whereby access to the market on that side was prevented, he had sustained a loss of $15,000; and for which last two items he is likewise entitled to demand and recover the additional sum of $25,000. Plaintiff's claim is that, in October, 1884, Vidalat & Co. purchased at public auction the right or privilege of using and operating the public markets of the city for the period of 26 months, for a consideration of $421,000, payable in monthly installments of $16,200: and under said contract, which was one of lease, the company acquired a right to all the market revenues derivable therefrom under then existing laws and city ordinances then in force. His further averment is that all such laws and ordinances entered into and formed part of the contract; and that the city also bound itself by a special covenant to maintain and enforce such laws and ordinances for its lessee's protection, against unlawful interference with its rights and privileges by private market people, and by all lawful means at its command. On the trial there was a verdict in plaintiff's favor for $75,000, without any specification of the particular demand, on account of which this allowance was made; and,

[1] Rehearing denied November 16, 1891.

after an unsuccessful effort on the part of the defendant to obtain a new trial, judgment was rendered accordingly, and it has appealed. In this court the plaintiff filed an answer to the appeal, and prayed for the judgment to be so amended as to allow him $85,000.

1. With reference to the first item of damages claimed, the following appears to be a fair summary of facts, viz.: That by official map and other testimony it is estimated that there were established and in operation, during the contract of Vidalat & Co., two or three hundred private markets. The purport of the testimony on this subject is that the distance or radius of six squares is indicated on the map by a series of circles having *radii* of 2,150 feet, measured on an air-line from the respective market-houses, each corner being taken as the center of a circle, and the line indicating its circumference that of the limit within which private markets were excluded. Within the limits of the different circles, as indicated on the map, plaintiff's witnesses undertake to locate various prohibited private market-houses, by taking streets and their municipal numbers as their guide, and estimating their distances, respectively, from the public markets, by what they suppose to be 2,100 feet. On this theory, lists of such private market-houses have been elaborately prepared and filed in evidence. There was but one witness who professed to have taken actual measurements, as appertaining to the lists; but cross-interrogation revealed the fact that the list he referred to was prepared in 1885–86, during the Vidalat lease, and that the measurements were made only two months previously to the trial, in May, 1890. The lessee gave notice to the proper city authorities of the existence of these private markets, and demanded their suppression. The city made some efforts to abate them, but with practically little success. There were some affidavits made against parties offending the private market ordinances, and some arrests were made, but no convictions secured. There seemed to have been considerable opposition to the enforcement of the law. To this effect is the testimony of the mayor of that time, his private secretary, police officers, and the city attorney. On this subject the latter says: "I have not my docket here, but the private market cases occupied a good deal of my time. There was a good deal of opposition to them. They went to the supreme court several times. * * * Question. I want to know whether you tried to close up the private markets. Answer. I did all I was called upon to do. * * * My associate attorney took them to the recorder's courts, and he attended to those cases; and, if I mistake not, S. P. Blanc, [who] was the attorney for Vidalat & Co., was associated with me in those cases," etc. "The private market men were particularly litigious, and one decision did not seem to have the effect of a final judgment." On the score of losses sustained on account of the private markets, the proof is desultory and suppositious. It shows, substantially, that, for the period between 1859 and 1868, the market revenues were farmed out for $450,000 per annum, and since the termination of the Vidalat lease, in 1886, they have been adjudicated for about $375,000 per annum. There have been constantly in force, since 1868, statutes and city ordinances preventing private markets, and their regulation has been constantly attended with similar difficulties to those which appear to have beset the Vidalat Company. The proof tends to show that during its lease there were many stalls vacant, and that the profits were greatly less than seemed to have been contemplated. In the lease there is a stipulation to the effect that all city ordinances relating to market leases then in force, whereby it was provided that private markets might be established in any portion of the city not within a radius of six squares of any public market, and whereby it was made the duty of the chief of police to prevent any private market being established within prohibited limits, were to form parts of the contract; and the city, as lessor, undertook to maintain and enforce such ordinances, by all lawful means. Taking all in all, this testimony falls short of this purpose, and fails to make out a case for damages against the city on this score, and for several reasons.

(*a*) In the first place, the *modus operandi* of establishing the localities in which private markets were situated was entirely incorrect and unsatisfactory. This clearly appears from the testimony of the city surveyor, a portion of which we quote, as follows, viz.: "Question. What is the difference between the radius map [in evidence] and the distance or measurement used by the supreme court? Answer. This, by the supreme court, is in a walking distance of six blocks. Q. Then the map is not a correct guide as to the prohibited markets? A. No, sir. Q. This list of private markets, that you made at the request of Vidalat & Co., * * * which are supposed to be within the prohibited distance, were made with reference to the radius? A. Yes, sir. Q. But that is not the list used by the supreme court, is it? A. No, sir. Q. * * * This list that is introduced here, prepared by order of Vidalat & Co., was prepared according to this 2,100 feet map? A. Yes, sir. Q. And this 2,100 feet map is not a map by which the distance is to be ascertained? A. No, sir," etc. Reference to decisions of this court in private market cases shows this testimony to be entirely correct. State v. Schmidt, 41 La. Ann. 27, 6 South. Rep. 530; State v. Barthe, 41 La. Ann. 46, 6 South. Rep. 531. In the former case it was established, by the testimony of the city attorney of 1880, that the maps in question were made under his instructions, and as a part of ordinance No. 4,798, of which he was author; and that the distance of six squares was, in contemplation thereof, to be computed "by taking the far side of the streets around the market, and walking six squares the nearest way." This has been the rule to which this court has adhered ever since. That rule was inaugurated under the city administration preceding that under which Vidalat & Co. farmed the market, and it was not

changed subsequently. The duty was plainly imposed on the plaintiff, at the trial in May, 1890, to have produced such evidence as would have rendered his right clear to recover so large a sum as that demanded against the city on this account. This duty he did not discharge. In so far as the testimony of the single witness, who testified that he had made actual measurements of the distances, is concerned, but little importance can be given to it, because it is manifestly unreliable, it not being pretended that the identical private markets in existence in 1885-86, when the lists were made, had been continued in the same localities to January, 1890, when the measurements were made. And it is evident that actual measurements made in 1890, on the hypothesis that the list made in 1885 was still correct, are unreliable, and such *data* is of very doubtful character. It is quite unreasonable to suppose that any witness could, with any sort of accuracy, have remembered the identity and localities of two or three hundred private market-houses for such a length of time.

(*b*) In the second place, there is nothing to show that the city authorities were willfully and flagrantly neglectful of the lessee's contract rights in this particular, or indisposed to perform their duties. Some efforts were exerted in this direction, but difficulties were presented which seemed hard to overcome. The contention of plaintiff's counsel is that the city, having leased the public markets to the plaintiff's assignor, was bound to maintain them in a condition to subserve the purposes of the lease, and could not lawfully do any act to diminish the revenues thereof during its existence; and the city, having expressly contracted to enforce the laws and ordinances relative to private markets for the benefit of the plaintiff as market lessee, was required to close all private markets opened in contravention thereof, and, in default of so doing, it became liable in damages. As applicable to this theory, the case of La Rosa v. Mayor, 4 La. 24, is cited and relied upon. In that case the city adjudicated to the plaintiff the exclusive right of vending oysters at designated stands, and prohibited the sale of oysters at all other places, and the plaintiff was awarded damages against the city in consequence of its failure to enforce the prohibition of its ordinances. But, in the plaintiff's case now under consideration, the right acquired to the revenues of the public markets was necessarily subordinated to the laws and ordinances specially authorizing the establishment of private markets elsewhere, in any part of the city, not within prohibited limits. The element of uncertainty in this case is the failure of the evidence to show that the private market-houses were within prohibited limits, for, in the absence of such proof, they were presumably authorized. The claim of the plaintiff is one sounding in damages *ex contractu*, and he is only entitled to be reimbursed the loss he has sustained under his contract, and the profit of which he has been deprived; that is, "such damages as were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract." Rev. Civil Code, art. 1934. Plaintiff's evidence leaves our mind in doubt of his contract having been violated by the city; and if, for the sake of argument, this were conceded to have been made plain, this is not otherwise shown to be a case for the allowance of damages. In the interpretation of the contract powers and duties of a municipal corporation, much the same tests must be applied as those which are applicable to private corporations and individuals. 2 Dill. Mun. Corp. (3d Ed.) § 935; Walling v. Mayor, etc., 5 La. Ann. 660; Arrowsmith v. Gordon, 3 La. Ann. 105; Smith v. Thielen, 17 La. Ann. 240; Gobet v. Municipality, 11 La. Ann. 300; McCord v. Railway Co., 3 La. Ann. 285; Verges v. Forshee, 9 La. Ann. 294.

2. With regard to plaintiff's eviction from certain spaces adjacent to certain of the market-houses, and the consequent loss of custom he sustained thereby, through the unlawful act of the city, in our opinion a case for damages is not made on the law and evidence. Plaintiff's lease was made and confirmed subject to all existing laws and ordinances relating to market leases generally, and among them was ordinance No. 479, C. S., section 25 of which particularly describes the *locus in quo* to be leased as follows, viz.: "That the entire areas covered by the several market-houses, including the sidewalks bordering the same, and that portion of certain streets spanned and covered by said market-houses, and also certain squares of neutral ground fronting St. Mary's market, are understood to be devoted to market purposes, except, however, a free and unincumbered passageway on all the said sidewalks bordering the said markets, which passage-way shall be kept free from obstruction." And, for the evident purpose of reinforcing this descriptive enunciation of said ordinance, the provisions of section 32 declare "that it shall be unlawful for any person to occupy any portion of the sidewalks or pavements bordering any of the public markets of the city by depositing for sale, or other purposes, any articles whatsoever, calculated to obstruct the free passage thereof by pedestrians, or to erect, or to continue if already erected, in or over the sidewalks or pavements, any awning, shed, bench, or partition, * * * without permission of the commissioner," etc. During the course of the trial the judge *a qua* limited and restricted plaintiff's evidence to the requirements of this ordinance, and excluded all other. In this he was evidently correct, and the result was that the evidence adduced failed to show any illegal evictions by the city authorities. From the evidence, it appears that quite a number of persons who, in 1884 and 1885, occupied portions of the open space in front of the French market, and vended their wares and merchandise, such as coffee, soda-water, and cigars, under awnings stretched overhead, were displaced and removed by the city authorities about the first of the year 1886, and were never permitted to reoccupy same thereafter. But those stands were not kept under the

aprons of the market, but on the sidewalks or pavements adjacent to the market-house, and formed obstructions to the free use of same, within the terms and plain meaning of the said ordinance, and were removable. Surely, plaintiff has no well-founded claim for damages against the city, on account of loss of custom or diminution of revenues on this account.

3. His claim of $15,000 damages, because access to the Pilie market on the Poydras-Street side was temporarily obstructed, on account of the *banquette* adjacent to the market-house being torn up, during some two or three months, while the street was undergoing repair, is wholly without any foundation. The proof shows that the Barbour Asphalt Paving Company had undertaken a contract to lay that portion of Poydras street in the vicinity of the Pilie market, with sheet asphalt, and that for that purpose the *banquette* adjacent was unavoidably torn up or necessarily obstructed. While it is true that this condition of things was suffered to continue much longer than seemed necessary for a speedy and energetic accomplishment of the work, yet we cannot detect anything in the evidence that would justify us in the belief that either the city or the paving company was grossly negligent of their obligations, or willfully did the plaintiff an injury. And it is well established by authority that such inconveniences as may fairly and legitimately result from the making of needed public improvements must be submitted to by all citizens of incorporated towns and cities, without compensation; each individual citizen being supposed to be recompensed by the enhancement of the general welfare of the community. 2 Dill. Mun. Corp. (4th Ed.) § 990. In contracting for such public street improvements, the defendant evidently acted within the scope of its contracting power. Paving Co. v. Gogreve, 41 La. Ann. 251, 5 South. Rep. 848; section 7, Act 20 of 1882. This is clearly a case of *damnum absque injuria* in this respect. On the whole, we arise from a very careful examination of the record, and a study of authorities applicable, with the conviction that the plaintiff is entitled to no damages against the city, and that the verdict of the jury, and the judgment thereon based, should be reversed *in toto*. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is now ordered and decreed that there be judgment rejecting plaintiff's demands, at his cost in both courts.

(43 La. Ann. 1133)

STATE *ex rel.* CAIRE *et al.* v. JUDGE OF TWENTY-THIRD DISTRICT COURT. (No. 10,885.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

MANDAMUS—SUCCESSION—FINAL ACCOUNT OF ADMINISTRATOR—RIGHTS OF CREDITORS.

1. When the application for an injunction does not show a *prima facie* right to the same, a *mandamus* will not issue to compel a district judge to issue the writ.

2. As long as the judgment homologating the final account of an administrator exists of record and unrevoked, it operates as a closing of the succession, and is a bar to further mortuary proceedings, which can only be had after the setting aside of the same.

3. When a succession has been settled, and the administrator discharged, and the property placed in possession of the widow and heirs, a creditor who appears subsequently must pursue them each for his share.

(*Syllabus by the Court.*)

Cross & Cross, for relators. *Respondent, in pro. per.*

MCENERY, J. This is an application for a *mandamus* to compel the respondent judge to issue a writ of injunction, which he declined to do, on the face of the papers. The only question presented in the application is, does the petition for the injunction disclose a *prima facie* right to the injunction? If so, the relator is entitled to the relief demanded. Live-Stock Co. v. Larrieux, 30 La. Ann. 798; Beebe v. Guinault, 29 La. Ann. 795. The facts set forth in the petition are that the Widow Caire administered, by proper appointment, the succession of her husband; that she filed her final account, "in good faith, and under the advice of counsel, all parties believing that the interests of the heirs were fully protected, but that said account was homologated without the heirs being parties, and the minor children were not represented, she never having qualified as tutrix to her minor children; that she was absolutely solvent at the time. The account showed all the debts paid, and the property was therefore turned over to her as usufructuary; all of the same being community property." The petition further shows that Antoine Caire was the holder of certain notes on which the deceased, Jacques Caire, the late husband of Widow Caire, was the indorser. These notes did not appear in the first account, as they were not due; and no opposition to the final account was made by the holder of the notes. Mrs. Caire went into commercial business, failed, went into insolvency, and Antoine Caire was recognized as a mortgage creditor of the community which existed between Mrs. Caire and her husband, Jacques Caire. Judgment was rendered against her, and execution issued, seizing the community property which had been mortgaged to secure the debt. We must presume that the judgment was rendered contradictorily with the widow and heirs in the proceedings to enforce the mortgages, as the petition is silent on this point. From these facts the following reasons for the issuing of the injunction are urged: (1) That the judgment does not support a writ of *fi. fa.*, as it merely recognizes a mortgage on succession property. (2) That said Widow Caire surrendered her usufruct in said property, which has been sold, and the same is in possession of purchasers. That, though relators believe said sale to be null and void, the description of the said property is so vague that bidders will have no notice of the specific property offered for sale, and such indefinite description would be injurious to the heirs. (3) That said heirs have accepted the succession of their father, Jacques Caire, under benefit of inventory, and that the liquidation of the

debts can go on only by an administration of the property of the succession. That the judgment homologated the final account of the administratrix, and turning the property over to her as usufructuary did not discharge her as administratrix until the debts of the succession were paid; and that the judgment of the honorable court recognizing said mortgage can only be executed under the probate jurisdiction. The relators, in their petition for the injunction, refer to the judgment in the insolvent proceedings of Mrs. Caire, in which Antoine Caire intervened. The case was appealed to the circuit court of appeals. The return of the respondent judge shows that the judgment rendered was under ordinary proceedings by said Antoine Caire against all parties in interest, each for his virile share. A *fi. fa.* then was the proper writ to issue under the judgment.

On the second cause alleged for the injunction it is unnecessary to comment, as the disposition of the usufruct by the widow can in no way influence the execution of the judgment, and the alleged wrongful description of the property cannot be injurious to the heirs.

On the third point urged the petition shows that the succession of Jacques Caire had been administered, and the administratrix discharged. The property was turned over to her as widow in community. When the suit of Antoine Caire was instituted there was no succession in existence. It had been settled and passed out of existence. The widow was in possession of the property for herself and minor heirs. As long as the judgment homologating the final account of an administratrix exists of record and unrevoked it operates as a closing of the succession, and is a bar to further mortuary proceedings, which can only be had after the setting aside of the same. Beauregard v. Lampton, 33 La. Ann. 828; Succession of Thibodeaux, 38 La. Ann. 716; Augustin v. Avila, 29 La. Ann. 837. After the widow and heirs had been placed in possession of the property each became liable for his share, and the debts of the deceased, Jacques Caire, become the debts of the heirs. Succession of Dunford, 25 La. Ann. 56. The only remedy left to the creditor, Antoine Caire, was to sue the widow and heirs, as the succession had been closed, and the property mortgaged to secure his debt was in their possession. The petition for the injunction does not disclose a *prima facie* right to the same. It is therefore ordered that the relief prayed for by relators be denied, and the rule granted herein be discharged, at their costs.

(43 La. Ann. 1119)

STATE *ex rel.* BAKER v. JUDGE OF SECOND RECORDER'S COURT. (No. 10,882.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

WRIT OF PROHIBITION—COURT EXCEEDING JURISDICTION.

1. It not appearing that a pending prosecution of the relatrix for a violation of a city ordinance is the same offense as that with which she stands charged under a previous affidavit, made under the same ordinance, the recorder had jurisdiction thereof to try and determine the same, notwithstanding the relatrix has appealed suspensively from a judgment and sentence under said previous charge.

2. It is unquestionably settled that, until a plea to the jurisdiction of a court has been made and overruled, an application for a writ of prohibition cannot be entertained.

(*Syllabus by the Court.*)

Appeal from recorder's court of New Orleans; A. M. AUCOIN, Judge.

Application by Catherine Baker for writs of prohibition and *certiorari*. Writs denied.

James C. Walker, for relatrix. *Henry Renshaw*, Asst. City Atty., and *Carleton Hunt*, City. Atty., for respondent.

WATKINS, J. The purport of relatrix's complaint is that on the 9th of August, 1891, she was arrested on the complaint of one W. G. Seelhorst with willfully and maliciously and unlawfully keeping an assignation-house at 336 Dauphin street, between Esplanade and Kelerec streets, in the city of New Orleans, in violation of section 8 of city ordinance 4434, C. S.; the complaint being that on the date named, before and after, she was thus unlawfully engaged and employed. Subsequently, to-wit, on the 10th of September, relatrix was put upon her trial, and convicted, and sentenced to pay a fine, or to be imprisoned in default of making payment thereof. In answer to this complaint in the recorder's court, the relatrix, *inter alias*, set up as a defense that her arrest and detention were "without due process of law," and said court "without jurisdiction to inquire into the subject-matter of said affidavit," and coupled therewith a special and general denial. From the sentence and decree therein pronounced the relatrix appealed, and gave bond according to law. That, notwithstanding her said appeal, she has again been arrested on the selfsame charge of violating same ordinance, upon the affidavit of same complainant, and of keeping an assignation-house at the selfsame municipal number; which affidavit was made and filed in same recorder's court on the 8th of October, 1891, during the pendency of her perfected appeal aforesaid. Her averment is that "the matter and fact set forth in the affidavit first mentioned, and the matter and fact set forth in the second affidavit, and severally mentioned, are one and the same matter and fact, and not divers and different matters and facts." It is on this hypothesis that relatrix avers that the recorder exceeded the bounds of his jurisdiction, he having no authority to take cognizance of and try and determine the subsequent charge and complaint, during the pendency of her suspensive appeal from the final judgment and decree rendered upon said former judgment and decree. *Certiorari* was intended to bring up the record of the recorder's court for inspection. The respondent returns that it is not a fact that the relatrix was arrested and held to bail upon an affidavit charging her with the same offense, and based upon identically the same fact, which is set forth in the affidavit first referred to. He avers that she was arrested

on the second affidavit for an infraction of said ordinance committed subsequent to the date set forth in the first affidavit. He further avers that the eleventh section of the city ordinance in question provides that each day any person shall continue to violate the provisions of the same shall constitute a separate offense. He further avers that in the second affidavit she was charged with a new and separate offense, committed on a date different and subsequent to the offense first charged against her. On this ground respondent claims the right to exercise jurisdiction, and prays that the writs be denied. He further pleads and avers that no plea to the jurisdiction was ever tendered in his court in said last-named cause, and that it has not been tried and disposed of. Reference to the eleventh section of the said ordinance discloses the correctness of the respondent's averment, for it declares "that each day any person shall continue to violate the provisions [thereof] shall constitute a separate offense;" and, in our opinion, that provision is conclusively against the complaint of the relatrix. The first affidavit was made on the 9th of August, and the latter on the 8th of October, 1889,—two months intervening. There is no room for doubt of there having been two different and distinct charges preferred against the relatrix, and of the respondent's jurisdiction in the premises we entertain no doubt, and it was not questioned by plea in his court before this suit was filed. State v. Davey, 39 La. Ann. 507, 2 South. Rep. 44, is precisely in point. In addition to this, it has been repeatedly held by this court that, "until after a plea to the jurisdiction has been made and overruled, an application for a writ of prohibition cannot be entertained." State v. Judge, 37 La. Ann. 843; State v. Steele, 38 La. Ann. 569; State v. Judge, 40 La. Ann. 607, 4 South. Rep. 485; State v. Justice, 41 La. Ann. 908, 6 South. Rep. 807. It is therefore ordered that the prayer of the relatrix be refused, and said writs denied, at her cost.

(43 La. Ann. 1136)

MAGINNIS' ESTATE v. NEW ORLEANS COTTON EXCHANGE & MUTUAL AID ASS'N. (No. 10,833.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

MUTUAL AID ASSOCIATION—NON-PAYMENT OF ASSESSMENTS — SUSPENSION — ACTION ON CERTIFICATE.

1. In a mutual aid association, a particular method of notice of assessments falling due, having been agreed upon and made a part of the charter, is binding on all members.

2. It being also provided that when a member neglects or refuses to pay any assessment he shall be suspended and treated as no longer a member, in case of death during the period of such suspension the holder of the benefit certificate cannot recover, unless the association is estopped by its own acts, or has waived the effects of the suspension.

3. The assessed had failed to pay the assessment within the time specified, and it remained unpaid at the time of his death.

4. There can be no recovery under his certificate.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge. Reversed.

Action by the estate of John H. Maginnis against the New Orleans Cotton Exchange & Mutual Aid Association on a certificate of membership in defendant association. Judgment for plaintiff, and defendant appeals.

Bayne, Denegre & Bayne, for appellant. *W. S. Benedict*, for appellee.

BREAUX, J. The defendant company, organized as a mutual life insurance association, is composed of members of the Cotton Exchange who choose to become members. The holder of a benefit certificate is entitled at the death of the assured to receive an amount equal to the assessment levied on each surviving member. One of the articles of the charter provides, upon proof of the death of a member, that each surviving member shall within 10 days pay the sum of $10, and that any member not paying shall be suspended, and treated as not being on the roll of membership, and in case of his death the holder of the benefit certificate shall be without right against the association; upon payment of dues within 30 days the suspension to cease. Only the board of directors, after the expiration, have authority to reinstate a member who has defaulted in paying assessments. The members are notified of assessment by posting in the rooms of the exchange. One of the members died on the 6th of June, 1889. Notice of the assessment was posted as required, and, in addition, two postal-cards were mailed to and were received by J. H. Maginnis. The assured J. H. Maginnis died at Ocean Springs on the 4th of July, 1889. The executor of his estate, about 10 days after his death, offered to pay the amount. The defendant refused to receive it. The debtor may be put in default by the terms of the contract. Civil Code, art. 1912. The defendant contends that the member was in default, and that the terms of the charter operated an immediate suspension. The default is proven, payment not having been made in compliance with the charter. When considering whether there was suspension, the thought occurs that in a voluntary association, in which the initiation, notices, payment of dues, assessments, suspension, and reinstatement are governed by its laws, each member is bound to comply with the obligations he assumes. When a charter contains an article suspending a member for the non-payment of an assessment, it is conclusive and binding. This regulation of the defendant association is self-operative, and takes effect after notice, unless it is estopped, or has waived the suspension. In Gunther v. Association, 40 La. Ann. 777, 5 South. Rep. 65, this court held that the article respecting suspension is self-enforcing, and that a member is suspended upon the non-payment of assessment after notice and delay. The decision was for plaintiff. The court held in that case: "There is not the slightest ground for attributing the failure to pay the assessment to any other cause than the want of no-

tice." There was suspension of the member, but the association was estopped by its fault in matter of notice of assessment.

If the defendant company voluntarily caused the late member, Maginnis, to believe that the members were not bound, by the notice posted on the wall, to pay within 10 days after the posting, or that the first postal-card mailed to him was a waiver of the suspension, or that the second card, notifying him that the assessment was due, gave right to postponement of payment, the plaintiff should recover. If, on the other hand, the first notice is binding on the members of the Cotton Exchange who are members of the association, having free access to its room of meeting, and if the postal-cards were issued *ex gratia*, the defendant company is not estopped from pleading the suspension and claiming its effect. The deceased was a member at the time the charter was amended, and as a member of the association consented that posting should be sufficient notice. As a member of the Cotton Exchange he had ample opportunity to see the notice. Its inefficiency is not proven. The postal-cards were not misleading. The notice posted on the wall notified the members that assessment 62 was due and payable on or before the 17th day of June, 1889. Precisely the same notice was given by postal-cards. In the second postal he was only informed that his assessment was due on the 17th of that month. On the 4th of July at the time of his death he had not complied. Some 10 days afterwards the executor of his estate offered to pay the amount. It was then no longer possible to comply with the regulation of the association. It was an agreement in due form, binding on all the members, that in case of death during suspension the right to recover on a certificate was lost. We are only enforcing a condition the members have made a law unto themselves. The suspension and notice were completed before death, and nothing in the nature of a waiver to avoid the effect of the suspension is shown. It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, annulled, and reversed, and it is now ordered, adjudged, and decreed, that the demand of plaintiff be rejected, with costs of both courts.

(43 La. Ann. 1129)

HACKETT v. HIS CREDITORS. (No. 10,831.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

INSOLVENCY—MEETING OF CREDITORS—OPPOSITION—APPEAL FROM ORDER ACCEPTING SURRENDER.

An appeal from an interlocutory order, accepting the surrender made by an insolvent debtor, will not interrupt the 10-days time in which an opposition to the meeting of creditors is allowed.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge. Opposition dismissed.

Michael Hackett, an insolvent, made a voluntary surrender to his creditors. An appeal was taken from an order accepting the surrender, but was dismissed. Afterwards the Ullman Goldsborough Company, a creditor, instituted proceedings to set aside the order, but such opposition was filed more than 10 days after the meeting of the creditors.

W. S. Benedict, for appellant Ullman Goldsborough Co. *Augustus Bernau*, for insolvent appellee.

MCENERY, J. This case was formerly on appeal to this court from an order accepting the surrender made by the insolvent debtor. Hackett v. His Creditors, 43 La. Ann. 124, 8 South. Rep. 587. The appeal was dismissed on the ground that the order accepting the surrender was not a definitive judgment,—that is, was a mere interlocutory order, the execution of which could not cause an irreparable injury; that it did not belong to that class of judgments which could be stayed by an appeal. After the appeal was dismissed, the complaining creditor instituted proceedings to to set aside the interlocutory order accepting the surrender of the insolvent. The appeal from the interlocutory order in the case of Hackett v. His Creditors, referred to and reported, 43 La. Ann. 124, 8 South. Rep. 587, did not have the effect of staying the proceedings; hence the 10-days time prescribed by section 1802, Rev. St., was not interrupted by the appeal. The complaining creditor, the Ullman Goldsborough Company, having filed its opposition after the 10 days prescribed by section 1802, within which time an opposition to the meeting of creditors is allowed, its opposition must be dismissed. Judgment affirmed.

(43 La. Ann. 1114)

NEWMAN *et al.* v. IRWIN. (No. 10,824.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

NEGOTIABLE INSTRUMENTS—ASSIGNMENT—NOTICE—EFFECT OF JUDGMENT.

1. In order to maintain and enforce an assignment of a credit or incorporeal right in respect to third persons, due proof must be made, not only of the transfer, but of notification having been given to the debtor of such transfer having been made antecedent to any third persons having acquired rights thereon.

2. A judgment is the highest evidence of a debt, and the title merges in the judgment. A judgment neither creates, adds to, nor detracts from a debt. It only declares its existence, fixes the amount, and secures to the creditor the means of enforcing it. A judgment on a promissory note extinguishes its negotiability. It is only transferable as other credits are.

3. One who charges the simulation or other illegality in the consideration of the transfer of a promissory note is held bound to make clear proof of his allegations, as in all other cases of contract. Such proof does not go to the validity of the cause, or consideration of the note, as between the maker and payee.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge. Affirmed.

Executory proceedings by Hand C. Newman for the seizure and sale of mortgaged property. Defendant, James E. Irwin, by his answer sought to enjoin such proceedings on the ground that the mortgage debt had become extinguished by compensation previous to plaintiff's acquisition of the mortgage notes, and that plaintiff's title

to the notes was simulated. Judgment for plaintiff. Defendant appeals.

Fergus Kernan, for appellant. *White, Parlange & Saunders*, for appellee.

WATKINS, J. When this case was last before us, the averments of defendant's answer were carefully stated, the interlocutory decree rendered therein by the district judge refusing an injunction reversed, and the cause remanded for further proceedings. Newman v. Frevin, 42 La. Ann. 720, 7 South. Rep. 799. Recurring thereto, it appears that there are but two questions for decision, and they are: (1) The extinguishment *vel non* of the notes proceeded upon, by compensation, prior to plaintiffs' acquisition of them; and (2) the simulation of plaintiffs' title to the notes themselves. The defendant, as maker of the notes sued on, does not gainsay plaintiffs' title to them, but the intervener does. The theory on which the defendant insists that compensation was accomplished is that, on the 2d of October, 1889, he purchased and acquired an undivided interest or share in a certain judgment, which was rendered by a competent court in the city of St. Louis, state of Missouri, in a suit styled and entitled "Bank of Commerce of St. Louis v. Katz & Mayer," upon the defendant's promissory notes of $10,000. Bank v. Mayer, 42 La. Ann. 1033, 8 South. Rep. 260. That the interest thus purchased was that of the bank against Albert Mayer, one of the members of the defendant's firm, who is alleged to have been the owner of the notes in pending suit, at the time of this transfer and assignment, and was affected thereby. That the plaintiffs assumed to purchase said notes of Albert Mayer, subsequently to said transfer, to-wit, on the 9th of October, 1889, whereas, in truth and fact, said notes had no existence at that time, having become extinguished by compensation antecedently, as stated above. That in the aforesaid acquisition of said undivided interest in said judgment the defendant transferred and assigned to the said bank the property mortgaged as an equivalent therefor; and by this means the "defendant expected to extinguish by compensation his mortgage notes to Mayer, discharge the mortgage from the property he had transferred to the bank, and thus secure to it an unincumbered title." 42 La. Ann. 722, 7 South. Rep. 799. The question presented to us at the threshold of the discussion, and one of serious and vital import to the defendant, is whether or not he really and legally accomplished and perfected his alleged acquisition of an interest in the judgment which the bank held against Mayer. To this question all others are subsidiary. It is needless to discuss the divisibility of a judgment without the judgment debtor's consent, if, in point of law, there has never been a transfer at all; and much the same may be said of other questions in the case. True it is that in our former opinion it is stated that it was alleged in the answer that the defendant acquired by purchase from the bank an interest in the judgment it held against Mayer for a larger sum, "with due notice to him of the transfer;" but, in the course of the argument of defendant's counsel in this case, the admission was made that such was not a fact, there being in the transcript no proof of any such notice having been given to Mayer. The contention of the defendant is that he gave to the bank a title to the mortgaged property in consideration of its transfer of an interest in the judgment it held against Katz & Mayer to him. He does not profess to have paid the price in money, but he claims to have given land in payment of the purchase price. Under our law, a giving in payment is an act by which a debtor gives a thing to his creditor, who is willing to receive it, in payment of the sum due. Rev. Civil Code, art. 2655. This transaction evidently was a giving in payment to the bank, and the bank, in consideration of this giving in payment, assumed to transfer to Irwin an interest in its judgment. The law further declares that it is perfect only when followed by delivery. Id. art. 2656. That, in the transfer of credits, the delivery takes place between the transferrer and the transferee, by the giving of the title, (Id. art. 2645;) but the transferee of a credit is only possessed, as regards third persons, after notice has been given to or accepted by the debtor that the transfer has taken place, (Id. art. 2643.) These principles of law were examined in Bernard v. Bank, 43 La. Ann. 50, 8 South. Rep. 702, and applied to a credit in bank for which a check was drawn; but, notice of same not having been given to the bank officers during the life-time of the drawer, the checkholder was held without right to recover. The drawing of the check was deemed to be a giving in payment of a debt due the checkholder, the effect of which was confined to them, the credit in bank being unaffected, without notice to the bank; and, the maker having in the mean while died, the contract lapsed, and the credit passed to the succession of the maker. This credit in bank was deemed to be a chose in action, and controlled by the provisions of Rev. Civil Code, art. 2642. In the instant case, the thing which the defendant claims to have acquired by the transfer of the bank to him is a judgment or an interest in a judgment. A judgment is also a credit, a chose in action, an incorporeal right; and, like the credit, it cannot be negotiated otherwise than by assignment and due notice to the judgment debtor. "A judgment is the highest evidence of a debt, and the title merges in the judgment. So, when a judgment is had upon a note, the latter is merged in the former, from which only by its reversal or rescission can it be severed. * * * The debtor cannot then plead against the claim, thus merged in the judgment, any prescription but that which bars the latter." 1 Hen. Dig. p. 726, No. 6, and authorities. "A judgment neither creates, adds to, nor detracts from a debt. It only declares its existence, fixes the amount, and secures to the creditor the means of enforcing its payment." Id. No. 8, and authorities. It matters not that suit was brought and judgment rendered upon negotiable promissory notes. As the title to the debt merged in the judgment, its negotiability, as commercial paper, ceased; and not the precepts of the

lex mercatoria, but those of the Civil Code, apply to its transfer and assignment. This being the case, the bank's assignment to Irwin of an interest in the judgment was unavailing, without notice thereof to Mayer, the judgment debtor, antecedent to his transfer of the notes in controversy to the plaintiff. The question of the compensability of the notes and judgment need not be discussed, as it could only arise after the perfection of the assignment. In respect to the intervener's complaint of the *bona fides* of the plaintiffs' purchase of the notes from Albert Mayer, little need be said. Inasmuch as plaintiffs do not contend that they acquired them before their maturity, they are in their hands, confessedly, subject to all offsets and equities existing between the maker and payee. But no such equities or offsets are urged or proved. The only doubt or distrust the allegation or evidence of the intervener purports to throw upon the transaction is in relation to the price plaintiffs paid therefor. That does not appertain to the cause or consideration of the notes themselves. They are unquestioned and unquestionable. In respect to the consideration paid by the plaintiffs, the evidence leaves no doubt in our mind as to its reality and genuineness. Judgment affirmed.

(43 La. Ann. 1076)

STATE v. QUAID. (No. 10,642.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

GAMING—"PIN-POOL."

The game ordinarily known and designated as "pin-pool" is not a gambling game, in the sense of the constitution and the law, and a city ordinance denouncing it as such is illegal.

(*Syllabus by the Court.*)

Appeal from recorder's court of New Orleans; WILLIAM B. MURPHY, Judge. Reversed.

Thomas Quaid was convicted and sentence to pay fines for gambling, and appeals.

Buck, Dinkelspiel & Hart, for appellant. *Henry Renshaw*, Asst. City Atty., and *Carleton Hunt*, City Atty., for the State.

WATKINS, J. The defendant is appellant from five different convictions and sentences to pay fines for alleged violations of city ordinance 4034, Council Series, which denounces as an offense "gambling with dice, cards, or other means, or keeping a banking game or gambling-house." The charge made in each of the several cases is as follows, viz.: "That Thomas Quaid did then and there violate ordinance 4034, Gen. St., by keeping a gambling game known as 'pin-pool,' upon which money is bet; said gambling game being played in the above-mentioned house," etc. The contention and answer of the defendant are that "pin-pool is not a gambling game, and therefore [it] is not in the contemplation of [said] ordinance; and, in the alternative, it is alleged that, if said ordinance was intended to embrace the game of pin-pool, [it] is illegal, null, and void; that the business of keeping a pool-table is recognized as legal by the state and city, which impose licenses on same; and that these licenses were paid by defendant." The proof shows that the game of pin-pool is played on a table on which five pins are set in a small square,—one being in the center of the square, and each pin being numbered from 1 to 5, respectively. The game is played by a number of persons, each one of whom uses a cue and balls, wherewith the pins are knocked down, and the player is credited on his score with the respective numbers of the pins thus knocked down. At the beginning of the game the game-keeper puts a number of marbles in a leathern bottle, on each one of which is a number printed, and, after thoroughly shaking it up, he casts one to each of the players. These balls indicate the order of preference among the players, and each one is entitled to credit on his score for the number marked on his ball. When, in the progress of the game, one of the players makes a total score of the precise number fixed as the winning number, he is entitled to the pool; and it consists of the total amount the players contributed thereto. The proprietor of the establishment furnishes the entire paraphernalia, and charges so much per game, according to the number of players, and, as soon as the game has been completed, he deducts same from the pool, and the residue goes to the winner. The players very frequently venture bets on the result of the game, but that is entirely optional with them. In such bets the proprietor has no interest, and assumes no risk whatever. It matters not, so far as he is concerned, what the amount or number of the bets may be, the proprietor gets no more nor receives any less a consideration for the game. The theory of the game is that the proprietor simply charges for the use of the table and appliances, and it is of no consequence to him whether one or all of the players pay for it, or whether the players contribute ratably in money, in advance, or agree that the fee be paid out of the pool by the winner. All of these things are purely conventional, and as agreed upon by the parties at the commencement of the game. This game is not in any correct sense a gambling game, such as is denounced in the constitution and laws. If the argument and reasoning on the subject needed re-enforcement, the necessary aid would be supplied by the acts of the state and city in demanding of and receiving from the defendant licenses for the prosecution of this business. The "keeping of a gambling game," in the sense of the law, is such as "implies loss or gain between parties" who are participating in the game. But the defendant, as proprietor, is not a participant in the losses or gains incident to the result of the game. That the players did engage occasionally in betting on the game did not constitute it a gambling game. On the contrary, it is exclusively a game of skill, and does not contain any element of chance. The ordinance in question does not rightfully apply to or legally embrace the game of pin-pool, and the conviction and sentence of the defendant were illegal. It is therefore ordered and decreed that the judgments and sentences

appealed from be annulled and set aside; and it is further ordered and decreed that the various proceedings and prosecutions against the defendant be abated and discontinued, and that he be relieved from the payment of costs.

(43 La. Ann. 1104)

GAST v. BOARD OF ASSESSORS. (No. 10,826.)[1]

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

TAXATION—EXEMPTION—MANUFACTURER OF WIRE FURNITURE.

1. A manufacturer of wire furniture is not exempt from taxation under article 207 of the constitution.

2. Where the constitution exempts the manufacturer of furniture "and other articles" of wood, the words quoted relate to and qualify the antecedent "furniture."

3. A limiting clause is generally to be restrained to the last preceding antecedent, and not to be extended to what follows it, unless clearly so intended.

4. Statutes conferring exemption should be strictly construed. This is emphasized by jurisprudence, in cases requiring the construction of exemption clauses. "Doubt is fatal; plausible hesitation warrants an adverse finding." City of New Orleans v. Robira, 42 La. Ann. 1102, 8 South. Rep. 402.

5. This court having heretofore held "that the manufacture of furniture and other articles of wood * * * convey an idea of similarity in the subject contemplated," the *onus* being with plaintiff, *held*, that the right to the exemption is not established.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge. Reversed.

Action by G. Gast to cancel an assessment of taxes on him as a manufacturer of wire furniture. Judgment for plaintiff. Defendants appeal.

Henry Renshaw, Asst. City Atty., and *Carleton Hunt*, City Atty., for appellants board of assessors and the city of New Orleans. *Wynne Rogers*, for appellant state tax collector. *Morse & Cahn* and *A. L. Tissot*, for appellee.

BREAUX, J. The plaintiff, a manufacturer of wire furniture, claims exemption from taxation under article 207 of the constitution. He is assessed for $6,000. Eleven-twelfths of the property is used in the manufacture of wire furniture, and the remainder is used in carrying on business not exempt from taxation. All the facts necessary for exemption are shown, if the manufacturer of furniture of wire is such a manufacturer of furniture as exempts him from taxation. The district court ordered the cancellation of the assessment in excess of $500. The sole question for our decision is whether, in so far as relates to furniture, the exemption is limited to wooden furniture. The article under which the exemption is claimed reads: "There shall also be exempt from taxation and license, for a period of twenty years from the adoption of the constitution of 1879, the capital, machinery, and other property employed in the manufacture of textile fabric, cotton, shoes, harness, saddlery, hats, flour, machinery, agricultural implements, manufacture of ice, fertilizers, and chemicals, and furniture and other articles of wood, marble, or stone, soap, stationery, ink, and paper, boat-building and chocolate: provided that not less than five hands are employed in any one factory." The furniture of which plaintiff is manufacturer is made of wire; such as chairs, lounges, baths, beds, etc. The authorities representing the defendant state contend that wire furniture is not within the exemption contemplated. On the part of the plaintiff it is contended that at the time of the adoption of the law it was well known that furniture was made from other material than wood; that it can be and was made of iron, brass, wire; that in interpreting this law the court must be guided by the rule that generic terms cover every species, unless the term, in its extent, is specially limited; that, if it was the intention of the makers of the law to construe the meaning of the generic term, and place a limitation on its scope, they would have used words to do so, and not left the presumption which might with a phrase have been made certain. The district judge, for whose judgment we entertain high regard, in his opinion states "that the first impression which one derives from reading this article is probably that, in so far as the exemption is intended to be extended to furniture, it is indefinite, and limited by the adjective 'wood,' which follows; and hence that only furniture manufactured of that particular article or substance is within the meaning of the language." That a "more careful consideration of the subject led him to the conclusion that the first impression is an erroneous one, and that the main adjective 'wood,' as well as those which follow it, limit or modify, not the word 'furniture,' but the phrase, 'and other articles,' which succeed it; and that furniture, no matter of what substance, is exempt, while with respect to 'all other articles' they must be of some one or the other of the substances designated in order to avoid such exemption." We will affirm the first impression of the court, for after careful consideration we are led to accept it as correct. The question is not free from difficulty; the meaning is doubtful. The exemption is stated by the word "furniture," but immediately after follow the words, "and other articles of wood." If it be a qualifying phrase, it applies to "furniture." "And other articles of wood" conveys the meaning that the exempted property is of that material. The word "articles" connotes furniture as well as other property. By "other," "furniture" is qualified. The word "other" must relate to the preceding or last antecedent, unless it is clearly evident from the nature of things that it is not a qualifying term. It is urged with some force that, had the law-making authority intended to limit the exemption as contended by the defendant, they would have used the qualifying adjective "wooden," and would have exempted "wooden furniture." The word "wooden" was not used as a qualifying adjective just preceding "furniture;" but

[1] Rehearing denied November 30, 1891.

immediately succeeding we have, "furniture and other articles of wood." The question is propounded by plaintiff's counsel: "Manufacturers of shoes are exempt. The constitution reads: 'Leather, shoes, harness, and saddlery.' If the manufacturer of a cloth shoe was before the court, would the court hold that only shoes manufactured of leather came within the meaning of the law?" The question propounded does not suggest any ambiguity, and answers itself in the negative. If, instead, the exemption clause were to read, "Shoes and other articles of leather," the manufacturer of cloth shoes would not be exempt. If "other" does not qualify "furniture," it serves no purpose. In so far as it relates to articles of wood, marble, stone, and other materials, if intended to qualify them, it is used idly, and signifies nothing. The second rule of interpretation "is to give all doubtful words or expressions that sense which makes them produce same effect." Potters' Dwar. St. p. 736. In the construction of a statute a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction. Cushing v. Worrick, 9 Gray, 382. In the pending case we have not discovered that the subject-matter requires a different construction. "General words are not to be extended to what follows, unless clearly so intended." Coxson v. Doland, 2 Daly, 66. The range of argument suggests the importance of stating that our conclusion relates to furniture of wire. We do not decide that "other articles" limit the exemption to furniture. This matter received consideration in the case of Martin v. City of New Orleans, 38 La. Ann. 397, and is not now before the court. We decide that furniture and the "other articles of wood" must be of wood in so far as relates to the qualifying words and their antecedent. The well-known and universally prevailing principle of interpretation that statutes conferring exemption should be strictly construed is specially emphasized in the jurisprudence of this state. "In such case doubt is fatal. Plausible hesitation warrants an adverse finding." City of New Orleans v. Robira, 42 La. Ann. 1102, 8 South. Rep. 402; Carre v. City of New Orleans, 41 La. Ann. 998, 6 South. Rep. 893, 42 La. Ann. 1121, 8 South. Rep. 399; Dennis v. Railroad Co., 34 La. Ann. 958. In the case of Jones v. Raines, 35 La. Ann. 998, it was held: "It is worthy of note that in the enumeration each kind of manufacture is treated as a distinct and separate subject, and all are separated from each other by a comma, except the manufacture of furniture and 'other articles of wood,' which are not thus separated, and thus convey an idea of similarity in the subject contemplated or provided for." From the case of Carre v. City of New Orleans, 41 La. Ann. 999, 6 South. Rep. 893, we extract: "The articles of wood mentioned in the article of the constitution are, therefore, those which, like furniture," etc. The article of the constitution. The words "furniture and other articles of wood." The application of the rules of construction and the decisions of courts have forced on us the conclusion that the plaintiff is not exempt from the payment of taxes. It is therefore ordered and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now decreed that there be judgment in favor of defendants, denying plaintiff's claim to exemption, and maintaining the validity of the assessment in its entirety, and that plaintiff pay the costs of both courts.

(43 La. Ann. 1110)

Succession of SCHWENCK.

RAUSCH-KOLB v. ROSENSTREAM. (No. 10,849.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

WILLS—CONTEST—UNDUE INFLUENCE—COMMUNITY SETTLEMENT.

1. The judgment of the district court on the provisional account is fully sustained by the evidence.

2. The evidence entirely rebuts and disproves the charge of undue influence as a ground for annulling the decedent's will.

3. Debts due by the deceased husband as head of the community of *acquets* and gains by a first marriage, and paid out of the earnings of the community under a second marriage, must, in a settlement between them, be charged to the first and credited to the second community.

4. The evidence sustains the adjustment made by the judge of the accounts between the two communities.

5. The allowance made for the revenues of the separate property of the minors, making no deductions for their expenses, is at least as much as they are entitled to. The question as to whether their expenses should be deducted is referred to, but appellee asks no amendment.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge. Affirmed.

James B. Rosser, Jr., for appellant. *Henry P. Dart*, for appellee.

FENNER, J. Jacob Schwenck was married thrice. His first wife died without children, and that marriage may be eliminated in this case. He then married Christina Seibel, who died in January, 1880, leaving three children, issue of the marriage, who are represented by P. O. Rosenstream as their dative tutor. In February, 1882, Schwenck married Wilhelimina C. Rausch-Kolb, by whom he left two children. He died on January 22, 1889, leaving a nuncupative will, executed on his death-bed, by which he constituted his wife his sole executrix, gave her the usufruct of all of his property, and the whole disposable portion in full ownership. This record presents three contests, which, though originally distinct suits, were covered by one judgment, and are practically consolidated. These are: (1) An action by the minor children of the decedent's previous marriage to annul his will; (2) an opposition on their behalf to the provisional account filed by the widow and testamentary executrix of said will; and (3) a partition suit instituted against the minors of the previous marriage by the said second wife, individually and as executrix and tutrix of the two minor children, issue of her marriage with decedent.

1. In the suit to annul the will several

grounds were urged, all of which are abandoned in this court except one, viz., a charge of undue influence exercised over the mind of the testator by Charles L. Rausch-Kolb, a brother to the wife, who was present in the room and one of the witnesses to the will. This may be disposed of very briefly. Waiving all questions of law, the evidence in the case, of witnesses introduced by the assailant of the will in his own behalf, conclusively negatives and annihilates the charge.

2. All the grounds of opposition to the account of the executrix are abandoned except to three items of bills put on the account as paid by her, and which opponent claims are not proved. We have examined the testimony, and find them fully proved.

3. Without undertaking a tedious statement of all the complicated issues involved in the partition suit, we shall confine ourselves to disposing of the particular objections to the judgment below which are urged by appellant in this court. The most important questions arise in the settlement of the accounts between the first and second community. The widow claims that the first community was, at the date of its dissolution, insolvent, and owed a large amount of debts, which were paid after the origin of the second community, and out of the earnings thereof. This is strongly disputed by the tutor of the minors of the first community. It appears that the decedent's business, before and after his last marriage, was the keeping of a bar-room and restaurant, which was his only source of income. The tutor shows that business was at least as profitable, and probably more profitable, before than after his second marrige; and he suggests the intrinsic improbability that the business should have left the decedent insolvent and largely in debt at the date of his last marriage, while the same business, in the years between that and his death, enabled him to pay off all debts, and, besides, to make considerable outside investments. Impressed with this suggestion, we have made a very critical examination of the evidence in the case, but we can find nothing to justify us in disturbing the finding of the district judge, who sustained the contention of the widow. It is incontestably proved that the decedent did owe large debts at the date of his last marriage, and there is not a word of evidence to show or indicate that he had any funds on hand with which to pay them, or any property other than that which remained at his death, and which was partly incumbered by the debts referred to. These debts were undoubtedly paid off during the last marriage, and, in absence of any evidence to the contrary, as well as in proper consideration of positive evidence to that effect, we are bound to hold, as did the district judge, that the payments were made with community funds. Neither the widow nor the court was bound to explain what became of the earnings of the prosperous business conducted by Schwenck prior to his last marriage. It is very certain that they did not prevent him from incurring large debts. Nor are the accumulations from the business during the last community, employed in paying off prior debts and in some investments of no great amount, intrinsically improbable or unreasonable. The business, during the existence of this community, extending over a period of seven years, is proved to have been profitable, averaging a gross income of about $35 per day, or nearly $13,000 per annum. It was closely and economically managed, with the active co-operation of the wife, who was an intelligent and hard-working woman; and the net profits were large. If the net results were so much more favorable after than prior to the marriage, it will not be the first time that the assistance of an intelligent, industrious, and saving wife, especially in that rank of life, has changed the financial condition of the husband from one of embarrassment to one of prosperity.

Appellant further disputes the proof of payment as to several items, viz.: (1) The Bultman debt. This debt was evidenced by a mortgage note for $6,000, and had been contracted prior to the last marriage. It had not been paid at the date of the marriage. It was paid off during the marriage. The only question is as to the amount paid during the marriage. The books of Jacob Schwenck, kept in his own handwriting, show the dates and amounts of the various payments running from May 31, 1882, to July 6, 1886, when the final payment was made. A. F. Bultman, the son of Mrs. Bultman, who held the note, attended to these collections from a certain period in 1884, and he renders an account of payments made, beginning November 19, 1884, which substantially corresponds with Schwenck's books. The prior payments had been made to Mrs. Bultman, who kept no memorandum of them, and could throw no light on the dates and amounts of payments. The presumption is overwhelming that Schwenck's entries are correct, and it is confirmed by all the evidence. We pay no attention to trifling inconsistencies in Bultman's evidence, much dwelt on by appellant. They amount to nothing. His own statement shows that he knew nothing about payments prior to 1884, and his reference to them in his testimony obviously arose from a mere confusion of dates. (2) The Dutrey debt. It is clearly shown that the debt existed and was unpaid in 1884. It was evidenced by a note for $500, which had been destroyed, and nobody could prove its date. But the holder accepted the face of the note without interest, and Schwenck told his wife at the time that he was glad enough to get that, as the note was prescribed. Of course, if there was any question as to prescription, the date must have been prior to the marriage. We are satisfied, besides, that, if the debt had been contracted during the marriage, Mrs. Schwenck would have known it. (3) The debt due to the mother of Schwenck. He undoubtedly owed her the full amount claimed as capital at the date of the last marriage. The debt had been satisfied in principal and interest. Although the mother's recollection of the actual amount paid is con-

fused, she does not dispute that she accepted the payment in full settlement of the debt, and proclaims her perfect confidence in the integrity of her son. A memorandum book is produced in Schwenck's handwriting, showing dates and amounts of expenditures for her account, and payments made, which went to the extinguishment of the debt. We will not waste further time in discussing evidence as to other items. We consider that all allowed by the judge are satisfactorily proved. We consider that appellant has no cause to complain of the allowance made by the judge for the revenues of the separate property of the minors, without any deduction on account of their expenses. Had appellant claimed an amendment in this matter, grave questions would have been presented. See Handy v. Parkison, 10 La. 98; Mercier v. Canonge, 12 Rob. (La.) 385. The case of Succession of Applegate, 39 La. Ann. 403, 2 South. Rep. 42, refers to the last-quoted case, and differs from the case then before us in particulars which do not exist in this case. On the whole, we think justice has been done.

Judgment affirmed.

(43 La. A. 1078, 1194)

CARROLL v. BANCKER *et al.* (No. 10,725.)

(*Supreme Court of Louisiana.* April 27, 1891. 43 La. Ann.)

JURISDICTION—ENFORCEMENT OF PRIVILEGE—DOMICILE OF DEBTOR—SEIZURE OF PROPERTY — EFFECT OF APPEARANCE — LOSS OF PRIVILEGE—PLEDGE OF FACTOR—LIEN OF LESSOR.

1. Act 64 of 1876, amending article 168 of the Code of Practice, confers jurisdiction on the courts of this state to enforce a lien or privilege on property within their jurisdiction, notwithstanding the domicile of the debtor or owner be elsewhere; but the effect of the decree must be restricted to the property that is proceeded against or its proceeds.

2. It is of no consequence that the property itself has not been seized. It is sufficient if the suit appears to be an action *quasi in rem*, and has for object to define the *status* of designated property, or to determine a lien or privilege on it.

3. It is permissible, under the law and jurisprudence, for a citizen of a parish different from the one in which he is cited to appear and answer to the merits, and by thus voluntarily submitting himself to the jurisdiction of the court, the judgment therein rendered is not *coram non judice*.

4. Whatever may have been the course of judicial opinion under Code Prac. art. 288, and Rev. Civil Code, arts. 2705, 2709, it is clear that under the provisions of Act 66 of 1874, and Act 44 of 1882, amending same, the right of pledge of a factor who makes advances of supplies to a planter is subordinate to the lien of the lessor who rents the land on the crops produced thereon; and the right of sale which is conferred upon the factor, coupled with the right to appropriate the proceeds thereof to the satisfaction of his claim, cannot be so construed as to defeat or lessen the privilege of the landlord for rent.

5. When the "effects" of a lessee consist of agricultural products, like sugar and molasses, and same have been pledged under the act of 1874 to a factor for advances of plantation supplies, and afterwards consigned to him for sale, his right to appropriate the proceeds is thereby restrained and subjected to the lessor's claim for rent, and same are subject thereto in the factor's hands.

ON REHEARING.

Plaintiff's privilege as lessor upon the crop of sugar and molasses was lost by him, as he did not, in accordance with article 2709 of the Civil Code and article 288 of the Code of Practice, seize it before it was shipped to the market to be sold, nor within 15 days after it had been removed from the leased plantation. WATKINS, J., dissenting.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge. Affirmed.

Action by Daniel R. Carroll against George W. Bancker and another to enforce a lessor's lien. Judgment for defendant. Plaintiff appeals.

Henry L. Lazarus, for appellant. *Rice & Armstrong* and *Charles Hernandez*, for appellees.

WATKINS, J. The object of this suit is the enforcement of a lessor's lien upon the proceeds of sugar and molasses produced and manufactured on the leased premises of plaintiff, and alleged to be in the possession of the defendant Hernandez. The claim of the plaintiff is that he leased to the defendant Bancker, for the year 1886, his certain sugar plantation in the parish of St. Martin, for the price of $2,500, which became due on the 10th of November of that year. That to secure the payment of the rent he had a lien and privilege on the crops produced on the leased premises; and, as a part of the crops on which his lien rests, he specifies 52 hogshead of sugar and 49 barrels of molasses, worth the sum of $2,500, that his lessee shipped to Hernandez; and he avers that same, or the proceeds thereof, are in his possession. A writ of sequestration was obtained, a seizure thereunder demanded by the sheriff, and a denial made on the part of Hernandez of his possession of either the products specified or the proceeds thereof. A rule was taken to traverse the truthfulness of his statement, and some testimony was reduced to writing; but the rule was voluntarily discontinued by plaintiff, and on the same date, or soon afterwards, he filed a supplemental petition, in keeping with the averments of his original petition, making Hernandez a party, and praying a judgment against him for the crops produced, or their proceeds. On the same date counsel for Hernandez filed an exception and answer, both being incorporated in the same paper: (1) No cause of action; no lawful ground for sequestration; petition too vague and indefinite, and the like. (2) That at the time of demand being made on him he had not, nor has he since had, any sugar or molasses belonging to the defendant, nor any proceeds thereof. But he avers that he furnished Bancker with supplies for the cultivation of his crop in 1886, as will be shown by his duly-recorded act of pledge, which is annexed to and made a part of his answer; and that when said crops were sold he applied the proceeds of sale to his account, as he had a right to do. He subsequently excepted further, that he cannot be thus proceeded against, on the ground that there is no suit pending on the original petition against Bancker, and, he being a resident citizen of the parish of St. Martin, and "not having voluntarily appeared therein, and there having been no seizure of his property, the

civil district court is without jurisdiction of the matter." These exceptions were sustained to the extent of requiring plaintiff to amend the second time, and this was accordingly done. To this amendment Hernandez filed an answer, pleading a general denial; and shortly afterwards Bancker appeared, and filed a similar answer and denial.

This analytical statement of the pleadings was necessary in order to clear the case of some confusion in which the statement of counsel had involved it. This case comes clearly within the principle of Act 64 of 1876, which amends the 163d article of the Code of Practice, and confers jurisdiction upon the courts of this state to enforce a lien or privilege on property within their jurisdiction, notwithstanding the domicile of the debtor be elsewhere, the operation and effect of the judgment being limited to the value of the property that is proceeded against. It matters not that the property itself has not been actually seized. Such a suit is substantially an action *in rem*, and has for object to define the *status* of the property, and to determine an apparent lien upon it. See Young v. Upshur, 42 La. Ann. 362, 7 South. Rep. 557, and authorities cited. In this class of cases we have frequently held that our courts have jurisdiction to bind the citizens of other states, and to hold them by their judgments, to the extent that their property domiciled here may be affected thereby. Young v. Upshur, 42 La. Ann. 362, 7 South. Rep. 557; Robbins v. Martin, 43 La. Ann. 488, 9 South. Rep. 108; Duruty v. Musacchia, 42 La. Ann. 357, 7 South. Rep. 555. Independently of these considerations, the suit is chiefly directed against Hernandez, who is a resident citizen of the parish of Orleans, and is to be affected by the decree; and it is not doubted that Bancker has parted with the crops that are sought to be reached thereby, in the hands of Hernandez, though not against the proceeds thereof. Plaintiff does not pretend that Hernandez is bound in any way for the payment of the rent, and no personal judgment is asked by him against Bancker. But it is a complete answer to Hernandez's objections to the jurisdiction of the court to state that Bancker has submitted himself thereto. That is conclusive against Hernandez. Phipps v. Snodgrass, 31 La. Ann. 88; Gomila v. Milliken, 41 La. Ann. 117, 5 South. Rep. 548; Code Prac. art. 93. In so far as the other exceptions of Hernandez are concerned, we need only mention the fact that their being incorporated in his answer is necessarily fatal to them. Robbins v. Martin, 43 La. Ann. 488, 9 South. Rep. 108, and cases therein cited.

On the merits we find the following to be a fair statement of facts, viz.: That the plaintiff leased his plantation to the defendant Bancker as stated, and he has paid no part of the price of the lease, and nothing has been paid him from the proceeds of the sale of the crops produced on the leased premises, and which his lessee had shipped to Hernandez, as his factor, residing in the city of New Orleans, these shipments having been made for the most part after plaintiff's rent had become due. On the 9th of June, 1886, the plaintiff's lessee executed in notarial form an act of pledge in favor of Hernandez for the sum of $2,000, due and payable on the 15th of December following. In this act it is stipulated that this sum is to cover the amount and value of necessary supplies which were thereafter to be furnished for the "cultivation and raising of a crop of sugar and molasses during the present year on * * * a certain sugar plantation situated in the parish of St. Martin, * * * belonging to Mr. D. R. Carroll, * * * which said plantation is leased by the said Bancker." It further stipulates that Bancker grants in favor of Hernandez "the lien and privilege recognized by law in favor of furnishers of supplies, and, moreover, pledges and pawns * * * all the crops of sugar and molasses that will be raised on said plantation during the season of 1886-87." In addition to these stipulations, Bancker specially covenanted and agreed that he would ship to Hernandez, "as soon as ready for market, all the sugar and molasses that he shall grow on said plantation, and that Hernandez was to sell the same for his account and apply the proceeds thereto." This act was duly registered in the clerk's office of the parish of St. Martin on the date of its execution. It appears from the transcript that Hernandez rendered to Bancker accounts of sale of certain sugars and molasses which were sold on the 22d, 23d, 26th, 27th, and 29th of November and the 1st of December, 1886, respectively, though none of said accounts were rendered until subsequent to the filing of this suit on December 3, 1886. It is admitted that the sugar and molasses Hernandez received from Bancker were so received on the days they were shown to have been sold, and that such dates were the dates of shipments from the plantation. It appears that Bancker cultivated another plantation, which belonged to his wife, and adjoined the Carroll plantation, and to which Hernandez likewise furnished supples, though neither this plantation nor the supplies to be thereto furnished are made mention of in the act of pledge. Bancker, as a witness, states that the first shipment of sugar and molasses from his wife's plantation was made on the 29th of November, 1886,—not more than four barrels, prior to that date; that all previous shipments had been made from the Carroll place. The account current filed in evidence by Hernandez shows that subsequent to the 29th of November the total sales aggregated only $866.42, and, as this sum must be attributed to his account for supplies that were furnished the plantation of Bancker's wife, and with which Carroll has no concern, it must be deducted from the total proceeds of crops received; and making this deduction will give us the following statement, viz.: The total proceeds of crops, $2,711.56; deducted for account of Bancker's plantation, $866.42; balance for account of Carroll plantation, $1,845.14. But, inasmuch as Bancker's account shows a total debt of $3,606.32, the sum of $866.42 must be subtracted therefrom, and, as Hernandez

holds other collaterals of Bancker, which are worth approximately $1,000, that value must be likewise subtracted therefrom. Making these alterations, we have this statement, viz.:

Amount to Bancker's debit....		$3,606 82
Less Bancker's plantation crops.....	$ 866 42	
Other collaterals.....	1,000 00	1,866 42
Balance due Hernandez...		$1,739 90

On this showing Hernandez is in possession of values to the extent of $105.34 over and above his claim, whereas Carroll, the lessor of Bancker, has received nothing at all. It further appears that all credits appearing on Hernandez's account against Bancker as appertaining to the Carroll plantation as of dates antecedent to the 22d of November, 1886, only aggregate $817.13, and, deducting this sum from the total amount of credits attributable thereto, viz., $1,845.14, and we find that $1,028.01 is the net amount realized from crops which were shipped from the Carroll plantation within 15 days previous to the institution of this suit, and the notification of plaintiff's writ of sequestration to Hernandez, and the sheriff's demand on him for the crops or their proceeds. All of the transactions here detailed took place subsequent to the maturity of plaintiff's claim, and prior to that of Hernandez; and Hernandez, as a witness, admits that the sums shown on his account to have been applied to Bancker's credit were thus applied after he had received notice of plaintiff's sequestration, and that Bancker was subsequently notified thereof.

On this state of facts the question for solution is whether Hernandez, holding possession of the crops of Bancker that were produced by the latter on a plantation under lease from Carroll, and which were consigned to the former as his factor under bills of lading, had the right after sale thereof to apply the proceeds to Bancker's account for supplies furnished, to the prejudice of Carroll's claim for rent. This question appertains, under the foregoing statement, to the proceeds of products which were received by Hernandez prior to the 22d of November, 1886, viz., $817.13, as the remainder were received and sold within the 15-day limit. While it is fully admitted and conceded by counsel for Hernandez that under the provisions of Act 66 of 1874 he acquired, by virtue of his act of pledge, a right subordinate to the lessor's lien on the crop produced on the plantation Bancker leased from Carroll, yet, because of the latter's failure to assert his right against the crops affected thereby while they are yet upon the leased premises, or within 15 days after their removal therefrom, same has lapsed; and that in no event does the landlord's lien extend to proceeds derived from the sale of property removed from the premises leased. It is provided in the Code of Practice (article 288) that the lessor may seize, even in the hands of a third person, objects which are subject to his lien, if same have been removed by the lessee "within fifteen days previous to his suit being brought;" and in Rev. Civil Code, art. 2709, it is provided that "in the exercise of his right of pledge the lessor may seize the objects which are subject to it before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified." But our attention has been attracted to an alteration in the textual provisions of the Civil Code by Act 66 of 1874 (as amended by Act 44 of 1882) in the following particulars, viz.: That while, under the provisions of section 1 of the former act, the planter may pledge his growing crop for advances of necessary supplies in favor of a merchant advancing same, yet the effect of such pledge is subordinate to the claim of the landlord for rent of land. That while, under the provisions of section 2 thereof, the advancing merchant to whom such agricultural products have been consigned by bill of lading shall have a right of pledge thereon "from the time the bill of lading thereof shall be put in the mail," and shall confer upon such pledgee the right to sell said products and "to appropriate the proceeds of sale to the payment of the amount due for such advances as may have been made thereon," yet it is also specially provided that nothing (therein) "shall be so construed as to defeat, or lessen the privileges of * * * landlords in this state * * * for rent," etc. That while, under the provisions of section 3 of that act, merchants or factors who have a balance of account due them by planters, who consign to them any agricultural products for sale, have a pledge upon the same from the time the bill of lading therefor "is deposited in the mail," and are authorized "to appropriate the proceeds of sale to the payment of the amount due" them, yet it further provides "that nothing herein shall be so construed as to defeat or lessen the privilege of * * * landlords in this state * * * for rent," etc. The latter act makes no alteration of the former except to extend the provisos contained in sections 2 and 3 thereof to "other valid existing privileges or liens." Whatever may have been the course of decision under the cited articles of the Codes, it is clear that under the terms of these statutory enactments the lien of the factor who makes advances of supplies to a planter is subordinate to that of the lessor who rents the land on the crops that are thereon produced; and that the right of sale which is conferred upon the factor, coupled with the right to appropriate the proceeds thereof to the satisfaction of his claim, is not to be so construed as to defeat or lessen the privilege of the landlord for rent. While under the provisions of Rev. Civil Code, art. 2705, "the lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased," and which pledge may, under the provisions of Rev. Civil Code, art. 2709, be exercised against the objects which are subject to it before they are removed by the lessee from the leased premises, or within 15 days after they are taken away, yet when such "effects" consist of agricultural products, like sugar and molasses, and same have been pledged under the act of 1874 to a

factor for advances of plantation supplies, and are afterwards consigned to him for sale, his right to appropriate the proceeds is thereby restrained and subjected to the lessor's claim for rent, and same are subject thereto in the factor's hands. In the instant case the act of pledge in favor of Hernandez expressly mentions the plantation to which he contracted to furnish supplies as one Bancker had leased from Carroll, and he cannot be permitted to disavow or gainsay the information he thus admitted was in his possession. He is conclusively bound by this admission, made in a *quasi* judicial act. As he was Bancker's factor, and had received his consignments of sugar and molasses, and claims the right to apply the proceeds to his own account, he must have known that Carroll had been paid nothing therefrom, and he was necessarily put upon inquiry as to his rights. Plaintiff acted promptly, and filed his suit, and gave Hernandez notice before his debt against Bancker became due, and thereafter pressed his claim vigorously. We are of opinion that plaintiff's right to recover of Hernandez is clear to the extent of the amount of the proceeds of the sugar and molasses that were produced and manufactured on the land he rented to Bancker, viz., the sum of $1,845.14, with legal interest from judicial demand. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed in so far as it rejects plaintiff's demands against Hernandez, and it is now ordered and decreed that same be so amended as to adjudge and decree that the plaintiff do have and recover of and from the defendant Hernandez the sum of $1,845.14, with legal interest from judicial demand, and that, as demanded, same be affirmed, at the cost of defendant in both courts.

ON REHEARING.

(Nov. 30, 1891.)

BREAUX, J. This suit has for object the enforcement of a lessor's privilege on the proceeds of a crop of sugar and molasses consigned by one of the defendants to his commission merchant, who sold it in this city.

PLEADINGS.

Plaintiff alleged that he had a privilege, sued for a writ of sequestration, and prayed for judgment against George W. Bancker, the lessee. Hernandez, the pledgee, was not made a party to the suit. Notice of the writ which issued in the case was served on him on the day it was issued, viz., December 3, 1886. On the 14th of December, on rule served on him, he was ordered to answer interrogatories in court. They were answered. Evidence was heard on the trial of this rule. On motion of plaintiff's counsel, this rule was discontinued on January 27, 1887. On the 18th day of April, same year, plaintiff filed a supplemental petition, alleging that defendants had conspired to defraud him, and that in consequence Hernandez had become responsible. An exception of no cause of action was filed and maintained with leave to amend. At a subsequent date another supplemental petition was filed, in which it was charged that Hernandez knew of the lease made by plaintiff, and that he schemed with lessee to remove the sugar and molasses from the plantation leased, and to hastily sell them, in order to defeat the lessor's lien. On issue joined the case was tried. The district judge decided for plaintiff and against the defendant George W. Bancker for the rental, with legal interest. The demand against Hernandez was rejected, and the suit of sequestration dissolved. From this judgment the plaintiff prosecutes this appeal.

STATEMENT OF THE CASE.

The consignor, G. W. Bancker, in 1886 cultivated two plantations in the parish of St. Martin,—one the property of his wife; the other adjacent that of the plaintiff, from whom he leased for $2,500 per annum. There was no sugar-house on the leased place. On the 7th of June, 1886, the defendant Bancker executed an act of pledge, under Act 66 of 1874, in favor of Hernandez, to secure the sum of $2,000, payable on the 15th day of December. This was a loan to enable him to cultivate his crop. The pledgor obligated himself in this act to consign to the pledgee all the sugar and molasses made on the plantation as soon as ready for market, to be sold, and the proceeds to be applied to the payment of amounts due to the pledgee. The contract shows that the plantation was leased by plaintiff to Bancker. This act was in due time recorded in the clerk's office. Hernandez, whose testimony is not contradicted, testifies that the note due by Bancker for advances "was held as collateral." "His account was to be paid as he shipped." Bancker, the only other witness who testifies with reference to this matter, corroborates this testimony. In September, Bancker shipped to his merchant, the pledgee, 34 barrels of molasses, products of the crop on the leased place; in October 1 barrel; and the remainder of that crop was shipped at different times from the 9th to the 24th of November. The account of sales credits the proceeds of the sale of the last sugar and molasses made on the Carroll leased plantation on December 1st. The last entries on Bancker's account on the credit side are: November 29, 1886, 8 hogsheads of sugar, $220.91; December 1, 1886, 8 hogsheads of sugar, $260.67; December 1, 1886, 10 barrels of molasses, $115.86; December 4, 1886, 16 hogsheads of sugar, $489.89. The last sugar—the 16 hogsheads—was sold on the day notice was given to Hernandez of the sequestration. The 16 hogsheads were not made on the leased plantation, but on the Bancker place. The only testimony we have on the subject is the following, by Bancker: "Question. Do you remember what were the last shipments made by you to Mr Hernandez prior to December 3, 1886? Answer. The last shipment I made was eight hogsheads of sugar on the 30th of November. Q. And next prior to that? A. On the 29th of November. Q. What did you ship then? A. Eight hogsheads of sugar. Q. Where was that sugar—those two lots—shipped from? A. They were from Mrs. Bancker's planta-

tion. Q. On which of the plantations, if either, had the cane which produced the sugar been raised? A. On Mrs. Bancker's. Q. Had any portion of the cane out of which these 16 hogsheads of sugar were made been raised and been at any time upon the plantation leased from Mrs. Carroll? A. No, sir." This witness also testified that the crop made on the leased place was removed from the place more than 15 days before it was shipped to the merchant. The cane was cut and hauled to the sugar-house, and manufactured into sugar. This, he says, occupied more than that number of days. That in time the sugar and molasses were hauled to the depot. They were marked in the name of the lessee, Bancker, in whose name the bills of lading were issued, and by whom they were mailed to the merchant. That it was all sold prior to the 2d of December. Hernandez, testifying, states: "Sales had been rendered on the 4th of December. After the writ of sequestration had been served, 16 hogsheads of sugar; that is all." His testimony and that of Bancker makes it evident that this sugar was not from the Carroll place, also that the proceeds from the sale of the sugar from cane on the Carroll place was credited on Bancker's account before service of the writ of sequestration, and that Hernandez did not know that the rental was still unpaid. He testifies: "Question. Did you know as a matter of fact that Mr. Bancker had not paid the rental to D. R. Carroll for the lease of the plantation? Answer. I did not, sir." No other witness testifies as to this matter except Bancker, who corroborates Hernandez. Relative to undue haste in selling the crop, the only witness is Hernandez himself, who was called in and examined as a witness for D. R. Carroll, plaintiff, and testified that he did not know whether the sugar came from the plantation of Bancker or from that of plaintiff, and that he sold it on its receipt, as he sold other crops. On the trial of the rule, which was afterwards discontinued, the counsel for Hernandez admitted, "for the purpose of this rule, but not as a matter of fact, that the sugar received from Mr. Bancker by Mr. Hernandez was received by him on the days on which it was shown to have been sold, and that such date was the date of shipment from Mr. Bancker's plantation."

ON THE MERITS.

Plaintiff has not argued that the 15 days had not elapsed after the removal of the crop. That fact is referred to in his brief in the following terms: "While it is true that plaintiff did not assert his rights within fifteen days after the removal of the cane from the plantation, it is likewise true that when he did assert his rights it was not by the application of the conservatory writ of provisional seizure." The question for solution is whether a lessor can recover the lessor's privilege, 15 days after removal, on sugar and molasses consigned by the planter, in due course of business, to his merchant, to whom he is indebted for more than the amount of his crop. The plaintiff contends that the second section of Act 66 of 1874 provides for the shipment of the crop by the farmer, and the right of the consignee to sell the property and to appropriate the proceeds of the sale to payment of amount due for such advances as may have been made thereon, but that the effect of the section is therein limited "so that nothing shall be construed so as to defeat or lessen the privileges of the laborers and landlord in this state for wages and rent by lien," and in argument directs attention to the fact that the act of 1874 was amended in 1882 by extending the reservation, so that the removal of the property and its consignment to the merchant would not have the effect of defeating or lessening "any other valid existing privilege or lien." Act 44 of the Acts of 1882, p. 56. These statutes have not added to the security of the lessor, nor have they repealed article 2709 of the Civil Code. "In the exercise of this right the lessor may seize the objects which are subject to it before the lessee takes them away, or within 15 days after they are taken away, if they continue to be the property of the lessee, and can be identified."

The effect of removal of property subject to the lessor's lien has received consideration in a number of decisions. In Denistoun v. Malard, 2 La. Ann. 14, relied upon in support of the proposition that the privilege held after the 15 days have elapsed since the removal of the property, the court held that those who opposed the lessor's lien could not place themselves in a better position by fraudulently removing the goods beyond the landlord's reach and frustrating search. The goods had been clandestinely removed in the nighttime by one who was not a purchaser in good faith. The plaintiffs, by supplemental petition, made the purchasers parties to the suit, and charged that the assignment was a fraudulent preference to deprive them of the landlord's lien. The court decided that it was a fraudulent preference by an insolvent debtor, and that there was, besides, a breach of good faith towards the landlord, and a violation of his rights in the removal of the goods, and that the object of the removal was to defeat the lien. There is marked dissimilarity between that case and the case at bar. The latter is not revocatory action. It is not alleged that the defendant is insolvent. It is not proven that the party "with whom the debtor contracted was in fraud as well as the debtor." Civil Code, art. 1982. In Desban v. Pickett, 16 La. Ann. 350, it was decided, on the authority of article 2709 of the Civil Code, that the lessor's right of privilege for the payment of rent on the movable effects of the lessee was extinguished by the removal and sale of the effects of the lessee for a valuable consideration, although 15 days between the removal by the lessee and the seizure by the lessor had not expired. Similar conclusion was reached in Hotel Co. v. Tarbox, 23 La. Ann. 715. In Washburn v. Frank, 31 La. Ann. 427, the testimony proved that the property was removed to defraud the lessor, and that a simulated sale was made to defeat the privilege. If the plaintiff had proven the allegations of fraud, these decisions would apply, and our conclusion

would be different. Without any evidence of fraud the court will not order an amount realized on a crop openly manufactured, and placed on the market to be paid by the pledgee to the lessor, who remained inactive until several days after the sale. Reverting to the decisions quoted, why would the court dwell upon the issue of fraud, and decide it, if the landlord's privilege is not limited to 15 days after removal? With or without fraud, it would be subject to the privilege, and there would be no necessity to prove it in order to recover. The consignment of the crop cannot have the effect of defeating or lessening "any other valid or existing privilege or lien." The sale was made, and the proceeds credited, before any rights were asserted. This presents the insurmountable difficulty to the recovery of plaintiff's claim. The sale of this crop was not made *pendente lite*, in so far as Hernandez is concerned. If it be conceded that the mere notice given on the 3d of December was sufficient to bring the property within the grasp of the law, although no copy of petition nor citation were served on the merchant,—only a notice of a writ issued as against Bancker,—it is made manifest by the uncontradicted testimony of the only two witnesses who testified with reference to that matter that the crop from the Carroll place had been sold before this notice was given, and at least four months before Hernandez was cited. The writ of sequestration issued in the usual form in a suit by plaintiff against his lessee. In executing the writ, the notice given to a third person will not make him a party to the suit, and compel him to deliver the proceeds of property properly sold, and for which he contended he held a superior claim. The plaintiff earnestly contends that the lessor's privilege is to be construed as in the seizure of property by the sheriff on which the lessor has a privilege. That officer holds the property or the proceeds of its sales subject to the legal rights of the creditors. It is, in that case, the possession of the law for the protection of their rights. It is not in commerce to the detriment of the creditors, but is held that their rights may be determined. In any case a privilege is lost if the property can no longer be identified. When, in due course of business, property is sold, and the proceeds are applied to the payment of a pledge to a creditor, without objection, after the 15 days succeeding its removal, articles 2709 of the Civil Code, and 288, Code of Practice, apply.

When the case was tried on its merits the following entry was made: "Counsel also offers and introduces in evidence the testimony of Chas. H. Hernandez, taken in this suit in open court on January 21st, 1887," *i. e.*, the testimony received on the trial of the discontinued rule. We have not given any effect to this admission, for the reason that it was part of the evidence on a rule discontinued. An admission is not reproduced when the testimony of a party to the suit is offered and admitted without any reference to the admission of counsel on the trial of a previously discontinued rule. The offer of the testimony of a witness taken in another case does not carry with it an admission by counsel of record. It was not the evidence of the defendant in rule that was admitted, but his testimony as a witness. "The testimony is a species of evidence by means of witness." The broader term "evidence" includes that which is given by witnesses, or offered by documents. If the admission on rule were before the court, what would it prove? That for the purpose of the trial of the rule, not as a matter of fact, "the sugar was shipped from Bancker plantation the day it was received and sold by Hernandez." The admission must be given effect as a whole, and which amounts to the following: That not as a matter of fact, but for the purpose of the trial of the rule, sugar was shipped, etc. This does not conflict with the testimony of the uncontradicted witness that the crop was removed from the plaintiff's place more than 15 days before it was shipped to the merchant. The plaintiff's privilege was lost.

On application for rehearing by plaintiff on oral argument, the case having been considered, the previous decree of this court may be set aside, and the case decided without granting a rehearing. It is now ordered, adjudged, and decreed that our former decree be set aside, and that the judgment of the district court appealed from is affirmed, at appellant's costs.

WATKINS, J., (*dissenting.*) This case presents a controversy between Carroll, as the lessor of Bancker, and Hernandez as the factor; and as the proceeds realized from the products raised on the leased premises are insufficient to pay both, the question for decision is whether the former is entitled to preference in receiving payment therefrom over the latter. Bancker shipped his entire crops of sugar and molasses to Hernandez for sale, and when sold, they realized $1,845.14. Sales of products were made antecedent to the institution and service of this suit, but notification thereof was not given to Bancker until afterwards. At date of suit Carroll's rent was due, but the supply account of Hernandez was not; therefore, when suit was filed, no application of the proceeds had been made, or could have been made, by Hernandez; but same were in his hands, as the factor and agent of Bancker, his customer. Hernandez's claim and pretension are that he had applied the proceeds to his supply account, though subsequent to his being notified of Carroll's suit, and, confessedly, before his account was due. Hernandez has no legal right to thus appropriate to himself the identical thing which is involved in Carroll's suit, *pendente lite*. Rev. Civil Code, art. 2543; Act No. 4 of 1878. Hernandez's relation to the proceeds in his hands was that of factor of Bancker. Lallande v. His Creditors, 42 La. Ann. 705, 7 South. Rep. 895. We must therefore deal with the proceeds in his hands in the precise situation they were at the date Carroll served Hernandez with notice. Now, what was that situation? On the 9th of June, 1886, Bancker executed an act of pledge in favor of Hernandez upon

the crops to be grown on the plantation he had leased from Carroll, knowledge of which Hernandez confessed in the act. In that act Bancker contracted to ship the crops to Hernandez, and authorized him to sell the same and apply the proceeds to his account. This act was drawn in pursuance of the terms of the act of 1874, which confers upon the factor a right of pledge subordinate to the lien of the lessor under the provisions of the Civil Code, for that statute declares that nothing therein "shall be so construed as to defeat or lessen the privilege of the landlord for rent." Hence it is clear that the stipulations of the act were binding on the parties, but not on Carroll, the lessor; the pledge of the act being subordinate to the privilege conferred by the law on the landlord for rent of land. Therefore the question is, can the lessor's lien be defeated by a removal of the crops from the leased premises by the lessee, their shipment to his factor, and his conversion of them into proceeds?

1. Claiming the right to apply the proceeds to his account against Bancker by reason of the pledge he acquired under the act of 1874, Hernandez seeks "to defeat or lessen the privilege of [Carroll] the landlord, for rent," in direct violation of its express prohibition. Notwithstanding the Code of Practice declares that the lessor's lien may be enforced against the objects affected by it "in the hands of third persons" within 15 days after removal from the leased premises, it does not declare that same cannot be seized after the lapse of 15 days if same continue to be the property of the lessee, notwithstanding their removal from the leased premises. Surely such would be an absurd declaration for the Code to make, because the property of an ordinary debtor may be seized, anywhere it is found, under ordinary process; and it is not readily perceived why the law should place the lessor at so great a disadvantage as this suggestion would imply. Hernandez does not possess the products or their proceeds as owner, but as the factor of Bancker, his customer. Lallande v. His Creditors, 42 La. Ann. 705, 7 South. Rep. 895. At the date of service Hernandez had not applied them to his account, and he was not permitted to do so afterwards. Rev. Civil Code, art. 2543. Bancker's indebtedness was not then due. Hernandez was not a third person in respect to Carroll or Bancker; and Hernandez cannot interpose his possession as factor with any greater show of success than Bancker could against the demands of Carroll, his lessor. Rev. Civil Code, art. 2709; Code Prac. art. 288. Whatever judicial opinion may have prevailed in respect to the provisions of the Codes, it is certainly true that Hernandez cannot claim any precedence over Carroll, under the prohibitive terms of the statute on which he founds his right. It is of no importance to inquire whether 15 days had elapsed or not, for the act declares that its provisions shall not be so construed as to defeat or lessen the privilege of the landlord for rent of land. Whatever may be the measure of protection accorded to third persons and *bona fide* purchasers by the provisions of the Codes, it is quite certain that the act of 1874 accords none to the factor over the lessor's lien for rent. Hernandez cannot escape the prohibition of the act. It was not in the power of Hernandez and Bancker, by any covenant of theirs, to defeat or lessen Carroll's lien for rent, neither by the pledge of the crops, their shipment, sale, nor application of their proceeds, all alike coming under the effect of the prohibition of the statute. Hernandez's conversion of the products into proceeds which remained in his hands as factor of Bancker, did not impair Carroll's right. In my opinion, Dennistoun v. Malard, 2 La. Ann. 14, is applicable to the question at bar. It appears that the plaintiff leased a small shop to Malard, who, being in insolvent circumstances, made a sale of his stock to certain of his creditors, without paying his rent. The court say: "We entirely agree with the judge of the lower court in the conclusion to which he came, both that the assignment was a fraudulent preference by an insolvent debtor, and that there was, besides, a breach of good faith towards the landlord, and a violation of his rights, in the removal of the goods. We consider the court below was justified in the opinion that the agent of the [creditors of the lessee] was aware that the lessor had not been paid, and that the object of the removal was to defeat [the lessor's] lien. It is said that the lien was gone, because it was not exercised within the fifteen days, by a levy on the property. * * * It is clear that the landlord's lien is superior to that of the vendor who has made delivery, and it cannot be contended that [the creditors of the lessee] could place themselves in a better position by fraudulently removing the goods beyond the landlord's reach, and frustrating his search. To recognize such a doctrine would be to say that a party could, by his own wrong, place a fair creditor *in duriori causa*." While it is true that Hernandez did not possess himself of the crop of Bancker fraudulently, but through the instrumentality of his contract of pledge, he is none the less attempting to breach the contract rights of Carroll, the lessor of Bancker, by appropriating their proceeds, in direct violation of the statute. Hernandez knew of Carroll's lease to Bancker, as it was mentioned in the act of pledge to him. He must have known that Carroll's rent had not been paid, as the total proceeds of Bancker's crops are in his hands. It is manifest that in thus attempting to impute said proceeds to his own account Hernandez sought to defeat the claim of Carroll for rent, in spite of the act of 1874, and as this court said Malard and his creditors could not do. It was of no consequence that the 15-day limit had expired. Hernandez does not possess as owner, and is not, in any sense, a third person. He was in duty bound to abide, as a faithful agent and custodian, the prohibition of the statute, and deal fairly by the landlord, of whose rights he was advised.

2. Hernandez founds his right of detention of the proceeds exclusively on his con-

tract of pledge under the planter's act of 1874. That act confers only the right of pledge, for it says "that, in addition to the privilege now conferred by law, any planter or farmer may pledge his growing crops of cotton, sugar, or other agricultural products for advances of money, goods, and necessary supplies, * * * which recorded contract shall give and confer on the merchant or other persons advancing money, goods, and necessary supplies for the production of said agricultural products a right of pledge upon the crops," etc. Section 1, Act 66 of 1874. It confers no lien or privilege whatever. This pledge is, in turn, subordinate to the lessor's lien under existing laws, for it says: "Nothing herein shall be so construed as to lessen or defeat the privilege of the laborers and landlords in this state for wages and rent, as now existing by law." Id. § 2. What, then, is the lien which the law then existing conferred on a lessor? The Civil Code declares it to be a privilege on the crops of the year. Rev. Civil Code, art. 3217. But, in addition to this privilege, the law declares that the lessor has "for the payment of his rent," etc., a right of pledge on the movable effects of the lessee, etc. Rev. Civil Code, art. 2705. "Privilege" and "pledge" are totally different things, for the Code says: "'Privilege' is a right the nature of a debt gives to a creditor, and enables him to be preferred before other creditors, even those who have mortgages," (Rev. Civil Code, art. 3188;) "but a 'pledge' is a contract, by which a debtor gives something to his creditor as a security for his debts." Rev. Civil Code, art. 3133. Therefore the effect of the act of 1874 on the farmer was to authorize him to pledge in advance a growing crop to his factor for future advances, and to remove them from his plantation to ship same to said factor for sale, although the plantation be one the farmer has leased. To this extent the statute enables the planter to impair or lessen the landlord's right of pledge, just as an ordinary creditor of the lessee might do by effecting a seizure under a *fi. fa.*, and making sale of crops pledged to a lessor. To this extent the provisions of the Civil Code are amended by implication. But the statute does not enable a planter or factor to defeat or lessen the landlord's lien on the crops or their proceeds. The right of any ordinary creditor to seize and sell crops that are stricken with a lessor's pledge, and convert them into proceeds, and thus relegate the landlord to the assertion of his lien thereon by way of this opposition, is "every-day practice," and it is sustained by numerous authorities. On this question it is only necessary for me to cite the case of Pickens v. Webster, 31 La. Ann. 870, wherein all adjudicated cases were collated and compared, and in which the court with deliberation held and affirmed the correctness of this doctrine. The interpretation which our original opinion places upon the act of 1874 rests upon the same foundation as those authorities do. The true conception of the legislature in adopting that statute appears to have been to enable the planter, under the exceptional circumstances stated therein, to ship his crops to market, and his factor to sell same and convert them into proceeds; but in so doing it did not intend to authorize either "to defeat or lessen the landlord's lien for rent." Under the provisions of this act the landlord's rights and remedies are precisely the same as though the crops had been seized and sold under *fi. fa.* and the proceeds placed in the custody of the sheriff. In lieu of such legal custody the act of 1874 supplies the trust of the factor. In no case or event does either a lien or right of pledge prevent a sale of the thing pledged or affected thereby, for the Code says: "The pledgee acquires the right of possessing and retaining the movable which he has received in pledge as a security for his debt, and may cause it to be sold." Rev. Civil Code, arts. 3165, 3220. These are the articles which authorize an ordinary creditor to seize and sell pledged goods and effects, as the act of 1874 does the factor of the lessee; and thereby the creditor's lien on the thing in each case is not extinguished, but transferred to the proceeds, which may be distributed ratably and *in concursu*. In construing these provisions the court said, in Robinson v. Staples, 5 La. Ann. 712, that "article 2675 [the present article being 2705 of the revised edition] of the Civil Code declares that the lessor has, for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee. * * * The right to levy a provisional seizure, even before the rent be due, is given by the statute of 1839 to the lessor who has reason to believe that his tenant is about to remove his property. We do not consider this statute as creating the privilege, but as providing a conservative remedy for its enforcement. It is not, therefore, well argued by plaintiffs' counsel that the lessors cannot have their privilege in this case, because they did not make a provisional seizure under the statute." In that case the landlord's lien was recognized and enforced on the proceeds in the sheriff's hands, and, under the statute of 1874, Carroll is equally entitled to take them from Hernandez.

3. In my opinion, the 15-day limit fixed in the Civil Code exclusively relates to the pledge of the landlord, and not to his lien and privilege for rent. It says: "The lessor has, for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the premises leased." Rev. Civil Code, arts. 2705, (2675.) In a subsequent article, in the same connection and chapter, it says: "In the exercise of this right the lessor may seize the objects which are subject to it before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified." Rev. Civil Code, art. 2709, (2679.) The words of this last article, to-wit, "in the exercise of this right," clearly refer to "the right of pledge," mentioned in the former article. The lessor's privilege is not mentioned anywhere in the title "of lease" in the Code. The *gravamen* of said two articles is that the right of pledge may be exercised within 15 days if the property continues to be that of the lessee,

which, under those articles, is a *sine qua non*. Those articles confer no right of enforcing this conservative remedy against goods which have been alienated by the lessee. This is the law of pledge. It is the Code of Practice which confers on the lessor the right to provisionally seize the goods of a lessee in the hands of a third person within 15 days. That is a method of procedure in the enforcement of the lien of the lessor, and not a matter of law. That such is the case, the decisions that are quoted in the present opinion of the court will attest, for in Desban v. Pickett, 16 La. Ann. 350, the court said: "The right of seizure after removal is made to depend upon the continued ownership of the lessee." The same is true of the case of Hotel Co. v. Tarbox, 23 La. Ann. 715, in which the court said: "In this case the evidence shows that the furniture claimed by the intervenors had ceased to belong to the lessee;" citing Desban v. Pickett. According to my reading of those two cases, there is nothing therein to indicate that seizures were made after the lapse of 15 days, and hence there could have been nothing decided therein in reference to the extinction of the lessor's lien on that account. Those cases turned exclusively on the fact of sale having been made by the lessee, and, as it is not pretended that Bancker has disposed of the proceeds of his crops to any one, those decisions do not apply to the case at bar against the lessee's agent. How can a mere failure to exercise a remedy provided by the Code of Practice, which is merely permissive,—"may seize, even in the hands of third persons," says Code of Practice, art. 288,—extinguish a privilege which the nature of the debt confers upon the lessor? Surely, the debt itself is not thus extinguished, and the effects which are stricken with a lessor's lien may be removed before the debt falls due. If it be true, as the court decided in Dennistoun v. Malard, that a lessor's lien could be successfully asserted against movable property after the expiration of 15 days, because it had been fraudulently removed; if it be true, as the court held in Pickens v. Webster, that an ordinary creditor can break the lessor's pledge by a seizure under *fi. fa.*, and relegate the lessor to the proceeds; if it be true, as the court held in Robinson v. Staples, that the Civil Code, art. 2705, does not confer a privilege, but a right of pledge, only, as a conservative remedy for the enforcement of a privilege,—what becomes of the theory that the property affected with a lien must be seized within 15 days, or it is lost? But those decisions are in perfect keeping with the Civil Code, which declares, viz.: "Privileges become extinct (1) by the extinction of the thing subject to the privilege; (2) by the creditor acquiring the thing subject to it; (3) by the extinction of the debt which gave birth to it; (4) by the prescription [of the debt.]" Rev. Civil Code, art. 3277. Unless a sale be considered the extinction of a thing stricken with the lessor's lien and right of pledge, the lien of Carroll has not yet become extinct. If that be true, however, then all those cases were necessarily decided wrong. That principle which, in those cases, the courts decided as a matter of jurisprudence, was, in the act of 1874, consecrated as matter of law, viz., that its provisions should not be so construed as to defeat or lessen the lien of the landlord for rent. It is that principle which, in my opinion, the present decision of the court sets at naught.

4. But conceding, for the argument, that all of the foregoing propositions are not well-grounded in law, and that the failure of the landlord to assert his privilege on Bancker's crops within the 15-day limit was fatal to his claim, let me examine and see how the case stands in point of fact. The contention of Hernandez's counsel is that the evidence shows that the crops of Bancker, grown on the premises he leased from Carroll, had been removed more than 15 days when Carroll's suit was filed. The statements of Bancker in some respects give color to this contention; but the admission of Hernandez (the purport of which is given in the original opinion) negatives its effect, and it is binding on him.

(*a*) Counsel for Hernandez denies the force and correctness of his alleged admission; and he also denies that such admission was offered and filed in evidence on the trial of the merits of the cause. The present opinion of the court accedes to this view; and as the only fair way of reconciling conflicting statements of fact is to refer to the transcript, I will submit to that test the accuracy of the statement contained in the original opinion of the court. On the 21st of January, 1877, certain testimony and notes of evidence "were taken by E. M. Brewer, stenographer, in behalf of Carroll, plaintiff in rule, in presence of H. L. Edwards, counsel for plaintiff, and Charles S. Rice, counsel for defendant. The notes of evidence show that "Mr. Charles Hernandez," witness, was "called on behalf of plaintiff in rule," and was duly sworn on "direct examination." Same witness was cross-examined. At the conclusion of that witness' cross-examination, on page 13 of the transcript, is to be found the following admission, viz.: "For the purpose of this rule, but not as matter of fact, it is admitted that the sugar received from Mr. Bancker by Mr. Hernandez was received by him on the days on which it was shown to have been sold, and that such date was the date of shipment from Mr. Bancker's plantations." Then follows immediately this phrase: "Mr. Hernandez, recalled. By Mr. Edwards." All of this transpired on the 21st of January, 1887, on the trial of plaintiff's rule; and on the 17th of June, 1890,—just two days prior to the date of the judgment that is appealed from,—the following occurred, viz.: "Counsel offers and introduces in evidence, on behalf of Charles Hernandez, the account marked 'A,' with reference to his evidence. * * * Also offers and introduces in evidence the testimony of Charles Hernandez, taken in this suit in open court on January 21st, 1887. Both sides closed." The foregoing is an exact reproduction of extracts from the transcript, and I candidly and confidently submit that said admission formed part of the defendant's

evidence on the trial of the rule. It is physically incorporated in it, and, as such, appears in the transcript. On the trial of the merits of this case the testimony of Hernandez, taken on the trial of the rule, was offered and filed in evidence on his behalf, though the rule has been discontinued. This is shown by reference to name, date, and case; and across the face of the evidence is plainly written this indorsement, viz., "Filed June 17th, 1890;" corresponding with the minute entry quoted above. If there is any escape from the conclusion that said admission was offered and filed in evidence on the trial of the merits, I am at a loss to discover where it is.

(*b*) But learned counsel is pleased to submit that the so-called "admission" was, in point of fact, no admission at all; and, with apparent seriousness, immediately quotes statements selected from the brief of plaintiff's counsel as completely binding on him. That an admission of defendant's counsel made in open court, in the presence of his client, then on the witness stand, incorporated in his written testimony, and brought up in the transcript, unaccompanied by any statement of error, does not bind the defendant, while a statement of fact, volunteered by counsel for plaintiff in his brief, is conclusive on his client; that the declaration that because an admission of record is prefaced by the words, viz., "For the purpose of this rule, but not as a matter of fact, it is admitted," etc., it is not the admission of any fact, — are propositions I can neither appreciate nor argue.

(*c*) But further conceding, for the argument, that all we have said is unfounded, and how does the case stand on the evidence of Hernandez and Bancker? Let us see. Bancker testified as follows, viz.: "Question. How many days are occupied from the time the cane is laid down at the sugar-house until the sugar is ready for shipment, — necessarily occupied in the manufacture of sugar before it is ready for shipment? Answer. From seven to nineteen days." This is from his direct examination in behalf of Hernandez. Again: "Question. When did you ship this sugar you made on Carroll's place to Hernandez? You testified that the last shipment was off the Bancker place. Now, I wish you would fix the date of the last shipment you made of sugar made from the cane raised on the Carroll place. Answer. From the 9th to the 24th of November." Again: "Question. How, then, could you, by looking at the account, distinguish it from the molasses made on the Bancker place? Answer. For the reason that I shipped all the sugar and molasses from the Carroll place before I ground the cane on the Bancker place. Q. When was the first shipment made from the Bancker place? A. Made on the 29th of November." Again, (on cross-examination, he said:) "Question. From the time the sugar left, on the 29th and 30th, to the 3d of December, it was not fifteen days? Answer. No, sir. * * * By Mr. Rice: Q. All the sugar on the 29th and 30th and thereafter, was from Mrs. Bancker's plantation? A. Yes, sir." Inasmuch as from seven to nineteen days are required for the manufacture of sugar ready for shipment, and from the fact that the last shipment of sugar and molasses from the Carroll place was made between the 9th and 24th of November, it does not affirmatively appear that any part of same was either manufactured off the Carroll place or shipped therefrom more than 15 days prior to the institution of this suit on the 3d of December, 1886. But, inasmuch as Bancker admits that the first shipment from his wife's plantation was made on the 29th of November, it is thereby tacitly admitted that all sales antecedent to the 30th of November were made of the crop raised on the Carroll plantation. The burden of proof being on Hernandez, it was his duty to have made out this defense clearly and satisfactorily. When interrogated on this question, he said: "Question. Did you receive any sugar from the plantation owned by Mr. Carroll from the parish of St. Martin, leased by George W. Bancker, during any day within fifteen days dating from the 3d of December? Answer. I would have to refer to my books to be able to answer that question, though my account will show it." Recurring to Hernandez's account, to be found on pages 60 and 62 of the transcript, and we find and extract therefrom the following *data*, to-wit:

November	22.	By 11 barrels of molasses..	$	84 37
"	23.	" 6 " "		45 61
"	26.	" 12 " "		120 24
"	26.	" 6 hogsheads of sugar..		182 88
"	27.	" 10 " "		302 47
"	27.	" 6 barrels of molasses..		71 53
"	29.	" 9 hogsheads of sugar..		220 91
		Aggregate value.....		$1,028 01

This is the identical amount that is stated in the original opinion to be "the net amount realized from crops which were shipped from the Carroll place, within fifteen days previous to the institution of this suit and notification to plaintiff's writ to Hernandez, and the sheriff's demand on him for the crops or their proceeds." It was on that evidence that our original opinion proceeds, though it was not therein reproduced, as it now is. I respectfully submit that, whatever may be said on the question of law in reference to that part of the crops that was shipped antecedent to the 15-day limit, Carroll is at least entitled to judgment for $1,028.01 as the amount of proceeds of that part of the crops that was shipped from his plantation within said limit. I therefore adhere to the views expressed in the original opinion of the court, and dissent from those expressed in the present opinion of the court.

(43 La. Ann. 1059)

STATE *ex rel.* CANION v. HALL, Judge.
(No. 310.)

(*Supreme Court of Louisiana.* Oct. 22, 1891.
43 La. Ann.)

WRIT OF PROHIBITION—REVIEW.

In the exercise of the supervisory jurisdiction over inferior tribunals this court will not investigate the intrinsic merits of a controversy.

(*Syllabus by the Court.*)

Appeal from district court, parish of De Soto; W. P. HALL, Judge. Writ denied.

Application by Charles Canion for a writ of prohibition.

Wm. Goss, for relator. *W. P. Hall, in pro. per.*

MCENERY, J. The defendant was indicted for violating a labor contract, under Act 138 of 1890. He moved to quash the indictment for several reasons. The motion was dissolved. He now applies for a writ of prohibition to arrest further proceedings in the case. It is not denied that the court had jurisdiction of the case. No irregularity is shown in the progress of the trial. It is elementary that in the exercise of supervisory jurisdiction over inferior tribunals the intrinsic merits of the case will not be investigated. It is therefore ordered that the relief prayed for by relator be denied, and that the rule granted herein be discharged.

(43 La. Ann. 1013)

ZEIGLER v. THOMPSON, Sheriff. (No. 298.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

LEVEE TAXES—ASSESSMENT AND LEVY—POWER OF POLICE JURY.

Act 33 of 1879 constituted Bossier parish a sublevee district, and authorized the police jury to discharge the duties of levee commissioners. Under this authority it levied a tax of 10 mills for the erection and repairs of levees. *Held*, that this power was withdrawn from the police jury by the adoption of the constitution of 1879, and has never been restored to it, with the exception of the power to repair and protect completed levees; that article 214 of the constitution did not authorize the police jury of Bossier to levy the tax, as the police jury could not act as a board of levee commissioners.

(*Syllabus by the Court.*)

Appeal from district court, parish of Bossier; J. T. BOONE, Judge. Reversed.

Suit by S. J. Zeigler against A. R. Thompson, sheriff, and *ex officio* tax collector, for an injunction. Judgment for defendant. Plaintiff appeals.

Land & Land, for appellant. *J. A. W. Lowry*, Dist. Atty., for appellee.

MCENERY, J. Act No. 33 of 1879 established certain levee districts in the state. The parish of Bossier was not put in any district, but the act provided that it should be a subdistrict, and that the police jury should discharge the duties incumbent upon the levee commissioners in the districts established by the act. The police jury in the several districts were charged with the care and preservation of completed levees. Under Act 33 of 1879, the police jury of Bossier parish levied a tax of 10 mills for the year 1890 on the property situated in the alluvial portion of said parish, to construct and repair levees. Real and personal property owned by the plaintiff was assessed and advertised for sale to enforce the collection of said tax. He enjoined the sale of his property, on the ground that the tax was illegal and unconstitutional, violating articles 209 and 214 of the constitution of 1879. Under Act 33 of 1879 police juries had no power to build levees. They were only intrusted with the care and the preservation of levees constructed by the state, and turned over to them. A fair construction of the act conferring upon the police jury of Bossier the duties of levee commissioners would confine these duties to the care and preservation of completed levees. In the case of Surget v. Chase, 33 La. Ann. 838, we said: "Previous to the legislation contained in Act No. 20 of 1866 and Act 115 of 1867, the police juries in this state were vested with all powers relating to public levees, but from that time to the date of the adoption of the constitution of 1879 this power was absolutely withdrawn from them, and was never restored to them, with the exception of the power to repair and protect completed levees. No greater power on the subject was conferred by Act 88 of 1880." And in the same case we said "that any legislation which would have attempted to confer on police juries the power to build public levees and to levy special taxes for the costs of building levees would be glaringly unconstitutional, and could not be enforced by the courts, unless the authority be found in articles 209 or 242, on which we express no opinion now." It is necessary that police juries exercising the taxing power should point to some authority to justify them in so doing. This levy is a special tax of 10 mills, under amended article 214 of the constitution of the state. This article authorizes the commissioners of the levee districts to levy the tax. It does not give the power to police juries. Police juries are subordinate political corporations of the state. Their duties and powers are specially limited by the constitution of 1879, and their powers cannot be enlarged beyond the limitations therein expressed. They cannot be made levee commissioners, because it would destroy their organization as police juries, and be conferring upon them a dual capacity, totally in violation of the spirit, if not the text, of the constitution. It was contemplated by article 214 of the constitution that levee districts should be distinct corporations, with special powers, entirely separate from the political corporations of the state. They are administered by commissioners, who have the power alone to levy the district tax, and who alone have the authority to build levees under legislative sanction. We do not intimate that the levee districts have such control of the levees as to exclude the paramount authority of the state, nor do we intimate that the legislature cannot make one parish a levee district under article 214 of the constitution. We therefore conclude that the police jury had no legal mandate to levy this tax, and that all its proceedings in attempting to levy and collect the same were without legal authority, and thereby unconstitutional, null, and void. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed, and it is now ordered that the ordinance of the police jury of Bossier parish levying a special tax on the property situated in the alluvial portion of said parish be declared unconstitutional, null, and void, and that the defendant tax

collector be perpetually enjoined from collecting said tax, and that he be condemned to pay the costs of both courts.

(43 La. Ann. 1001)

STATE v. SPILLMAN. (No. 308.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

CRIMINAL LAW—CONTINUANCE—EVIDENCE—HARMLESS ERROR.

1. The refusal of a continuance on the ground of an absent witness will not be interfered with, when the testimony does not touch the issue of guilt or innocence, but only goes to impeach the testimony of an expected witness for the state, who has not testified, may not testify, and, if testifying, may admit the facts charged against him.

2. The exclusion of testimony entirely foreign to the issues of the case, and offered to show the *animus* of opposing witnesses, will not be held as impairing the proceedings, when the possibility of injury therefrom is remote and insignificant.

(*Syllabus by the Court.*)

Appeal from district court, parish of Caddo; A. W. O. HICKS, Judge. Affirmed.

Indictment of Humphrey Spillman for larceny. Defendant was convicted, and appeals.

John W. Jones, for appellant. *J. Henry Shepherd*, Dist. Atty., for the State.

FENNER, J. The appeal stands on two bills of exceptions. The first is taken to the refusal of the judge to grant a continuance grounded on the absence of a witness by whom, the affidavit of defendant states, "he expects to prove, and can prove, that the witness Y. I. Dowden said to him, at different times, that he would compromise the suit, and not appear and prosecute the same, if he would pay him fifteen dollars; that he was the prosecutor in the case, and that he was mad at the time he made the arrest, and that if he would pay him fifteen dollars he would not appear before the grand jury to prosecute the case." The indictment was for larceny. It is manifest that such evidence does not bear on the material question of defendant's guilt or innocence. The utmost effect it could have would be to impeach the testimony of the state witness referred to. The same facts, if true, might have been proved by that witness himself. If questioned, he may have admitted them, which would have rendered the testimony of the absent witness superfluous. The record does not advise us whether the state witness referred to was questioned on the point, and what his answers were. We cannot interfere with the large discretion vested in the trial judge in refusing a continuance on such a ground, where the evidence of the absent witness does not touch the question of guilt or innocence, but only tends to impeach the testimony of another witness who had not yet testified, might never testify, or, if testifying, might admit the facts charged. If injury did result to defendant from the absence of his witness, it might have been made to appear on a motion for new trial.

The second exception arraigns the exclusion, by the judge, of evidence of a witness to the effect that he was arrested by two of the state witnesses while on the road in charge of a loaded wagon and team, and that they refused to allow him time to provide for the wagon and team, but brought him away, leaving them standing on the road. The evidence was offered to show the *animus* of the witnesses, and to weaken the effect of their evidence. The testimony is utterly foreign to the issues of the case, and the possibility of injury from its exclusion is too remote to demand consideration. People who arrest a man for stealing their property are not usually animated by very kind feelings towards him. Judgment affirmed.

(43 La. Ann. 1016)

PRATT, Tax Collector, v. HOLMES. (No. 301.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

APPEAL—JURISDICTION.

In the absence in the pleadings, when the amount is less than $2,000, of any suggestion as to the legality or constitutionality of the tax, the appeal will be dismissed.

(*Syllabus by the Court.*)

Appeal from district court, parish of Webster; J. T. BOONE, Judge. Dismissed.

Action by D. W. Pratt, tax collector, against J. J. Holmes. Judgment for plaintiff. Defendant appeals.

Drew & Stewart, for appellant. *Watkins & Watkins*, for appellee.

MCENERY, J. The defendant is sued for a license tax for carrying on the occupation of broker. He answers, denying that he conducts a brokerage business. There is no issue suggested by the pleadings in any way involving the legality or constitutionality of the tax. There is only a question of fact at issue, whether or not the defendant conducts and carries on the business for which the license is demanded. Article 81 of the constitution as amended; State v. Frank 42 La. Ann. 225, 7 South. Rep. 674. The amount involved is less than $2,000. It is therefore ordered that the appeal be dismissed.

(43 La. Ann. 1049)

LEVY v. WINTER. (No. 307.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

PLEDGE—POSSESSION BY ONE OF TWO PLEDGEES—RIGHTS OF PLEDGEES.

1. In case a single collateral is pledged by two separate and distinct contracts to two creditors, whose claims aggregate the value of the collateral, possession by one is a possession for the benefit of the other, and in this respect each is the agent of the other *pro hac vice*.

2. Suit brought by one creditor against a common debtor, seeking the collection and application of the proceeds of the collateral to the extent of his demand, does not affect or impair the rights of the other as to his.

(*Syllabus by the Court.*)

Appeal from district court, parish of Caddo; S. L. TAYLOR, Judge. Affirmed.

Action by Simon Levy, Jr., against William Winter. Judgment for defendant. Plaintiff appeals.

Land & Land, for appellant. *Wise & Herndon*, for appellee.

WATKINS, J. This is a suit for the recovery and restitution of certain sums of money the plaintiff claims to have paid the defendant in error under the circumstances related in his petition. A certain promissory note for the sum of $7,000, drawn to the order of and indorsed by S. N. Ford, and payable at a future date, was by the maker and indorser delivered to one Adolph Cahn as a collateral security for Ford's indebtedness to Cahn of something more than $3,500. Levy v. Ford, 41 La. Ann. 873, 6 South. Rep. 671. Subsequently Ford pledged this note, which was secured by special mortgage, to the present defendant, with Cahn's consent, thereby intending to secure, with the surplus in excess of Cahn's claim against Ford, certain indebtedness of W. P. Ford and S. N. Ford to him, and also the indorsement of S. N. Ford on the Borquin rent-notes that were antecedently pledged to said defendant. Levy v. Ford, supra. Cahn brought suit against Ford for the foreclosure of that mortgage, and joined Winter as a co-defendant, and prayed for judgment attributing the proceeds of sale to the payment of his debt by preference. To this prayer the defendants in that suit made no objection. Levy, the present plaintiff, intervened, and, denying Cahn's ownership of the mortgage collateral, alleged that he had an interest in having it adjudged that Winter be preferred to Cahn in the distribution of the proceeds, and he prayed judgment to that effect. In this court it was held that the question of preference in payment was one purely personal to Cahn and Winter, and with which Levy had nothing to do, and the demands of Levy were rejected. Cahn v. Ford, 42 La. Ann. 965, 8 South. Rep. 477. During the pendency of this suit the mortgaged property was sent to sale under a junior mortgage held by Levy, and it was purchased by him at the price of $12,500, of which he retained the sum of $7,000 and upwards, to meet taxes and prior incumbrances. Out of the remainder of this sum he paid Winter $1,547.75 on account of the indebtedness of W. P. and S. N. Ford, and the further sum of $1,558.37 on account of S. N. Ford's indorsement of the rent-notes. These are the sums plaintiff seeks to recover from Winter on the ground that they were paid in error of law and fact. The contention of plaintiff's counsel is that, because Winter surrendered to Cahn the custody and possession of the mortgage collateral for use in that suit, and whereby he was enabled to obtain judgment thereon, coupled with his failure to make any defense therein, he waived and lost whatever right or interest he had in the pledge of said note.

The plaintiff further urges the judgment and decree of the court in the aforesaid suit of Cahn v. Ford, supra, as forming *res adjudicata* as to the defenses set up by Winter here. These questions may be summarily disposed of. In Levy v. Ford, supra, all of these questions are gone into and decided in respect to Winter, and those affecting Cahn were gone into and decided in Cahn v. Ford, supra. The questions settled by those two decisions in this respect were that Ford first pledged the $7,000 mortgage note to Cahn to secure an indebtedness of about $3,500, and subsequently, and with Cahn's consent, this note was also pledged to Winter for the surplus above Cahn's claim. This was most clearly and definitely understood and agreed upon by and between the three parties,—Ford, Cahn, and Winter. One note was, by two separate contracts, pledged to two different parties. It being payable to bearer, no formal written act of pledge was necessary or made. It was, under the circumstances, a matter immaterial whether the physical possession and actual custody of the pledge was in Cahn or Winter. They had a perfect right to hold and use it indifferently. The fact that when Cahn sued Ford and Winter the former called for and the latter furnished the note, to be filed as the evidence of this right of Cahn, is of no consequence to Levy. The suit of Cahn was founded on Ford's indebtedness to him, and the collateral note was employed and used only as an adjunct and accessory thereof. The judgment therein rendered did not extinguish the obligation of that note. Nothing but the seizure and sale of the mortgaged property, and the payment of the proceeds thereof to Cahn, did extinguish it, and then only *pro tanto*. Cahn and Winter had both a fixed interest in the collateral; and when, by means of judgment, seizure, and sale, and payment to Cahn of his debt, with interest and cost, his claim was extinguished, the right of Winter to demand and receive the residue became absolute and determinate. As the learned judge of the district court aptly phrases it: "Possession by one was a possession for the benefit of the other, and in this respect each was the agent of the other *pro hac vice*." We are of opinion that neither by that suit nor by its conduct or management were any of the rights of Winter in any manner affected. No right of his was impaired by the judgment and decree therein rendered; and same cannot be given the affect of *res adjudicata*. One pledgee may lawfully seize and sell effects pledged to another, without prejudice to the subordinate or alternative rights of the other on the pledge. Horner v. Dennis, 34 La. Ann. 389; Pickens v. Webster, 31 La. Ann. 875.

Judgment affirmed.

——— (43 La. Ann. 995)

STATE v. JEFFERSON. (No. 296.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

HOMICIDE—EVIDENCE—NEW TRIAL—ARGUMENT OF COUNSEL—APPEAL.

1. In case the proof shows that the accused was the aggressor in the affray which resulted in the homicide, proof of an attack made by the deceased upon the accused on the day previous thereto is inadmissible for the purpose of establishing the *status* of the accused as acting in his own right, or that he acted at the time of the homicide under the belief that he was in imminent danger of death or of great bodily harm.

2. The trial judge charged the jury that "it is incumbent on the state to prove the offense charged, or legally included in the indictment, to [their] satisfaction, beyond a reasonable doubt; and before they can convict the accused they must be satisfied from the evidence that he is guilty beyond a reasonable doubt." He said, "A

reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for." This is a concise and absolutely correct exposition of the law as applicable to reasonable doubt.

3. The supreme court will not interfere with district judges in the manner of conducting their courts, or of enforcing rules of propriety and decorum on the officers of their courts.

4. It is not good ground for an application for a new trial that, in the course of his argument before the jury, the district attorney made use of improper remarks, unexcepted to at the time, which had the tendency to improperly influence the jury against the accused.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Feliciana; F. D. BRAME, Judge. Affirmed.

Indictment of Seymour Jefferson for murder. Defendant was convicted of manslaughter, and appeals.

W. F. Kernan, for appellant. *J. Henry Shepherd*, Dist. Atty., for the State.

WATKINS, J. The defendant was indicted for murder, convicted of manslaughter, and sentenced to imprisonment in the state penitentiary for seven years, and prosecutes this appeal therefrom on the several grounds enumerated in the record.

1. The first question presented for consideration is whether the trial judge erroneously excluded evidence offered for the purpose of showing that the deceased beat the defendant on the head with a large, heavy club, causing the blood to flow freely, and that this occurred on the evening antecedent to the homicide,—this testimony being offered for the purpose "of establishing the *status* of the accused as acting in his own right," and of showing that "at the time of the homicide he acted under the belief that he was in danger of death or grievous bodily harm, and that he had reasonable grounds for such belief." Counsel states in his printed argument that he did not offer this evidence for the purpose of justification in killing the deceased, but that it was offered for the purpose of establishing "the *status* of the accused as acting in his own right, and that, at the moment of killing, he had reasonable grounds to believe, and did believe, he was in danger of death, or of grievous bodily harm." This, in our opinion, is a distinction without a difference, for the only ground upon which such evidence could be admissible is that it justified the homicidal act; and it is a well-established rule that, in order that such testimony should be admissible, there must be satisfactory proof of an actual physical attack, or hostile demonstration, made by the deceased at the time of the homicide; for, if such were not the case, the accused could not reasonably believe he was in imminent danger of death or of great bodily harm. If there were a question as to whether the attack was made by the deceased or the accused in the fatal rencounter, it would be competent to show, by prior declarations of either party, that the attack made was the one he intended to make. It is likewise permissible to prove antecedent acts and declarations for the purpose of showing the *quo animo*, or of rebutting the charge of malice. Whart. Hom. 694, 695. But in this case it clearly appears that the accused was the attacking party, armed for the fray, and that he actually killed the deceased, while he was making an effort to arm himself for his defense. This being the situation of the parties, the proffered evidence of the attack made by the deceased on the defendant upon the evening previous was not competent. It constituted no part of the *res gestæ*. Instead of mitigating the crime, it would have had rather a tendency to aggravate it.

2. The second question in the case is whether the judge properly charged the jury on the question of a reasonable doubt. Defendant's counsel requested the court to charge the jury as follows, viz.: "The accused is presumed to be innocent until he is proved to be guilty beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt; it should be an actual and substantial doubt, not mere possibility or speculation. The evidence should be so clear and conclusive as to satisfy your minds, to a moral certainty, that the accused is guilty of the crime charged; otherwise you should acquit." The court refused to give this charge as requested, but instead thereof charged the jury as follows, viz.: "It is incumbent on the state to prove the offense charged or legally included in the indictment to your satisfaction, beyond a reasonable doubt; and, before you can convict the accused, you must be satisfied from the evidence that he is guilty beyond a reasonable doubt. A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for. It is not sufficient you should believe his guilt only probable. In fact, no degree of probability merely will authorize a conviction; but the evidence must be of such a character and tendency as to produce a moral certainty of the prisoner's guilt to the exclusion of reasonable doubt. The evidence should be such as to satisfy your minds to a certainty, beyond a reasonable doubt, that the accused is guilty of the crime charged; otherwise you should acquit." The court adds: "The court charged *verbatim* all except the last sentence, and refused that on the ground that in the written charge in the record it had already charged the jury fully upon reasonable doubt, and substantially and almost in the same words of the said last sentence of said requested charge." In our opinion, the charge given by the judge was clear, concise, and exactly in keeping with the law on the subject. In the main, it follows the language contained in the defendant's requested special charge, and we cannot discover any well-grounded objection to it. On the contrary, it meets our unqualified approval.

3. The third question in the case is in reference to certain remarks made by the district attorney in the course of his argument before the jury, and to which defend-

ant's counsel excepted, and reserved a bill of exceptions. The remark objected to was that "if jurors do not convict people who have been so clearly shown to be guilty as this defendant has been, in this case, you might as well tear down the court-house." This statement is a strong one, and one possibly unauthorized by the evidence; but we are not prepared to say the judge erred, in not directing the district attorney to withdraw it, or in not instructing the jury to disregard it altogether. The jury are the sole and exclusive judges of the facts given in evidence, and upon that evidence they must determine the guilt or innocence of the accused. The judge is prohibited from charging the jury on the facts in evidence. Had he denied the correctness of the statement of the district attorney, he might have been understood by the jury as expressing an opinion on the facts as favorable to the accused as that of the district attorney was unfavorable to him; and, in thus attempting to correct one error, committed another one. In State v. Garig, 43 La. Ann. 365, 8 South. Rep. 934, we gave full and exhaustive consideration to a similar question, and, after making a collation of pertinent authority, said: "So, in this case, had the judge acceded to the wishes of the prisoner's counsel, and permitted him to have made an explanation to the jury, in reference to the questioned statement of the district attorney, they might have received the impression that the judge conceded the correctness, and allowed such impression to have influenced their verdict." As we had occasion to say in State v. Duck, 35 La. Ann. 764, "this court cannot and will not interfere with district judges in the manner of controlling their courts, or enforcing rules of propriety and decorum on the officers of court," so we repeat here. We think the district judges can be safely intrusted with the proper control and management of their courts and the conduct of business therein. In the present instance we cannot say that the judge erroneously exercised his discretion.

4. The fourth ground of objection is that, on application for a new trial, the defendant's counsel was not permitted to prove that the district attorney had made, during the course of his argument, certain other prejudicial statements. The district judge assigned, as his reason for rejecting the evidence, that the defendant's counsel urged no objection to such statements at the time they were made, and reserved no bill of exceptions; and consequently same could furnish no ground for a new trial. In this ruling the judge did not err. If the defendant's counsel made no objection, and retained no exception, at the time such objected statement was made, we cannot perceive with what propriety same can be assigned as relievable error in an application for a new trial. This question does not come within the principle announced in State v. Selley, 41 La. Ann. 146, 6 South. Rep. 571. That case relates to a question of the admissibility of certain alleged dying declarations in evidence, and, in aid of the court in determining that question, it was held that the accused had the right to have the testimony reduced to writing, and annexed to a bill of exceptions. Here the question is whether an isolated and independent fact, altogether disconnected from the evidence, and to the accomplishment of which no objection was urged at the time, can be proven in support of an application for a new trial. There is no similitude between the two cases. There is no doubt of the fact that the strong and impassioned appeals of prosecuting officers often exercise strong influence over the minds of jurors, but it is the duty of the presiding judge to correct any such impression as they may make by a concise and emphatic charge, to which all right-minded jurors will listen, and act accordingly. We think the judgment should be affirmed, and it is so ordered.

(43 La. Ann. 1003)

STATE v. OLIVER. (No. 309.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

HOMICIDE—EVIDENCE—THREATS.

1. When the question is one of a previous threat having been made by the accused against the deceased, it is perfectly competent for an isolated and complete sentence containing a threat to be given to the jury in evidence, notwithstanding the witness did not hear and could not relate the whole of the conversation on other subjects in the same conversation.

2. It is not competent for parol proof to be made of the purport and effect of the testimony of absentees from the state, who were present and testified on a former trial.

(*Syllabus by the Court.*)

Appeal from district court, parish of Webster; J. T. BOONE, Judge. Affirmed.

George Oliver was tried and convicted of murder, and appeals.

Watkins & Watkins, for appellant. *J. A. W. Lowry* and *J. H. Shepherd*, Dist. Attys., for the State.

WATKINS, J. The defendant is appellant from a conviction of the crime of murder without capital punishment, and a sentence to life-time imprisonment in the state penitentiary, relying on three bills of exception.

1. The first bill of exceptions relates to the alleged illegal reception on the part of the prosecution of proof of previous threats made by the accused against the deceased. The judge states that the witness said he heard the beginning of the conversation, and could repeat the substance of it. That he said that he left the parties standing together, but did not know what they said after he left them. That he further said "that Maria Roan walked up to where the accused and others were standing, and asked, 'Have you heard the lies George Sikes [deceased] told on his wife?' Defendant said, 'Yes,' and if he owned it to him to-day he would shoot the top of his head off." The objection urged by defendant's counsel was that the witness was not able to repeat the entire conversation, and that it was not competent for the court to admit an isolated phrase or part of a conversation; that the accused was entitled to have the whole of it, or to have the whole excluded from the jury. The objection is grounded on a general and

well-recognized rule of evidence; but we are of opinion that the language quoted by the judge as the testimony of the witness constitutes a distinct threat, which was admissible; and that evidently was the sole object of the district attorney in introducing the evidence. It may be true that much more may have been said in the course of the conversation between the accused and the persons mentioned by Maria Roan, upon different topics, which she did not hear. That is immaterial. But, if more was said on the same subject, it was the duty of defendant's counsel to have introduced those other persons, and proved that fact, and not left it open to inference. We regard the testimony competent.

2. The second bill relates to the rejection of parol proof of the purport and substance of the testimony of certain absent witnesses, who, since the former trial of this cause, have permanently removed from the state. The objection urged to the competency of the proffered testimony is that it is hearsay evidence. While it is true that Greenleaf lays down the general proposition that the testimony of deceased persons given in a former trial between the same parties may be proven by other persons who were present, and who may testify from their recollection of what it was, and that the same author says "it is also receivable if the witness, though not dead, is out of the jurisdiction of the court, or cannot be found after diligent search, or is insane, or sick, and unable to testify," etc., (1 Greenl. Ev. § 163,) and that "in all cases when the party has, without fault or concurrence, irrevocably lost the power of producing the witness again, whether from physical or legal causes, he may offer the secondary evidence of what he testified in the former trial," (Id. § 168,) yet this rule—possibly a perfectly safe one in civil cases—cannot with propriety, in our opinion, be extended to criminal trials. We are aware of no case within the range of our jurisprudence in which this has been done. Mr. Bishop, after discussing the question very exhaustively, and citing a number of English cases and precedents, says: "This principle applies, not only to these formal depositions, but likewise to the evidence of what a witness testified to orally at a previous trial. It, moreover, provides, not only in civil cases, but in criminal, and in general, in the United States as well as in England. But the admission of the evidence is limited, or nearly so, to the case in which the witness is deceased, and in this case it is the general American doctrine to receive equally the deposition, taken as before mentioned, and evidence of the formal oral testimony. But when the witness is merely in another state, or otherwise beyond the power of the court, this is not sufficient. 1 Bish. Crim. Proc. (2d Ed.) § 1098; Id. (3d Ed.) §§ 1194, 1195. We think this is the safe and conservative doctrine, and, while operating injuriously in exceptional cases, it will operate as a mutual safeguard to the state and accused persons generally. But it is proper to observe that this expression of opinion is limited to the sole question of the reproduction, by this means, of the parol evidence of absentees; and on this ground we approve of the judge's ruling as correct.

3. The third bill of exceptions relates to the judge's declination of the motion of the defendant for a new trial. As it relates exclusively to the sufficiency of the evidence to justify the verdict, the allowance *vel non* by the district judge of a new trial is a question that is addressed to his sound legal discretion, and with which this court cannot deal. Judgment affirmed.

(43 La. Ann. 1075)

RICKS *et al.* v. BOARD OF ASSESSORS. (No. 10,848.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

TAXATION—EXEMPTION—MANUFACTURER OF LEATHER AND OF SHOES.

Capital, etc., employed in the manufacture of "shoe-uppers," is not employed in the manufacture of "leather," nor in the manufacture of "shoes," and is not exempt under article 207 of the constitution.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge. Reversed.

Action by A. G. Ricks & Co. against the board of assessors. Judgment for plaintiffs. Defendants appeal.

Henry Renshaw and *Carleton Hunt*, City Attys., for appellants. *Buck, Dinkelspiel & Hart*, for appellees.

FENNER, J. The only question presented in the case is whether plaintiffs, as manufacturers of "shoe-uppers," are exempt from taxation under article 207 of the constitution, which exempts "capital, machinery, and other property employed in the manufacture of textile fabrics, leather, shoes, harness, saddlery," etc. Manufacturers of leather are exempt, and manufacturers of shoes are exempt. Plaintiffs do not pretend to manufacture the leather out of which their shoe-uppers are made, and therefore they clearly do not fall within that exception. Are they manufacturers of shoes? Obviously not. A shoe is ordinarily composed of uppers, soles, and heels, sewed or otherwise joined together in such manner as to constitute an article of apparel for the feet. A shoe-upper is no more a shoe than is a shoe-sole or shoe-heel. It is axiomatic that exemptions from taxation are strictly construed, but even extreme liberal construction could not bring plaintiff's business within the grasp of the provisions of article 207 of the constitution. Nothing short of a judicial amendment of the constitution could accomplish it. The judgment appealed from is therefore reversed and annulled, and it is now adjudged and decreed that there be judgment in favor of defendants rejecting plaintiffs' demand, at their cost in both courts.

(43 La. Ann. 1131)

STATE v. TAYLOR. (No. 10,897.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

INDICTMENT — MOTION TO QUASH — DEFECTS IN DRAWING JURY.

1. A motion, made at the same term of court in which the indictment was found, before arraignment, to quash the indictment for irregularities in drawing the jury, is seasonably made. In such a case the defendant could not file a motion on the first day of the term.

2. Defects in the drawing of the jury cannot be taken advantage of unless it appears that some fraud has been practiced, or some great wrong committed, in the drawing and summoning of the jury, that would work a great and irreparable injury to the defendant. Section 10, Act 44, of 1877.

3. This act refers to and embraces the irregularities committed by the commission. When a person not a jury commissioner intrudes upon their deliberations, and takes part in them, this will vitiate the proceedings, and the *ventre* drawn should be set aside.

(*Syllabus by the Court.*)

Appeal from district court, parish of Lafayette; ORTHER C. MOUTON, Judge. Affirmed.

Indictment of Willie Taylor for murder. The indictment was quashed, and the state appeals.

Walter H. Rogers, Atty. Gen., for the State. *Joseph A. Chargois, Wm. Campbell, Crow Girard*, and *L. I. Tansey*, for appellee.

MCENERY, J. The defendant was indicted for murder, and the indictment was returned and filed in court on the 8th October, 1891. On the next day—October 9th—the defendant was called for arraignment. His counsel objected, and asked for time in order to file a plea for the defense, if necessary. The motion was overruled. On the 14th October he filed a motion to quash the indictment for irregularities in the drawing of the jury which presented the indictment. For some of the irregularities the alleged indictment was quashed. The state has appealed. The attorney general urges that the motion was filed too late, and ought to have been filed in accordance with section 11 of Act 44 of 1877 on the first day of the term. In the case of State v. Sterling, 41 La. Ann. 680, 6 South. Rep. 583, we held that the state did not require impossibilities. The jury was drawn after the first day of the term, and the indictment presented at the same term of court. It was therefore impossible for the accused to file his objection to the irregularity of drawing of the jury on the first day of the term. He asked for time to prepare for his defense when arraigned on the day following the finding of the indictment. The motion was overruled. The judge assigned as his reasons therefor that if, after examining the indictment, the defendant desired to file any plea, he would permit him to withdraw his plea to the arraignment. The motion to quash was filed on the 14th October, of the same term, only six days after the defendant was indicted. He has brought himself within the exception which relieved him from filing his plea on the first day of the term. He filed the plea seasonably, as the defect did not appear upon the face of the papers or proceedings, and could only have been discovered after the first day of the term. If indicted at the same term of court for which the jury is drawn, the defendant can, before arraignment, at the same term file his objection to the irregularity in the drawing of the jury. State v. Williams, 30 La. Ann. 1028; State v. Vance, 31 La. Ann. 398; State v. Bradley, 32 La. Ann. 402; State v. Thompson, Id. 879; State v. Conway, 35 La. Ann. 350; State v. Strickland, 41 La. Ann. 514, 6 South. Rep. 471; State v. Sterling, 41 La. Ann. 679, 6 South. Rep. 583. In section 10, Act 44, of 1877, it is provided that no defect or irregularity in the drawing of the jury in the summoning of it shall be sufficient cause to set aside the *venire* unless it appears that some fraud has been practiced, or some great wrong committed, in the drawing of and the summoning of the jury. There were gross irregularities in drawing the jury. The clerk omitted to perform the duties specially assigned to him under the act, and the box was not of that kind, provided with lock and key, as the law directs. But these were irregularities only, and it is not shown that they were done for the purpose of injuring the defendant, or with any fraudulent intent, or that some great wrong had been done him. It is essential to show these facts in order to set aside the indictment for such irregularities as are alleged. The irregularities, however, embraced within the meaning of section 10 of Act 44 of 1877 refer to those committed by the jury commissioners. Where a person not a commissioner intrudes himself upon their deliberations, and does acts which it is their duty to perform, these acts are not those of the commissioners, but of one who has no authority to perform them, and are absolutely null and void. The record discloses the fact that one Gustave Lascoste was permitted to participate in the proceedings of the jury commission, and the name of one of the jurors was not written by any member of the commission, but by him. It is the duty of the clerk or a member of the jury commission to perform the official acts in the drawing of the jury assigned to him by Act 44 of 1877, and we again reiterate what we said in relation to his duties in the case of State v. Conway, 35 La. Ann. 350. Judgment affirmed.

(43 La. Ann. 1138)

STATE v. CLAVERY. (No. 10,907.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

Appeal from district court, parish of Lafayette; ORTHER C. MOUTON, Judge.

Walter H. Rogers, Atty. Gen., for the State. *Joseph A. Chargois, William Campbell, Crow Girard*, and *L. I. Tansey*, for appellee.

MCENERY, J. The questions submitted in this case are identical with those in the case of State v. Taylor, ubi supra, (just decided.) For the reasons assigned in that case the judgment in this is affirmed.

(43 La. Ann. 1024)

JONES v. LAKE, Sheriff, *et al.* (No. 304.)

(*Supreme Court of Louisiana.* Oct. 28, 1891. 43 La. Ann.)

MORTGAGE — FORECLOSURE SALE—RIGHTS OF PURCHASER — INJUNCTION AGAINST JUDGMENT CREDITORS OF MORTGAGOR.

1. A purchaser of real property at sheriff's sale, made under *fi. fa.* in the foreclosure of a special mortgage, cannot acquire or take title to any other property than that coming within the description recited in the act of mortgage.

2. As against a seizing creditor of such purchaser's vendor, said purchaser, seeking to arrest the sale by injunction, on an allegation of his ownership as adjudicatee of the property seized, is in duty bound to make out his title by clear and indisputable written evidence.

3. In such an injunction suit neither the verity nor validity of the judgment is put at issue, and it is clearly incompetent for plaintiff to attack or question the right of the plaintiffs in execution in any other respect.

(*Syllabus by the Court.*)

Appeal from district court, parish of Caddo; S. L. TAYLOR, Judge. Reversed.

Petition by John R. Jones against John Lake, sheriff, and another, for an injunction. Judgment for petitioner. Defendants appeal.

R. J. Looney, for appellants. *Wise & Herndon*, for appellee.

WATKINS, J. Petitioner, alleging ownership and possession in good faith of the following described real property, viz., "all that portion of lot or block sixty-eight (68) of the city of Shreveport, north and east of Bosworth's boundary line, owned by Mrs. M. D. C. Cane in 1874;" and that he acquired the same at sheriff's sale made in 1886, in the foreclosure of a special mortgage executed by Mrs. Cane in favor of one Leavenworth in 1874; and that in the *procès-verbal* said property is described as "all of lot or block sixty-eight (68) north and east of Bosworth's boundary line,"—enjoins the seizure and sale of the same under an execution issued under a judgment in the suit entitled "M. J. McCormick vs. M. D. C. Cane." He alleges the death of the plaintiff in execution, and represents that his heirs are Mrs. Anna B. Stockwill, Mrs. Williamina B. McCormick, and Mr. William B. McCormick; and he avers that Mrs. Stockwill has no interest in said judgment or execution, because she has long since conveyed her interest therein to S. B. McCutchen, who denies having authorized the issuance of said writ. He prays judgment for $500 general damages, and $250 attorney's fees, against Williamina B. and William B. McCormick *in solido*, and perpetuating his injunction. The two defendants named moved to strike from the petition the allegation in reference to the assignment by Mrs. Stockwill to McCutchen, and his denial of authority for the issuance of the writ of execution, on the ground that they are foreign to any legal investigation of this case; and no right or interest, as such, of McCutchen can be determined in this case, as the plaintiff must stand against the world on his own title; and, further, because neither Mrs. Stockwill nor McCutchen are made parties to this suit. This motion being overruled, the two defendants named filed an answer, in which they first plead a general denial, and then urge, as a special defense, that they caused to be seized, in the execution of their judgment, "a certain lot of ground in that portion of block sixty-eight (68) adjoining and to the north and north-east of the land sold by S. Bennett and Mrs. M. D. C. Cain to Geo. M. Nicholls, in April, 1848, and since said time has remained a separate and distinct portion of block sixty-eight, and is the property of Mrs. Cane, and that her title thereto has never been divested." Their answer then avers that plaintiff's petition and annexed documents disclose no grounds for this action; and it further avers that the execution enjoined runs in favor of Anna B. Stockwill as a co-heir of the two defendants named, and the injunction bond does not run in her favor. They pray the dissolution of the injunction, with $500 general damages, and $500 special damages awarded against the plaintiff. On these issues the parties went to trial, and there was judgment in plaintiff's favor perpetuating his injunction without damages.

1. It is our opinion that the defendants' motion to strike from the plaintiff's petition the allegations referring to the assignment of Mrs. Stockwill to McCutchen of her interest in the judgment, execution of which is enjoined, should have prevailed, because such an issue cannot be litigated in this suit. The controversy presented by the plaintiff, primarily, is title *vel non* of the property seized, and it is of no consequence to him what particular person is owner of the judgment under which same is seized. The injunction is directed against the seizure and sale of particularly described real property, and not against the judgment. This suit is only a third opposition coupled with an injunction. We cannot, in the present state of the case, remedy the error, otherwise than by declining to consider the averments referred to. The informality suggested in the injunction bond cannot be considered either, as there was no motion made to dissolve on that account filed *in limine*.

2. The controversy, being narrowed within proper limits, may be stated in this wise: The defendants seized the property claimed, among others, as that of Mrs. Cane, and the foundation of plaintiff's claim of ownership is the mortgage from Cane to Leavenworth, which he, as assignee, executed against the mortgaged property, and became the adjudicatee of same at execution sale. Hence the question at issue and to be determined is whether the plaintiff acquired title thereby to the particular property in dispute; and that must be ascertained by reference to the act of mortgage and sheriff's sale. If these fully and sufficiently describe the property to convey a title the plaintiff's injunction must be perpetuated, leaving the defendants to assert whatever adverse right they have in some other proceeding. The defendants were seeking, by an execution of a judgment *via ordinaria*, to collect a debt. There was no effort to enforce a mortgage. There is no claim of that kind set up in their answer. Plaintiff enjoined the sale of particular property, on the ground that he

had acquired title from Mrs. Cane in the foreclosure of the Leavenworth mortgage. He can take nothing by this action other than that Mrs. Cane mortgaged to Leavenworth, for the plain reason that, in the confessed foreclosure of that mortgage, he could not cause to be seized and sold any property other than that which she had hypothecated to his assignor. Referring to the authentic act of mortgage from Cane to Leavenworth, we find the following is the description of the property which is therein hypothecated, viz.: "All that portion of lot or block sixty-eight (68) north and east of Bosworth's east boundary, now owned by Mrs. M. D. C. Cane." The same description is contained in the *fi. fa.* under which sale was made to the plaintiff under judgment in the suit entitled "John R. Jones vs. Mrs. M. D. C. Cane." The advertisement thereof contained the same description, omitting the words, "now owned by Mrs. M. D. C. Cane." The judgment recognizing the mortgage, and ordering sale of the hypothecated property, recites the same description as that contained in the act of mortgage. The sheriff's *procès-verbal* of sale contains the same description. This is identically the same description as that contained and set out in the plaintiff's petition. The description of the property, as given in the advertisement of sale enjoined, is as follows, viz.: "Part of block sixty-eight, (68,) in the city of Shreveport, beginning at the north corner of lot sixteen, (16,) in block fifty-four, (54;) run thence, on a prolongation of the north-west boundary line of Spring street, along the Hamilton Oil-Mill line, to Cross bayou; thence, down the bayou, to a point from which a line parallel with the first-described line will strike the north corner of lot sixteen, (16,) in block fifty-five, (55;) thence along the north-west boundary line of block fifty-five, (55,) and the prolongation of the same, to the point of beginning,—containing about an acre and a half, fronting on Cross bayou on one side, and the Texas & Pacific Railroad on other." The question to be solved is whether the property claimed by the plaintiff is contained in the description of the property as advertised for sale. Then we must ascertain what is the property described in plaintiff's deed as "all that portion of block sixty-eight (68) north and east of Bosworth's boundary line." There is nothing ambiguous or uncertain in this description. "Bosworth's boundary line" is a fixed and definite limit, and can be easily located; and hence "that portion of block sixty-eight (68) north and east" of that line is easily located. No one examining the map of the city of Shreveport could easily mistake its locality or the extent of its area. In their printed brief defendant's counsel aver that "they never contested plaintiff's title to that portion of block sixty-eight (68) covered by his deed, or by the mortgage of Leavenworth." Page 7. Reference to the maps in evidence discloses that block 68 fronts on Cross bayou on the north, is of an irregular frontage on that side, and extends on the south side nearly the entire width of three adjoining blocks. At one time this property was owned by Mrs. Cane and one Bennett, and they sold off a portion of it, situated in the center, in March, 1848, to George M. Nicholls. The description of the property sold is as follows, viz.: "The following piece of ground in the town of Shreveport, and known as a part of block No. sixty-eight, (68,) and described and bounded as follows, to-wit: Commencing at the corner of block No. 54, and corner of lot No. 9 of said block, it being the north-west corner of said lot and block, and running in a direct line as a continuation of the north-east boundary (line) of Market street, until said line reaches Cross bayou; and running down said bayou, until it reaches a line drawn from Cross bayou, parallel to the line first above described, and extending from the bayou to the north-west boundary line of block numbered fifty-four (54) in the prolongation of said line; thence, along said last line, to the starting point, so as to include within these boundaries two and five-eighths (2⅝) acres." By this conveyance, block 68 was completely severed, and subdivided into three distinct and separate lots, each one distinct and well-defined, as will appear from the De Voe map in evidence, the 2⅝-acre lot sold to Nicholls reaching across block 68, from the corner of lot No. 9, in block 54, to Cross bayou, and completely covering the intervening area. The portion of block 68 to the north and east of the Nicholls lot, which is the portion now in controversy, and precisely the same as that contained in the advertisement of the sale which is enjoined, is found to contain 1⅓ acres. That portion of block 68 to the west and south of the Nicholls lot was much larger than either of the other two lots, the distance from front to rear being greater. The portion sold to Nicholls was adjudicated to W. E. Hamilton by same description, in December, 1868, and thereon he erected and established his oil-mill plant, as indicated on the De Voe map. On the 7th of December, 1871, Mrs. Cane and Mrs. McCormick conveyed to A. W. Bosworth the following described lot, viz.: "Being a part of block sixty-eight (68) in said city, according to the original map, said lot or block sixty-eight (68) having been allotted to these vendors in the partition of the original Shreveport Town Company of record, and the land herein conveyed is that part of said block or lot sixty-eight (68) bounded as follows: By projecting the dividing line between lots eleven (11) and twelve (12) of block thirty-seven (37) to Cross bayou, running back on said projected line two hundred (200) feet; thence running a line eighty (80) feet in length perpendicular to said projected line, and parallel to the north-west front of said block thirty-seven, (37;) and thence running a line one hundred eighty-nine and one-half (189½) feet to Cross bayou; and thence along said bayou to the point where the projected line between lots eleven (11) and twelve (12) of block thirty-seven (37) strikes the said Cross bayou; and the property herein conveyed corresponds to lots twelve (12) and thirteen (13) of the proposed plan in future extension of a block between Market and Edwards streets and Cross bayou," as will

be shown by the H. P. Leavenworth survey of November 27, 1871, shortly antecedent to this scale. Subsequently there was a partition between Mrs. Cane and Mrs. McCormick, and on the 16th of January, 1874, Mrs. Cane consented to the Leavenworth mortgage aforesaid, by the description given supra, to-wit: "All that portion of lot or block sixty-eight (68) north and east of Bosworth's east boundary;" and not as stated in the plaintiff's petition, viz., "all of lot or block sixty-eight (68) north and east of Bosworth's boundary line,"—the two decriptions being materially different. A full and complete description of the Bosworth purchase has been given, in order to show that the "Bosworth's east boundary" was a fixed and established line, by the Leavenworth survey of November 27, 1871, antecedent thereto; the surveyor becoming subsequently the mortgagee of Mrs. Cane, Bosworth's vendor. We have also given a full and complete description of the property Nicholls purchased from Cane and Bennett in 1848, for the purpose of showing what is meant by the "north-west boundary line of Spring street, along the Hamilton Oil-Mill line," which occurs in the advertisement of the enjoined sale; and to show that, ever since 1848, the Hamilton Oil-Mill's property has had a definite and fixed eastern boundary line, as will appear from the De Voe map. It is upon these descriptions, thus established by contemporaneous public records, that the defendants rely for the assertion in their answer that Mrs. Cane, their judgment debtor, still owns "that portion of block sixty-eight (68) adjoining and to the north and north-east of the land sold by S. Bennett and Mrs. M. D. C. Cane to George M. Nicholls in April, 1848," etc.; and that the plaintiff did not acquire same under the Leavenworth mortgage in 1886. In January, 1874, when Mrs. Cane consented to a mortgage to Leavenworth, she, as the vendor of Nicholls and of Bosworth, respectively, knew, and is conclusively presumed to have known, the "Bosworth east boundary line" as well as "the Hamilton Oil-Mill east line," and Leavenworth, who made the survey of the *locus in quo*, in November, 1871, must also have known them when he accepted the mortgage of Mrs. Cane in 1874.

Under these circumstances it seems quite clear that when Leavenworth accepted the mortgage of Mrs. Cane on "all that portion of lot or block sixty-eight (68) north and east of Bosworth's east boundary," situated on the extreme north-western part of that block, he did not acquire a mortgage on "that portion of block 68 adjoining and to the north and north-east of the land sold" by Cane and Bennett to Nicholls in 1848, situated on the extreme north-eastern part of that block, and between which two properties the Hamilton Oil-Mill property of 2⅝ acres has intervened since 1848. It appears that in 1886 the plaintiff instituted suit against Mrs. Cane in the foreclosure of the Leavenworth mortgage, of which he was the assignor, and became the adjudicatee of the hypothecated property, by the identical description given in the mortgage,—thereby placing himself in Leavenworth's place and stead,—paying therefor $100. It further appears that under expropriation proceedings in 1881—subsequent to the mortgage, though antecedent to this sale—the New Orleans Pacific Railway Company acquired a small portion of block 68, situated east and south of the Bosworth lot, for which they paid on the Leavenworth mortgage $2,750; same being equal to the capital of the mortgage debt and costs. In 1871, Bosworth paid for the small lot he purchased $5,300; Nicholls paid in 1848 for the 2⅝ acres he purchased of Cane and Bennett $2,625; and Hamilton paid, in 1868, for the same property, $8,000. Is there any reason to suppose that the lot in question, adjoining, as it does, the Hamilton Oil-Mill property on the east, of 1⅞ acres, was not worth as much proportionately? Can it be supposed that this valuable property, in addition to the residue of the property adjacent to the Bosworth property, would have been adjudicated to the plaintiff for $100 in 1886? Such suppositions are repugnant to reason, in view of the fact that the testimony in this case shows that the property in controversy is alone worth $5,000. To fully disclose the plaintiff's contention, we quote the following pertinent extract from the brief of plaintiff's counsel at pages 4 and 5, to-wit: "This is the description: The said Mrs. M. D. C. Cane declares that she does by these presents specially mortgage and hypothecate unto and in favor of the said F. P. Leavenworth, his heirs and assigns, the following described property, situated in the city of Shreveport, La., to-wit: All that portion of lot or block sixty-eight (68) north and east of Bosworth's east boundary, now owned by the said Mrs. M. D. C. Cane. It is admitted she owned the land in controversy at date of mortgage, and it is averred in answer that she owned it in 1848. Now, she mortgages all the land east and north of the Bosworth tract, and then adds, 'now owned by the said Mrs. M. D. C. Cane.' That is, if she owned any more land in block or lot 68, she mortgaged that also, as we will show further on." Counsel subsequently adds the following, viz.: "The extreme portion of said block 68, east of Bosworth's east line, is the tract marked 'Jno. R. Jones,' and is the tract in controversy. W. R. De Voe, the city surveyor, made this map, and says this tract is east of Bosworth's tract, and a portion of lot or block 68 of the city of Shreveport." We do not consider the language of the act of mortgage as hypothecating all the land east and north of the Bosworth tract, then owned by Mrs. Cane. Had she so intended, she would have employed different and more comprehensive language, better calculated to have conveyed such an intention. The statement of De Voe, as a witness, is strictly true, but it does not throw any light on the question. The learned judge, in his exceptionally able opinion, says: "If in the mortgage to Leavenworth, and sale to Jones, the land had been merely described as all the land then owned by her (Mrs. Cane) in block 68, it would have been sufficient. No one could have been misled by such a description, and no difficulty could

have been met in identifying the property." But he fails to state that such was not the case; and that is the precise reason why we are of opinion that the Leavenworth mortgage did not cover all the land Mrs. Cane then owned in block 68. For this reason we consider the judge's conclusion clearly a *non sequitur*. The learned judge cites the fact that the defendants remained inactive and silent while Jones' sale was pending, as an evidence of their manifest acquiescence in his purchase. But the same question recurs: The purchase of what property? The argument is self-destructive. He also cites the expropriation proceedings supra, and her acquiescence in the application of the proceeds as a credit on the Leavenworth mortgage debt, as an acquiescence in the existence of a mortgage on the property. But the question instantly arises, what property was mortgaged? To each and all the questions the answer is the same. Reference is made in the brief of the plaintiff's counsel to an averment made by Mrs. Cane in her answer in the expropriation suit to strengthen the Leavenworth mortgage and Jones' title; but that document forms no part of the evidence offered, was not referred to in the plaintiff's petition, and is not mentioned in the judge's reasons for judgment. To that suit neither the plaintiff nor the defendants were parties or privies. The defendants are Mrs. Cane's grandchildren, and are endeavoring to execute a judgment against her, but they are not her heirs, because she is still living. It is not possible for us to give it any effect. The plaintiff must stand or fall upon the title he derived at sheriff's sale. The testimony shows that plaintiff has been, since his purchase in 1886, exercising some rights of ownership in the property,—such as grading and the like. His right to claim compensation therefor should be reserved, but the judgment in his favor must be reversed, and his injunction dissolved, with costs, but without damages; the defendants' right being, in this respect, reserved also. It is therefore ordered and decreed that the judgment appealed from be, and the same is, annulled and set aside; and it is now ordered and decreed that there be judgment dissolving plaintiff's injunction at his cost, and without damages, the right of defendants being reserved in this respect.

(28 Fla. 191)

HELLEN *et al.* v. STEINWENDER *et al.*

(*Supreme Court of Florida.* July 13, 1891.)

RECORD ON APPEAL—SETTING ASIDE JUDGMENT—AFFIDAVIT FOR DEFAULT.

1. Where a motion is made, subsequent to final judgment entered by the clerk after default for want of appearance, to open such default and to vacate such final judgment, and exhibits, in the shape of affidavits, etc., are presented to the judge to sustain or to resist such motion, the fact that such papers or exhibits were presented to and considered by the judge upon such motion must be evidenced by a bill of exceptions signed and sealed by the judge, or in some other manner tantamount to such bill of exceptions, otherwise such papers and exhibits cannot be considered by this court upon writ of error for want of the proper evidence that they were in fact used or considered in connection with such motion.

2. Where the affidavit or proof upon which the clerk enters a final judgment after default fails entirely to establish any count in the plaintiff's declaration, such final judgment is illegal, and will be reversed on writ of error.

(*Syllabus by the Court.*)

Error to circuit court, Duval county; JAMES M. BAKER, Judge.

John E. Hartridge, for plaintiffs in error. *A. W. Cockrell & Son*, for defendants in error.

TAYLOR, J. On the 22d day of March, 1888, the firm composed of H. A. Steinwender, A. C. Sellner, and G. A. Steinwender, doing business under the firm name of Steinwender & Sellner, instituted their action in *assumpsit*, upon an account for goods sold, etc., in the circuit court of Duval county, against William H. Hellen and George F. Acosta, as partners, doing business under the firm name of Hellen & Acosta. Summons *ad respondendum* was issued March 22, 1888, returnable to the rule-day in April, 1888, and the following return was made thereon by the sheriff: "Received this summons March 22, 1888, and served the same March 22, 1888, by delivering a true copy thereof in the county of Duval to the within named defendant William H. Hellen, of the firm of Hellen & Acosta." The declaration was not filed until the rule-day in May, 1888. The defendants failed to enter any appearance either on the return-day of the summons in April, or on the rule-day following in May, when the declaration was filed; and, on the rule-day in May, the plaintiff caused default judgment to be entered for want of appearance. On the 17th day of May, 1888, a term of the circuit court being then in session, the plaintiffs applied to the clerk for and obtained the entry of a final judgment for the sum of $866.03, inclusive of costs. Afterwards, on the 21st day of June, 1888, the plaintiffs caused execution to issue. On the 22d day of June, 1888, the defendants, by their counsel, served the following notice upon the plaintiffs' counsel: "Take notice that we will on Monday, the 25th day of June, at ten o'clock A. M., or as soon thereafter as we can be heard, move before the Honorable JOHN F. WHITE, Judge, at Live Oak, Fla., to open the default entered, and to set aside the judgment rendered and entered in this case, on the ground that the defendants, William H. Hellen and George F. Acosta, partners as Hellen & Acosta, have a meritorious defense to this suit, and were never at any time indebted to the plaintiffs, and were never in any way served with process in this case." The hearing of this motion was had before the judge of the third circuit, because of the absence from the state of the judge of the fourth circuit, where the cause was pending. The motion was denied, and from the judgment and the order denying the motion the defendants have taken a writ of error to this court.

At the hearing of this motion before the judge of the third circuit, a demurrer, and various pleas, affidavits, and other exhibits copied into the record here, purport to have been presented to the judge in support of, and in resistance to, the motion. These exhibits cannot be considered

by this court, because the fact that they were formally presented to and considered by the court below in connection with said motion is not evidenced to this court by any bill of exceptions, or in any other manner recognized by our statutes or practice. In Broward v. State, 9 Fla. 422 the court says: "The proper way to get facts before an appellate court, in such form as to render them evidence, is to make a statement of them in the shape of a bill of exceptions, and then get the circuit judge to sign and seal it, and order it to be made a part of the record." There must be something, either a formal bill of exceptions, or that which is tantamount thereto, evidencing the fact that such papers were considered on the hearing of the motion, before we could consider them on writ of error. Carter v. State, 20 Fla. 754.

The declaration in this case is as follows: "H. A. Steinwender, A. C. Sellner, and G. A. Steinwender, copartners, doing business under the firm name and style of Steinwender & Sellner, by their attorneys, A. W. Cockrell & Son, sue William H. Hellen and George F. Acosta, copartners, doing business under the firm name and style of Hellen & Acosta, hereinafter called defendants, for this, to-wit: (1) That heretofore the plaintiffs bargained, sold, and delivered to Isadore M. Acosta and Joseph S. Hellen, copartners, doing business under the firm name and style of Hellen & Acosta, hereinafter called Hellen & Acosta No. 1, certain goods, wares, and merchandise, more particularly set forth in the bill of particulars hereto attached as part hereof, for which the said Hellen & Acosta No. 1 promised to pay the plaintiffs the sum of eight hundred and fifty-two 32-100 dollars; but nevertheless the said Hellen & Acosta No. 1 wholly refused to pay the same, or any part thereof, and still doth refuse so to do; and notwithstanding the said Hellen & Acosta No. 1, soon after receiving said goods, or about the time of actually receiving the same into their place of business on Bay street, in the city of Jacksonville, said county and state, with the intent to defraud the plaintiffs, claimed they had sold the said goods, wares, and merchandise to the defendants, the said Joseph S. Hellen being the brother of William H. Hellen, and the said Isadore M. Acosta being a brother of the said defendant George F. Acosta; and then and there the defendants, under said name of Hellen & Acosta, formed a partnership as aforesaid, and continued the business of the said Hellen & Acosta No. 1, at the said place of business, and then and there took possession of all and singular the said goods, wares, and merchandise, and converted the same to the use of themselves, the said defendants; notwithstanding the defendants then and there knew that the plaintiffs had not been paid for the same, or any part thereof, and notwithstanding the defendants then and there knew the said Hellen & Acosta No. 1 intended thereby to defraud the plaintiffs as aforesaid. And thereby the defendants greatly damaged the plaintiffs, and the plaintiffs claim the sum of fifteen hundred dollars.

"(2) And for a second count the plaintiffs allege by this reference to all heretofore alleged, excepting the last paragraph next above, and further allege, and the defendants then and there promised to pay the plaintiffs the sum of $852.32, but nevertheless the defendants wholly failed to pay the plaintiffs said sum, or any part thereof, and still doth refuse so to do; and the defendants have wholly failed to pay the plaintiffs the value of said goods, or any part thereof, and the plaintiffs claim fifteen hundred dollars.

"(3) And for a third count the plaintiffs sue the defendants for this, to-wit: The defendants promised to pay the plaintiffs for certain goods, wares, and merchandise, set forth in detail in the bill of particulars hereto attached as a part hereof, sold and delivered by the plaintiffs to the defendants, as much as the said goods were reasonably worth, and the same were then and there reasonably worth the sum of $852.32, of which the defendants had notice; and being so indebted, the defendants, in consideration thereof, promised to pay the plaintiffs said sum, but nevertheless the defendants wholly refused, and still doth refuse, to pay the same, or any part thereof, and the plaintiff claims $1,500.

"(4) And for a fourth count the plaintiffs sue the defendants for $852.32, money due and payable by the defendants to the plaintiffs on account stated between them, and plaintiffs claim $1,500.

"(5) And for a fifth count the plaintiffs sue the defendants for $852.32, money due and payable by the defendants to the plaintiffs for goods bargained and sold by the plaintiffs to the defendants, and plaintiffs claim $1,500.

"(6) And for a sixth count the plaintiffs sue the defendants for $852.32, money due and payable by the defendants to the plaintiffs for money had and received by the defendants to the use of the plaintiffs, and plaintiffs claim $1,500.

To this declaration there is attached, as a part thereof, an itemized account for various goods, aggregating $852.32, which account is made out against Hellen & Acosta, without stating the individual names of the parties composing the firm. After the entry of the default for want of appearance, the following affidavit, with the following account appended, was filed with the clerk of the circuit court, upon which he entered the final judgment appealed from:

"Mess. Hellen & Acosta, Jacksonville, Fla., to Steinwender & Sellner, Dr.

5 brls. Old Oscar Pepper Bourbon, Spr. '88, 193.80, per gall. 2.40				$465 12
2 cases Pomery Sec. Champ., quarts 29.50				59 00
2 " " " "			pts. 31.50	63 00
2 "	Fenve Cliquot	"	quarts 29.25	58 50
2 " " " "			pts. 31.25	62 50
2 "	Dry Monopole	"	quarts 28.30	56 60
2 " " " "			pts. 30.30	60 60
1 "	Planot & Co. Cognac, 1840			26 00
	Dray			1 00
				$852 32

"State of Missouri, city of St. Louis—ss.: Before me, the undersigned, a notary public in and for the city and state aforesaid, duly commissioned and qualified for a term expiring June 29, 1889, personally appeared on this fourteenth day of May, A. D. eight-

een hundred and eighty-eight, A. C. Sellner, of lawful age, to me known, who, being by me duly sworn, on his oath deposes and says that he is a member of the firm of Steinwender & Sellner, the within-named claimants, (said firm being composed of Herman A. Steinwender, Gustavus A. Steinwender, and this affiant;) that the within demand against the copartnership of Hellen & Acosta, of Jacksonville, Florida, is, within the knowledge of affiant, just, due, and unpaid; that full credit has been given by claimants to said copartnership of Hellen & Acosta for all payments and offsets to which they are justly and legally entitled; and that the amount of eight hundred and fifty-two and 82-100 dollars, as within claimed, is justly due. A. C. SELLNER.

"Sworn to and subscribed before me this 14th day of May, 1888. Witness my hand and notarial seal. [Seal.] AUGUST AHRENS, Notary Public City of St. Louis, Missouri."

The errors assigned are as follows: "(1) The court erred in entering the default in this case; (2) the court erred in rendering and entering a final judgment in this case; (3) the court erred in overruling the motion of the plaintiffs in error to open the default and set aside the judgment herein." And counsel for plaintiffs in error urges the second assignment on the ground "that the proof does not pretend to show the delivery to the defendants, or to any one for them; nor does it pretend to show that they derived any benefit therefrom."

We think the second error assigned is well taken. The plaintiffs in the first count of their declaration disclose the fact that the bill of goods sued for were sold and delivered to Joseph S. Hellen and Isadore M. Acosta, as copartners, doing business under the firm name of Hellen & Acosta; while the suit is brought against William H. Hellen and George F. Acosta, as copartners, under the same firm name of Hellen & Acosta; the purchasers named in the declaration not even being made parties to the suit. The second count in the declaration reiterates the allegations contained in the first by reference, and then alleges a distinct promise on the part of the defendants to pay the plaintiffs for said goods. The first and second counts, coupled together, constitute, in substance, an allegation that the defendants became liable for and promised to pay the debt contracted by Joseph S. Hellen and Isadore M. Acosta, as partners. The third count alleges that the defendants promised to pay the plaintiffs for certain goods set forth in detail in the bill of particulars thereto attached. This bill of particulars is also referred to in the first count as being an exhibit of the goods sold to Joseph S. Hellen and Isadore M. Acosta. The fourth count is for money due and payable upon an account alleged to have been stated between plaintiffs and defendants. The fifth count is for money due and payable for goods bargained and sold by plaintiffs to the defendants. The sixth and last count is for money had and received by the defendants to the use of the plaintiffs. In all these common counts the amount of the said bill alleged in the first count to have been contracted by Joseph S. Hellen and Isadore M. Acosta is claimed. The affidavit filed with the clerk, upon which the final judgment was entered, does not connect the defendants William H. Hellen and George F. Acosta with the indebtedness sued for in the declaration. Under the familiar rule that the *allegata et probata* must agree, this proof should at least have established some one of the counts *ex contractu* in the declaration as against the defendants, but it does not establish any one of the counts in the declaration. It does not prove that the bill of goods sued for were ever sold or delivered to the defendants. Neither does it pretend to prove any promise by the defendants to pay for said goods. We are therefore forced to the conclusion that this final judgment has been illegally entered without any proper proof to sustain it. Wilson v. Fridenberg, 22 Fla. 114. There was error, therefore, in entering it, and the court erred in refusing to set it aside. It will be proper to say that the affidavit upon which this judgment was entered was not included in the original transcript of the record sent here, though the clerk certified that such transcript constituted a true copy of "all the proceedings, and a correct copy of the record of the judgment, as appears upon the files and records of" his office. This affidavit, duly certified, was subsequently supplied by consent of counsel upon its omission being called to their attention by us. This became necessary because the sufficiency of the affidavit was directly questioned in the errors assigned, and in the position taken by counsel for plaintiffs in error in his briefs in reference thereto.

The judgment of the court below is reversed.

Rehearing denied.

(94 Ala. 608)

SPRATT v. WILSON *et al.*

(*Supreme Court of Alabama.* Nov. 12, 1891.)

RESCISSION OF MORTGAGE — AGENCY — EVIDENCE.

1. Where a bill is filed to foreclose a purchase-money mortgage, and defendant files her cross-bill to rescind such mortgage on the ground that W., one of the complainants, was acting as her agent when she purchased the land, and without her knowledge purchased it from his own firm for her, the burden is on her to show such agency.

2. Defendant testified that she was induced by W. to purchase the land, that he was her agent, and that she acted wholly on his advice. W. testified that he was not her agent, but that he treated her as other persons, showed her the property he had for sale, and that she made her own selection. It appeared that they charged her no commission on the purchase, and that she paid them part of the purchase price. *Held*, that no agency was shown to have existed.

3. The fact that plaintiffs advanced part of the purchase price of a lot formerly purchased by them for her does not tend to show that they regarded themselves as her agents in other matters, but may be explained by the consideration that they were interested in getting commissions on that sale.

4. The failure to notify defendant of an unpaid mortgage on the land, or to have the wives of the other plaintiffs join in the conveyance, would not justify a rescission, where such mortgage has been paid, the claims to dower relinquished, and the solvency of plaintiffs is unquestioned.

Appeal from chancery court, Jefferson county; THOMAS COBBS, Chancellor. Affirmed.

Bill by Wilson, Martin & Leedy against Louise Spratt to foreclose a mortgage on real estate. Defendant filed a cross-bill for a rescission of the mortgage. Decree for plaintiffs. Defendant appeals.

E. K. Campbell, for appellant. *A. W. Cochran* and *R. H. Pearson*, for appellee.

WALKER, J. On March 22, 1887, Miss Louise Spratt purchased a lot in the city of Birmingham from Wilson, Martin & Leedy at the price of $1,700. She paid $1,100 of the purchase money in cash, and executed her promissory note to the vendors for the balance. This note was made payable on the 23d day of February, 1888, and was secured by the purchaser's mortgage on the lot. The original bill in this case was filed January 15, 1889, for the foreclosure of that mortgage, no payment having been made on the note thereby secured. The defendant interposed a cross-bill, asking for a rescission of the contract of purchase, that the mortgage and note be delivered up and canceled, and for the repayment of the principal and interest of the amount paid on the purchase. The right to rescind is claimed on the ground that Mr. Wilson, one of the complainants, while acting as the defendant's agent, and intrusted by her with full power and discretion to invest her money in real estate, abused the trust and confidence reposed in him as such agent by making a sale to the defendant of property belonging to his own firm, without informing her that they were the vendors of the property, and without fully and fairly advising her as to the facts of the transaction. The defendant claims that not until after the filing of the bill in this case did she learn that the complainants had sold her their own property. It is very plain that an agent should not put himself in such a position that his own personal interests conflict with the duty he owes to his principal, and that, if he is an agent to buy, and uses his position to purchase his own property for his principal, the principal can avoid the purchase, unless it was made with his full knowledge and free consent. Adams v. Sayre, 70 Ala. 318, 76 Ala. 509; Potter's Appeal, (Conn.) 12 Atl. Rep. 513; 1 Lawson, Rights, Rem. & Pr. § 93; 1 Amer. & Eng. Enc. Law, 372, 375. And when a vendor occupies a relation of trust and confidence towards his vendee, transactions between them will be narrowly watched, and the vendor must show that the vendee was fully informed of the facts, and that the sale was in every respect just, fair, and equitable. Waddell v. Lanier, 62 Ala. 347; Boney v. Hollingsworth, 23 Ala. 698; 1 Amer. & Eng. Enc. Law, 376, 377. The difficulty in this case is in arriving at a satisfactory conclusion as to what relation existed between the parties at the date of the sale in question. The evidence on this subject is in irreconcilable conflict. The burden is upon Miss Spratt to sustain her allegation that Wilson was her agent to make the purchase for her. That fact must be established as the foundation of her claim. It appears from the testimony of Miss Spratt and of her mother that the former was a young woman without business experience, and with few friends in Birmingham, where she was earning a livelihood by teaching music and doing occasional work for newspapers; that she gave music lessons to two of Mr. Wilson's children, was kindly treated by himself and his wife, and frequently visited their residence on terms of intimate friendship; that during the "boom" in Birmingham she heard much of Mr. Wilson's success as a real-estate agent, and he frequently talked in her presence of the large amounts of money made by his customers, and urged her to invest in Birmingham real estate, and "let him make her rich;" that she had no money to invest, but, finally yielding to Wilson's persuasion, she induced her mother to borrow money, and let her have it for investment in Birmingham. In this way Miss Spratt acquired $980. She and Mr. Wilson are the only witnesses as to what occurred between them in making the investment. It is undisputed that Miss Spratt deposited with Wilson, Martin & Leedy $200 on February 25, 1887, and $778 on March 5, 1887; that on March 14, 1887, Wilson, Martin & Leedy made a sale to her for one of their customers of a lot at the price of $2,250, $1,250 of which was paid in cash, the firm advancing the difference between Miss Spratt's deposit and the cash payment; that within a few days thereafter they sold this lot for Miss Spratt at a profit of $250, and she then made the purchase which is the matter of controversy in this suit. Wilson, Martin & Leedy charged and collected commissions on the sale made for Miss Spratt. No commissions were charged on either of the purchases made by her. They admit that they acted as her agent in the sale made by her; but deny that they were her agents in either of her purchases. Miss Spratt testifies, in effect, that Mr. Wilson was her agent throughout; that she acted entirely on his advice, and followed implicitly his suggestions and instructions. Mr. Wilson, on the other hand, states that in making the sales to Miss Spratt he met her as he met all other persons wanting to invest, told her what he had for sale, and offered her various properties, from which she made her own selections. Miss Spratt says that she does not remember that Wilson submitted more than one lot for her to choose from, but that, if he did so, she took the one he advised her to take.

In considering this conflict of testimony the circumstance is not to be lost sight of that Wilson was engaged in business as a real-estate agent, and that this fact was fully known to Miss Spratt. An intending purchaser may apply to a real-estate agent either to learn what he has for sale with a view of buying from what may be offered, or to enlist his services to negotiate for the purchase of property that may be desired. If the real-estate agent is resorted to for first-mentioned purpose, plainly he is to be treated as the representative of the seller and not of the purchaser. When the question arises as to whether the agent who brought about a sale acted for the pur-

chaser or for the seller it is material to inquire whether the circumstances indicate that the understanding of the purchaser was that he was getting property which was in the agent's hands for sale, or that the agent acted in the matter solely in his behalf, and was not interested in serving the seller. In the present case there is nothing to indicate that Miss Spratt understood that Wilson was not to sell her property which he had for sale. When questioned on the subject, she does not pretend to say that Wilson, Martin & Leedy were not to sell her property on their books or under their control, or that it was her understanding that they were to go into the market and get property for her from some other agent or seller. She says that she had no understanding on the subject with them, but that Mr. Wilson was to do the best he could for her in every respect, uninstructed by her. There is nothing to indicate that it would have been contrary to her expectation to purchase real estate which Wilson's firm had in charge for sale. Nor is there anything to show that Wilson was led to understand that he was not to offer her such property. Unless something is done to deceive the purchaser into the belief that the person he deals with in making the purchase is acting alone in his interest, we think that one who offers property for sale may fairly assume that the purchaser understands that he is interested either as the paid representative of the seller, or as the owner of the property. It fairly appears in this case that Miss Spratt went to Wilson as a person having real estate for sale. It does not seem to have been her understanding that any one besides his firm represented the seller. There was no concealment of the fact that that firm had for sale the lot which she bought. Whether she understood that it belonged to the firm or to some one for whom they were acting, the fact that they were openly acting for the seller, whoever that might be, was sufficient to deprive her of the right to rely upon them as her agents in the matter. A purchaser is not entitled to treat as his agent one who openly holds himself out as the representative of the seller. Insurance Co. v. Allen, 80 Ala. 571, 1 South. Rep. 202. We are satisfied from the evidence that Miss Spratt had confidence in Wilson's integrity, in his experienced judgment as to real estate, and in his professions of friendly interest; that she thought he would not urge her to make a disadvantageous purchase; and that it would be wise for her to buy property recommended by him. We are further satisfied that it would have been much better for her if she had never given heed to his glowing account of the "boom" and of fortunes easily made on small investments. But we cannot overlook the fact that the evidence strongly indicates that she understood that Wilson had the lot in question for sale. Whether she supposed that he was acting for himself or for an undisclosed owner, in neither event had she the right to rely upon him as her agent. The fact that confidence was reposed in the seller's fairness and honesty, especially in dealing with an intimate friend, cannot convert the seller into the purchaser's agent, or confer upon the purchaser the right to avoid the sale because the supposed friendly and well-wishing seller has not made as full a disclosure or acted as entirely in the interest of the purchaser as an agent is required to act for his principal. It does not plainly appear that Wilson acted in the matter as her agent, rather than as a friendly seller, or that he or his firm understood that she looked to them as her agents, or expected them not to act for the seller of the property. The impression made by all the evidence taken together is that the real transaction was that a shrewd seller got the best of it in a trade with an unwary purchaser, rather than that an agent to purchase bought from himself without the knowledge of his principal. In the circumstances as disclosed by the evidence, and in view of the conflicting statements as to the relations between the parties, we are unable to reach the conclusion that the fact of agency has been satisfactorily proved.

The fact that Wilson, Martin & Leedy advanced part of the purchase money on Miss Spratt's first purchase may be explained by the consideration that they were interested in earning commissions on that sale, and in getting a chance to earn commissions from her by negotiating another sale at an advanced price. This fact does not necessarily tend to show that they regarded themselves as her agents throughout. Their payment of taxes on the lot involved in this suit may have been for their protection as mortgagees, or because they were interested as agents to sell the property if an opportunity offered. The property was bought to be sold again. Miss Spratt purchased for speculation, as Wilson's firm well knew. The right to have a rescission is claimed principally upon the ground that Wilson, being the agent to purchase, bought from his own firm without informing his principal that he was thus interested in the sale. Relief cannot be granted upon that ground, as the fact of agency has not been satisfactorily shown. It is also suggested, though not much urged, that a rescission would be justified because of the failure to inform the purchaser of the unpaid mortgage on the property, and because of the neglect to perfect the legal title by having the wives of the two married grantors join in their conveyance. The mortgage debt has been paid, and the outstanding legal claims to dower have been duly relinquished. In these circumstances, and in view of the unimpeached solvency of the grantors in the warranty deed to Miss Spratt, the defects mentioned do not warrant an application to a court of equity for a rescission of the contract of sale. Parker v. Parker, (Ala.) 9 South. Rep. 426. No error is discovered in the record. Affirmed.

(94 Ala. 632)

EAST TENNESSEE, V. & G. R. CO. v. BAKER.

(*Supreme Court of Alabama.* Nov. 11, 1891.)

RAILROAD COMPANIES—INJURIES TO STOCK—NEGLIGENCE—INSTRUCTIONS.

1. In an action against a railroad company for killing a mule, plaintiff's evidence tended to

show that the mule came upon the track from the west side about 75 yards from the place where it was killed, and, without leaving the track at all, ran that distance ahead of the engine. There were no obstructions on that side to cut off the engineer's view. Defendant's evidence tended to show that the mule came from the east side, where there were obstructions, and that it first ran across the track, and then came back upon it just ahead of the engine, and ran but a very short distance before it was killed. *Held* that, as there was evidence from which the jury could have drawn an inference of negligence on the part of the defendant, the general charge in its favor should not have been given.

2. In an action against a railroad company for killing a mule, an instruction that, if the engineer was "on the lookout for obstructions at the time he discovered the mule," defendant was not liable, was properly refused; because, under it, the jury might have found for defendant, though they were satisfied that the engineer was negligent in not maintaining such a lookout prior to the time of actual discovery as would have enabled him to discover the mule sooner than he did.

Appeal from circuit court, Shelby county; LEROY F. BOX, Judge. Affirmed.

This action was brought by Mary M. Baker against the East Tennessee, Virginia & Georgia Railroad Company to recover damages for the alleged negligent killing of a mule, the property of the plaintiff. Defendant requested the following charges, which were refused: (1) "If the jury believe all the evidence, then they must find their verdict for the defendant." (2) "If the jury believe from the evidence that the engineer in charge of the defendant's train was on the lookout for obstructions at the time he discovered the mule, and used all the means in his power to prevent the injury, they must find for the defendant." (3) "If the jury believe from the evidence that the engineer was on the lookout for obstructions at the time he discovered the mule, and at once blew the whistle for brakes and the cattle alarm, and reversed his engine, and there was no negligence on the part of the other trainmen contributing to the injury, then they must find in favor of the defendant." There was judgment for plaintiff, and defendant appeals

Pettus & Pettus, for appellant.

WALKER, J. The evidence for the plaintiff tended to show that the mule came upon the track from the west side; that the field on that side was open and clear of obstructions, so that the engineer could see animals approaching from that direction; that the mule came upon the track 70 or 75 yards from the point where it was killed, and, without leaving the track at all, ran that distance ahead of the engine. The evidence for the defendant, on the other hand, tended to show that the mule came from the east side; that on that side there were obstructions to cut off the engineer's view of the animals coming towards the track; that the mule first ran across the track, and then came back upon it a second time, just ahead of the engine, and ran along the track, but a very short distance before it was struck and killed; that from the point where the mule first crossed the track to the place where it was killed was about 50 yards. It was the province of the jury to accept or reject the one or the other of these versions, in whole or in part, and to determine from the whole evidence what was the truth of the matter. The court cannot say that it appears without conflict in the evidence that the defendant discharged the burden upon it to show that there was no negligence on its part which caused or contributed to the alleged injury. There was evidence from which the jury might draw the inference that, if the engineer had been keeping a proper lookout, he might have discovered the mule sooner, and in time to frighten it out of the way of danger or to avoid killing it. When there are discrepancies in the testimony upon matters material to the issue, and there is evidence from which the jury could draw an inference adverse to the defendant, the general charge in favor of the defendant should not be given. Railway Co. v. Lazarus, 88 Ala. 453, 6 South. Rep. 877; Hall v. Posey, 79 Ala. 84. There was no error in the refusal to give such charge in this case.

It was the duty of the engineer to be on the lookout for obstructions on the track, so far as such lookout could be maintained consistently with his discharge of his other duties. Failure to maintain a steady look out is itself culpable negligence. Railway Co. v. Lazarus, 88 Ala. 453, 6 South. Rep. 877; Railroad Co. v. Caldwell, 83 Ala. 196, 3 South. Rep. 445. This duty is one that must be constantly observed, not, however, so as to keep the engineer from attending to his other duties. The requirement is that the engineer, while giving all due care to the handling of his engine, must also maintain a steady watchfulness for dangers or obstructions ahead. Railroad Co. v. Bayliss, 75 Ala. 466. To prove that the engineer was on the lookout when he actually discovered an obstruction on the track is not enough to show that he has fully performed his duty in this regard. If he failed to discover the obstruction sooner, when he might have done so if he had been duly watchful, then the defendant is chargeable with negligence. Railroad Co. v. Watson, (Ala.) 8 South. Rep. 793. The engineer might have been "on the lookout for obstructions at the time he discovered the mule," as hypothesized in both the second and third charges requested by the defendant, and yet have negligently failed to maintain such lookout prior to the time of the actual discovery, and the failure to see the mule soon enough to avoid killing it may have been owing to the absence of proper watchfulness. Those charges were rightly refused, because, in obedience to either of them, the jury could have found for the defendant, though they were satisfied from the evidence that the engineer was negligent in not maintaining such a lookout as would have enabled him to discover the mule in time to avoid the casualty. The duty to be watchful is not to be confined to the time of the actual discovery of an obstruction. The steady performance of the duty is enjoined in order that obstructions may be discovered in time to avoid casualties therefrom, if practicable. No error is discovered in the record. Affirmed.

(94 Ala. 194)

TRAMMELL v. LEE COUNTY.

(*Supreme Court of Alabama.* Nov. 10, 1891.)

CONTRACT FOR HIRE OF CONVICTS — STATUTORY REQUIREMENTS—OMISSION—ESCAPES.

1. Where one hires convicts from a county, and receives the benefit of their labor, he cannot be heard to contend that the kind and place of labor was not stated in the contract as required by law, or that he did not give bond as he should have done, since the provisions mentioned are intended only for the security of the county and the welfare of the convicts, and their omission could not in any wise affect the hirer.

2. Where a contract for work done is executed on the part of the laborer, it presents a clear case for suit and recovery on a common count.

3. Where one hires convicts from a county, binding himself to pay for the full terms of their sentences, less the services lost to him by death, and there is no provision for abatement in case of escape, testimony that some of the convicts did escape was properly excluded in an action for the hire of such convicts.

Appeal from circuit court, Lee county; J. M. CARMICHAEL, Judge. Affirmed.

This was an action brought by Lee county against R. J. Trammell to recover for the hire of convicts. The contract of hiring showed an agreement on the part of Trammell to hire the convicts sentenced to hard labor for the county, and stipulated that he should give bond, with good and sufficient security, to be approved by the judge of probate. It did not, however, as required by law, set out the kind of labor, or the place at which it was to be performed. The bond stipulated for was never given. There was judgment for plaintiff, and defendant appeals.

J. M. Chilton, for appellant. *W. J. Samford*, for appellee.

STONE, C. J. There was great want of precision, and of conformity to statutory requirements, in the contract of letting which gave rise to this suit. Still it appears that Trammell had the benefit of the labor of the county convicts, and it is the opinion of the court that he should pay for that labor according to the terms of his contract. True, Trammell was not required to give personal security, as he should have been; but the court holds that all the duties which were omitted were provisions intended for the benefit and security of the county and the welfare of the convicts, and that Trammell cannot be heard to complain of their omission. It did not injure him. There were no sureties in this case, and we need not decide what would be their *status*, if any had been taken. Trammell alone is sued, and the claim is simply one for work and labor done. The contract was an executed one on the part of Lee county, and presented a clear case for suit and recovery on a common count. The second or special count, however, sets out all necessary averments, and authorized a recovery to the same extent as a common count for work and labor done would have justified. The circuit court did not err in permitting the record of county convicts, made and kept by the judge of probate, to be received in evidence to the extent it was allowed to go to the jury. Code 1886, § 4590: 1 Whart. Ev. § 639. By the terms of the contract of hiring, Trammell bound himself to pay for the full terms of the sentences, less the service lost to him by the death of the convict. There was no provision made for discount or abatement in case of escapes. He took the risk of these. The court did not err in excluding testimony offered that some of the convicts had escaped. Affirmed.

(95 Ala. 60)

TRAGER *et al.* v. FEEBLEMAN.

(*Supreme Court of Alabama.* Nov. 11, 1891.)

CLAIM OF EXEMPTIONS—SPECIAL ISSUES—EVIDENCE—OTHER PROPERTY DISPOSED OF.

1. Where an attachment issues against personal property, and defendant files with the officer a verified claim to an exemption, as required by Code, § 2521, plaintiff, by making a written demand, under section 2525, on defendant to file an inventory of his personal property, except such as is exempt, waives the objection to the sufficiency of the claim of exemption.

2. Where, under the general issue whether defendant had other personal property, money, etc., not embraced in the inventory afterwards filed, plaintiffs have the benefits they would have had under special issues, the refusal to grant special issues, if error, is not prejudicial.

3. Plaintiffs having shown that shortly before the attachment defendant had a large sum of money in his possession, it is competent for defendant to show that he appropriated it to the payment of his just debts.

4. Where defendant owes his mother and brother, and on the day of attachment hands his clerk $500 to pay the indebtedness, and the clerk does so some weeks later, but before plaintiffs make a written demand that defendant file an inventory, the money so paid, if the debts were just, cannot be estimated in ascertaining the amount of the exemption to which defendant is entitled, nor deducted from his claim of exemption.

5. A gift by defendant to his niece, about the time of the attachment, of several hundred dollars' worth of accounts, would be fraudulent.

Appeal from circuit court, Perry county; JOHN MOORE, Judge. Reversed.

Action on attachment by Trager, Canman & Co. against Mardus J. Feebleman. Judgment for defendant. Plaintiffs appeal.

G. B. Johnston and *J. H. Stewart*, for appellants. *Pitts & Harwood*, for appellee.

CLOPTON, J. An attachment sued out by the appellants against the appellee January 1, 1890, was levied the next day on certain personal property. On the same day appellee filed with the officer levying the process a verified claim to the property as exempt under section 2521 of the Code. Notice thereof having been given to the plaintiffs, they instituted a contest of the claim in the mode prescribed by the statute. It may be conceded that the claim of exemption filed with the officer, not having been accompanied by a statement of personal property, choses in action, and money, as required by section 2521, was insufficient. Instead of objecting thereto on this ground, plaintiffs made a written demand upon defendant, August 16, 1890, to file in the circuit court a full and complete inventory of all his personal property, except such as is specially exempt from levy and sale, all moneys, debts, and choses in action belonging to him, or in which he is beneficially interested. By the written demand under section 2525 the plaintiffs waived the objec-

tion to the sufficiency of the claim of exemption. Tonsmere v. Buckland, 88 Ala. 312, 6 South. Rep. 904. Defendant having filed an inventory in answer to the demand, an issue was formed under the direction of the court.

The real issue in such contest is whether the claimant had other personal property or choses in action or money not embraced in the inventory. But it is unnecessary to consider the propriety of the ruling of the court refusing to require defendant to join in the special issues tendered by plaintiffs. Under the general issue as formed they were allowed and had the full benefit which they could have derived from the special issues. The refusal, if erroneous, is error without injury.

Plaintiffs having introduced evidence showing that defendant, shortly before the issue of the attachment, received money for goods sold, and had a considerable sum in his possession, it was competent for him to show that he had appropriated the money to the payment of debts justly due by him. The evidence was relevant to the issue, whether the money belonged to him or was in his possession when the written demand for an inventory was made.

It is shown that on January 1, 1890, the same day on which the attachment was issued, defendant handed to his clerk, who is his brother, a sum of money,—$500,—which he directed him to pay to his mother and brother on account of debts which he owed them respectively, and get their receipts for the same. The clerk was not the agent of the mother or brother to collect the money, and did not pay it to either of them until the latter part of January, when he went to Meridian and Vicksburg, where they respectively resided. The justness of the debts is not controverted. The court substantially charged the jury if defendant was justly indebted to his mother and brother in the sums stated, and paid the money to his clerk in good faith before the levy of the attachment for the purpose of paying the debts, and the clerk paid the same to the mother and brother after the levy of the attachment, and the same was received by them in payment of their respective debts, this was a ratification of the payment of the money to the clerk, and the jury must find for the defendant. Charges were asked by plaintiffs asserting the contrary proposition, which were refused. Plaintiffs contend that merely placing the money in the hands of the clerk with a request that he pay it to specified creditors did not, *ipso facto*, change the ownership; that the request was revocable, at the option of the defendant, until the money was paid to the creditors, or they ratified the payment to the clerk; and that they could not ratify the payment after the issue and levy of the attachment, so as to cut off the right of plaintiffs to subject it to their demand; hence that, the money not having been paid to the creditors, and there being no ratification until after the levy and issue of the attachment, the money must be estimated in ascertaining the amount of the exemption to which defendant is entitled, and be deducted from his claim of exemptions, as provided by section 2531. The well-settled rule is that when one person delivers money to another, accompanied by a mere request, without any present valuable consideration, to pay it to a third person, such request does not, of itself, change the ownership of the money. Coleman v. Hatcher, 77 Ala. 217. But if the money is subsequently paid to such third person, and he receives it in payment of his debt, this is a ratification of the unauthorized act, which operates, by relation, to change the ownership of the money as of the time of its delivery to the receiver. Brooks v. Hildreth, 22 Ala. 469. Until such payment or ratification, or until the depositary has entered into some arrangement with the creditor, by which he is brought under obligation to hold the money for him, and by which he would be prejudiced by a revocation of the original direction, the money is subject to garnishment in his hands. The mere selection and claim of certain property as exempt, though levied on by attachment or execution, does not deprive the defendant of the right to prefer creditors, and apply any property he may own, not levied on, to the payment of their just debts. Weis v. Levy, 69 Ala. 209. If he has other property or money which may be subjected to his debts, it is incumbent on the attaching or executing creditor to reach and subject it by legal process. Plaintiffs had the right to garnishee the clerk, and thereby intercept the payment of the money to the mother and brother; but, failing to do so, they acquired no lien on the money, and its application to the uses originally intended—the payment of their debts—offended no rights of plaintiffs. No rights of theirs intervened so as to prevent a ratification from having the same force and effect as previous authority to collect the money. Of course, this rule has no application if the defendant thereby attempted a fraudulent disposition of the money as against his existing creditors. It may be that, had the defendant filed an inventory when he filed his claim of exemption with the officer, such inventory should have embraced the money in the hands of the clerk, which had not then been paid to the creditors, stating the facts. It had, however, been paid over when the written demand was made for an inventory. In such case the issue is not whether the money belonged to defendant at the time he filed his claim of exemption, but whether it belonged to him when the written demand to file an inventory in the circuit court was made under section 2525. The money having been paid to the mother and brother, and received by them in payment of their debts, before the written demand, cannot be estimated, if their debts be just, in ascertaining the amount of the exemption to which defendant is entitled, nor deducted from his claim of exemption. But there is evidence tending to show that defendant stated, the day before the attachment was issued, to a witness, that he had between three and four hundred dollars' worth of accounts, which he intended to give his niece. These accounts, if he in fact had them at that time, and had made no proper disposition of them,

should have been included in his inventory. A gift of them to his niece would have been fraudulent as against the plaintiffs. The charge under consideration instructs the jury that on the hypothesized facts therein stated they must find for the defendant. This conclusion excluded from the consideration of the jury whether the defendant had accounts which he should, but had failed to, embrace in his inventory, though he may in fact have given them to his niece after filing his claim of exemption. For this reason the charge is erroneous. Reversed and remanded.

(94 Ala. 581)

GLASS v. MEMPHIS & C. R. CO.

MEMPHIS & C. R. CO. v. GLASS.

(*Supreme Court of Alabama.* Nov. 10, 1891.)

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—TRESPASSERS—WANTON NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. Whether defendant's railroad rightfully occupies a street in a city must be determined in a direct proceeding, and cannot be raised for the first time in an action for damages against the company for killing plaintiff's intestate.

2. The fact that persons living in the neighborhood of a railroad are accustomed to walk upon the track without objection by the company does not make them any the less trespassers.

3. Evidence of such a custom is irrelevant and inadmissible.

4. In such an action for damages, evidence of the habits of decedent in regard to trains, and whether they were those of a prudent and careful person, is inadmissible.

5. The fact that the accident took place at a railroad trestle which spans an abandoned end of a street does not make the fact that other portions of the street are used by vehicles and pedestrians relevant.

6. Where decedent goes upon defendant's track without its sanction, and attempts to walk over a high trestle, but when midway across is struck by a train and killed, decedent is a trespasser, and defendant is only liable for gross negligence or carelessness on the part of its employes amounting to wantonness or an intention to inflict injury.

7. Such wantonness and intention cannot be inferred, unless the employes actually know of the peril of decedent, and fail to make reasonable effort to avert it.

8. A charge that, if decedent went upon the trestle without looking and listening for an approaching train, she was guilty of contributory negligence, is irrelevant, since she was a trespasser on the track, and no amount of prudence in attempting to cross the trestle would change her attitude as such.

9. A charge that there was no evidence before the jury of any pecuniary damage to plaintiff by reason of the death of his intestate, if error, will not avail on appeal, where the jury return a verdict of damages for plaintiff.

10. Where the evidence is conflicting whether or not defendant's employes did all in their power to avert disaster after becoming aware of decedent's presence on the track, a general charge in favor of defendant was properly refused.

Cross-appeals from city court of Decatur; W. H. SIMPSON, Judge. Affirmed.

Action by Samuel Glass, administrator, against the Memphis & Charleston Railroad Company for damages for killing plaintiff's intestate. Judgment for plaintiff for $460. Plaintiff and defendant both appeal.

This suit was brought by Samuel Glass, as administrator of his mother, Martha Glass, deceased, to recover $30,000 as damages for the alleged wrongful and negligent killing of the intestate by the defendant. Defendant pleaded the contributory negligence of the intestate, and plaintiff replied that defendant was guilty of gross, willful, wanton, and reckless negligence. The proof showed that on the 18th day of March, 1889, plaintiff's intestate was returning to her son's house-boat on the river, from the business portion of the town; that she came to the corner of Ferry and Market streets, and from there went diagonally across an open lot, with only one or two small houses on it, by a footpath, till she reached the railroad track; that she then walked down said track a distance of from 20 feet to 60 yards, and got on defendant's trestle across a large gully; and that she had walked about two-thirds of the way across this trestle when defendant's train, coming from behind, knocked her off into the ditch below. The testimony also showed that the intestate could have gone home by Market street, and thereby have avoided walking on the track except at the street crossing; that the distance by this route was a little longer than the one adopted by the intestate, but had a bridge across the ditch, erected by the city for the use of vehicles and pedestrians. The evidence also showed that at that time a person crossing the open block going towards the trestle could see a train approaching the trestle for a hundred yards or more, and could hear it a greater distance; that a person getting on the track at the point where it intersected the footpath could see a train approaching as far back as Canal street, which was the top of a "pretty steep" grade, and was distant from the trestle between 1,500 and 1,600 feet. None of the witnesses saw Mrs. Glass as she stepped from the footpath upon the track, though she was seen by some while approaching the track, by others on the track approaching the trestle, and by still others when on the trestle. All testified that she did not seem to be watching or listening for the train, and that she walked very slowly while on the trestle. The track was laid along what had been, before the war, Water street; but this street had not been used since the war for vehicles, and, "so far as the city was concerned, was abandoned." Since the side track was built there in 1886 there was no place for pedestrians to walk except on the roadbed, and in crossing the trestle on foot one had to step from timber to timber. The train was being operated by an engineer, a fireman, and three brakemen; one of the latter—and foreman of the crew—being stationed at the rear end of the front coal-car; another on the third car from the front,—a box-car; and the third on the car next to the engine; this being the ordinary and general number and arrangement of the crew on a switch train. The whistle blew for Arrantz's mill,—1,170 feet from the trestle,—and the train stopped (or slowed up considerably) there, in order that the "draw," going down to the river, might be raised. Some of the witnesses state the train came to a stop, but all agree that it slowed up considerably.

The length of the train was between 220 and 250 feet, and that of the trestle 75 or 80 feet. The train hands testified that, as soon as they observed Mrs. Glass on the track, (which was just as they passed Jervis' mill,) they gave the signal to the engineer to stop, and began to put on brakes; that the whistle was blown, the engine reversed, the brakes set, and the track sanded, and that they used every means in their power to stop the train. The witnesses, without contradiction, (except by a negro man, who was on a steam-boat, 400 or 500 yards up the river,) state that the whistle was blown repeatedly for the intestate to get off the track; and that the train hands motioned to her, and hallooed at her. Most of the witnesses testified that the whistle began to sound the cattle-alarm, and the train hands began to try to stop the train when the front car was about Jervis' mill, which was about 600 feet from the trestle; and that they continued so to do until plaintiff's intestate was knocked off. The train ran about the length of the train after the intestate was struck, the engine stopping directly over her.

On the examination of the witnesses for the plaintiff, the plaintiff sought to introduce evidence tending to show that it was the custom of people in the neighborhood of the accident to walk over the trestle, and that it was used as a passage-way. On examination of the plaintiff himself, he was asked: "Did you know your mother's habits with respect to railroad trains, —of carefulness or carelessness?" The defendant objected to this question as irrelevant. The court sustained the objection. The plaintiff also sought to introduce testimony to the effect that the south end of Well street, over which the trestle where the accident occurred was built, was still used as a street. The court in its general charge instructed the jury, among other things, that "the railroad company must be presumed to be in the rightful possession of the street along which it was laid, and therefore was not a trespasser;" and also that "the deceased was at the time of the accident a trespasser on the defendant's track." The plaintiff duly excepted to these portions of the general charge. At the request of the defendant the court gave the following written charges to the jury: "(1) Even if the train could have been stopped before reaching the trestle, defendant would not be liable, on the evidence in the case, if the train employes, after discovering Mrs. Glass on the trestle, made an effort in good faith with the means at their command to stop the train, and to prevent injury to her. (2) Defendant did not owe to plaintiff's intestate, Martha Glass, the duty to discover her on the trestle in time to stop the train and prevent injury to her. If she could have seen the train coming by looking back when she went on the trestle or while she was thereon, and if the train employes in good faith tried to stop the train and prevent injury to Mrs. Glass after they discovered her danger, defendant would not be liable." "(4) The failure of defendant's employes in charge of the train to look out for obstructions on the track, and to discover Mrs. Glass on the trestle in time to stop the train before reaching her, if the jury find from the evidence that there was such failure, would not alone authorize the jury to find that defendant was guilty of wanton, reckless, or intentional negligence. (5) If the jury believe the evidence in this cause they would not be entitled to find for the plaintiff, unless they find from the evidence that the train employes, after they discovered Mrs. Glass on the trestle, and the danger she was in, failed to make an effort in good faith to stop the train and prevent the injury. (6) If the jury believe the evidence in this case, it establishes the fact that the plaintiff's intestate, Martha Glass, went upon the trestle over which defendant's track runs, and that when she went on the trestle, if she had looked back, she could have seen the train coming in time to get out of the way, and avoid injury, and the failure of the employes on defendant's train to discover Mrs. Glass in time to stop the train is not such evidence of wanton, intentional, or reckless injury as will authorize a recovery by plaintiff. (7) On the undisputed evidence in this case plaintiff's intestate was not lawfully on defendant's track at the place where she came to her death, and defendant owes her no duty except not to injure her wantonly, recklessly, or intentionally. (8) If the jury believe from the evidence that the plaintiff's intestate, Martha Glass, went upon the railroad track, and undertook to walk across the trestle, when defendant's train was approaching said trestle, and that when she went upon the trestle she could have seen the train coming if she had looked in the direction from which the train was coming, or could have heard it if she had stopped and listened, then she was guilty of contributory negligence if she went upon said trestle without so looking and listening, and the verdict of the jury must be for the defendant, unless they find from the evidence that the train employes, after they discovered that the plaintiff's intestate was on the trestle and in danger of being struck by the train, did not in good faith try to stop the train by the use of the appliances at their command. (9) If the jury believe from the evidence that the plaintiff's intestate went upon the trestle over which defendant's track ran, and that the train was then approaching said trestle, then it was the duty of said Martha Glass to use her senses of hearing and of sight to discover an approaching train in time to avoid danger, and, if she did not look and listen to discover said train, if it was then approaching said trestle, she was guilty of contributory negligence, and the plaintiff cannot recover unless the failure of defendant's agents or servants in charge of said train to stop the same after they discovered said Martha Glass on the trestle amounted to intentional indifference to stop the train and prevent injury to her." The plaintiff excepted to the court's refusal to give, among others, the following written charge, requested by him: "(4) If there was no train in sight or hearing when the deceased stepped on the track or trestle, then it was wholly unnecessary for deceased to have stopped and looked and

listened, and it is immaterial whether she did so or not."

Wert, Speake & Callahan and *E. W. Godbey*, for plaintiff. *Humes & Sheffey*, for defendant.

McCLELLAN, J. 1. Whether the spur track of the Memphis & Charleston Railroad Company was rightfully in what was known as "Water Street" is not a material inquiry in this case. Railway companies may, and frequently do, acquire the right to lay their tracks in the streets of towns and cities, and, unless the question is raised in a direct proceeding to oust them of the use for this purpose of the streets, the presumption is, as declared by the city court, that they are in rightful occupancy thereof.

2. "The mere fact that persons living in the neighborhood of a railroad track have become accustomed to use it to walk upon without any objection on the part of the railroad company does not in any manner alter or change the duty of the railroad company to such persons. They are simply trespassers." And evidence of such custom is irrelevant and inadmissible. Railroad v. Brinson, 70 Ga. 207, 19 Amer. & Eng. R. Cas. 42, and notes; Hoppe v. Railway Co., 61 Wis. 357, 21 N. W. Rep. 227, 19 Amer. & Eng. R. Cas. 74, and notes; Railroad Co. v. Womack, 84 Ala. 149, 4 South. Rep. 618; Railway Co. v. Meadows, 10 South. Rep. 141; Mason v. Railway Co., 6 Amer. & Eng. R. Cas. 1.

3. Evidence of the habits of the person injured in respect of trains, whether those of a prudent and careful person or the reverse, is never admissible in actions sounding in damages for personal injuries. Railroad Co. v. Robbins, (Kan.) 23 Pac. Rep. 113; Chase v. Railroad Co., 19 Amer. & Eng. R. Cas. 356; Railroad Co. v. Colvin, (Pa. Sup.) 12 Atl. Rep. 337; Railroad Co. v. Clark, 15 Amer. & Eng. R. Cas. 261.

4. The fact that the south end of Well street, the north end of which, as originally laid out and used, lay along where the ravine now is, was still open and in use as a street, was not relevant to any issue in this case. It is uncontroverted that at the time plaintiff's intestate was killed by being knocked from the railway trestle which spanned this ravine there was no street either in or crossing the ravine, and no mode of crossing it except upon the timber of the trestle, and no way open by which vehicles or pedestrians could pass down what had once been, but had long since ceased to be, the northern part of Well street. What influence the intestate's right to be on the south end of that street could have upon her or the company's rights and duties with respect to this trestle is not conceivable.

5. It is not negligence in itself for one to cross over a railroad track wherever he may have occasion to do so. Before making the attempt, however, he must know that no train, engine, or car is approaching in such proximity as to render the undertaking dangerous. If he fail to use his senses to this end, if ordinarily he omit to stop and look and listen for trains before going upon the track for the purpose of passing over it, his act in so doing is a negligent one *per se;* and, if injury result to one thus on the track, in consequence of not having taken this precaution, enjoined upon him by the commonest dictates of prudence and care, it is well settled in our jurisprudence that he cannot recover for the mere negligence of the railway company. Railroad Co. v. Webb, 90 Ala. 185, 8 South. Rep. 518; Leak v. Railway Co., 90 Ala. 161, 8 South. Rep. 245. And it follows, of course, that one, having this right, with this care and caution, to cross the track of a railway whenever and wherever he has occasion to be on the other side of it, who takes this precaution, goes on the track for the purpose of crossing it, with all the assurance his senses properly exercised can give him that it is safe to do so, and yet from some cause, against which he could not guard, is injured, he may recover; for the law does not contemplate that railroads, roadbeds, and tracks shall impede travelers, whether along highways or across country, any more than their physical conformation may of necessity involve; and, while the traveler may be negligent in attempting to cross without proper circumspection, he is never a trespasser, because he is never without this qualified right to pass over.

6. But precisely the reverse of all this is true with respect to one, whether in town or country, and whether the track be upon an embankment, on a level, or in a cut, or through a tunnel, or over a trestle, who gets on a railroad for the purpose of passing, not across it, but along its course, and does proceed along its course, using it as a road. Such one is essentially and at all times a trespasser if he be not there by the sanction of the company; and he is as much a trespasser whether he stop and look and listen before going upon the track or not. Nor is his attitude in this respect in any degree relieved by the utmost diligence and care to avoid injury while proceeding on his way. This may secure his safety, but it renders him none the less a trespasser. He, unlike one who merely crosses the track, and to whom it is only an impediment to progress, which he has a right to overcome prudently and carefully, uses that of which the company is entitled to the exclusive use; and his act is in the nature of a conversion, a wrongful misappropriation, of another's property to his own purposes. In all reason, and by every analogy which the law affords, he must act upon his own peril. The company owes him no duty except that which every man owes to every other man, whether a trespasser or not,—to do no act nor omit anything, after his presence and peril become known, the doing or omission of which would tend to inflict injury upon him. There are cases, and among them that of Railroad Co. v. Donovan, 84 Ala. 141, 4 South. Rep. 142, which appear to hold that those operating a railroad in a town or city or through a thickly populated district, where there is occasion for people to pass along the track, and a usage to that effect, owe the duty of keeping a vigilant lookout for such persons at such places. This doctrine does not, in our opinion, consist

with that declared in the succeeding cases of Railroad Co. v. Womack, 84 Ala. 149, 4 South. Rep. 618, and Railway Co. v. Chewning, (Ala.) 9 South. Rep. 458, nor with the general doctrine, now thoroughly established in this court, that one who is injured in consequence of being negligently on a railroad track cannot recover unless the railroad employes are guilty of such gross negligence or recklessness as amount to wantonness or an intention to inflict the injury, and that this wantonness and intention to do wrong can never be imputed to them unless they actually know (not merely ought to know) the perilous position of the person on the track, and with such knowledge fail to resort to every reasonable effort to avert disastrous consequences. And this doctrine applies as well to densely populated neighborhoods in the country, and to the streets of a town or city, as to the solitude of the plains or forest. Railway Co. v. Lee, (Ala.) 9 South. Rep. 230; Railroad Co. v. Vance, Id. 574; Railroad Co. v. Trammell, Id. 870; Railroad, etc., Co. v. Vaughan, Id. 468. That these adjudications establish that there can be no recovery in such cases for the mere negligent failure to see the trespasser in time to avoid injuring him cannot be doubted. A duty, for a violation of which no redress is afforded, is an anomaly. It cannot in any legal sense be said to be a duty at all. Hence it must be that trainmen are under no duty to keep a lookout for such persons, since confessedly their failure to do so involves no liability upon their employers, and warrants no redress to the injured persons in consequence of such failure. And the principle declared in Donovan's Case must be confined to persons exercising the undoubted but qualified right to cross a railroad track. For such persons a lookout must be maintained, since they are in no sense trespassers, having always the right to pass over the track, and doing so, when due care is observed by them, not at their own peril, but upon the implication that the company will, in recognition of their right, keep a lookout for them, and conserve their safety. Persons traveling on the track, having under no circumstances a right to do so, can never assume that railroad employes will be on the alert to discover them in their wrong-doing. The latter are authorized to presume that the roadbed will not be thus wrongfully intruded upon and used, and are justified in acting upon this presumption. It is only when the presumption of the absence of trespassers is displaced by the knowledge of their presence that the duty to observe all reasonable care and prudence to avoid injuring them arises and is upon trainmen.

7. In the case at bar the person killed did not intend and was not attempting to simply cross the track, but she was upon and proceeding along the track over a high trestle of considerable length. To this effect the evidence is free from conflict. Hence, whether she stopped and looked and listened before entering upon the track for approaching trains, whether, had she done so, she would have been apprised of the approach of the train which killed her, and whether she was attentive and diligent to discover the approach of a train while proceeding along the track, are each and all wholly immaterial inquiries. No possible solution of any one or all of them could have affected her *status* with respect to the train, or the duties of the trainmen with respect to her. Had she seen or heard the train approaching, and gone upon the trestle, from which there was no escape short of outracing the train to the further end of it, in front of the moving cars, this would, according to the intimation in Railway Co. v. Lee, supra, have been such recklessness on her part as would have defeated recovery by her administrator, even had the trainmen themselves been guilty of gross negligence amounting to wantonness; but it is not pretended that she either saw or heard the train before going on the trestle, and it is to be doubted whether she ever became aware of its proximity till stricken by it. But she was wrongfully at the place where she was killed. She was a naked trespasser, wholly regardless of the precautions she may or may not have taken before going on the track, or while proceeding along it. Her negligence and wrong in being there would, as a matter of law, and to be so declared by the court, be a complete defense in this case, so far as defendant's liability is attempted to be rested on the mere negligence of its employes; and, on the other hand, such negligence would not preclude a recovery if the defendant's employes were guilty of that wantonness or recklessness which is imputable from wrongful acts or omissions on their part after they discovered her peril, and this though she had been wholly lacking in care and circumspection at the moment of going on the track and while proceeding along it. So that it is manifest that the ruling and charges of the trial court in respect of her supposed lack of diligence and prudence in going on the track without stopping and looking and listening for a train, and in proceeding along the track without keeping a vigilant outlook for its approach, are mere abstractions in the case, which, whether correct in themselves or not, can exert no influence upon the facts of either appeal. Of this character are charges 2, 6, 8, and 9, given at the instance of the defendant, and charge 4, refused to plaintiff. In some of the charges referred to given for defendant, and in those numbered 1, 4, 5, 7, of defendant's series, as also in the court's general charge, the propositions that the railroad company was not a trespasser in the street; that the intestate was a trespasser on the company's track; that the defendant owed her no duty but that of resorting to all reasonable effort to conserve her safety after her peril was discovered; that her presence on the trestle was negligence *per se;* and that the plaintiff was not entitled to recover unless the jury found that the trainmen, after becoming aware of the intestate's position and danger, failed to exert themselves to avert the disaster, etc.,—are clearly stated in accordance with the foregoing opinion; and the assignments of error by the original

appellant, which proceed on a different theory as to the principles of law obtaining in the premises, are untenable.

8. If it be supposed that charge No. 8 given for defendant is faulty, in that it declared "there is no evidence before the jury of any pecuniary damages to the plaintiff by reason of the death of his intestate," the infirmity will not avail on this appeal, because, the jury having expressly found that pecuniary damages were inflicted upon the plaintiff, and returned a verdict therefor, this declaration, if erroneous, could not have involved injury to the appellant in chief. Donovan v. Railroad Co., 79 Ala. 429; Carrington v. Railroad Co., 88 Ala. 472, 6 South. Rep. 910. The cross-appellant (the railroad company) has withdrawn all the assignments of error originally made by it except that one which is addressed to the refusal of the trial court to instruct the jury to return a verdict for defendant if they believed the evidence. This charge should never be given when the evidence on a material point is conflicting, or when, whether conflicting, strictly speaking, or not, it affords a legitimate inference adverse to the party requesting the instruction. The pivotal inquiry in this case was whether defendant's employes did all in their power to avert the disaster after becoming aware of the intestate's presence and peril. The affirmative charge was asked by the defendant on the theory that they fully acquitted themselves in this regard; but we are not prepared to say that the jury were not authorized from all the circumstances in evidence to infer the contrary, and hence our conclusion that the charge was properly refused. The foregoing considerations determine all the questions reserved on both appeals against the respective appellants, and the judgment on each appeal is affirmed.

WALKER, J., not sitting.

(94 Ala. 447)

BRINSON *et al.* v. EDWARDS.

(*Supreme Court of Alabama.* Nov. 10, 1891.)

PRACTICE ON APPEAL — RECORD — PLEADINGS — FRAUDULENT CONVEYANCE — PREFERENCES — PROOF OF RESIDENCE.

1. Although it is not the function of a bill of exceptions to show the pleadings in a cause, and as a rule, when they are not set out in the record, the presumption is that the cause was tried on the general issue, and that no special pleas were interposed, yet, where the record is wholly silent on the subject, and the bill of exceptions states that a certain special plea was filed, and its recitals show that the matters urged by both parties, and considered by the court without objection, were such as could only have been presented by the plea mentioned, the presumption that it was not filed will not be indulged.

2. Where one sells a stock of goods at its fair value, and receives payment in the discharge of an antecedent debt, and the notes of the purchaser for the balance, and the notes, together with his remaining personalty, do not exceed in value the amount of exemption to which he is entitled, the effect of the transaction is to make an authorized preference among the seller's creditors, and secure to him a sum of money which is not liable to his other debts; and the fact that notes were taken in part payment of the purchase does not render the transaction fraudulent, since, as the notes were included in the exemption, the change was merely in the form of the property exempted, and did not therefore involve any prejudice to the rights of the creditors.

3. In an action by the purchaser to recover for the wrongful attachment of said property it appeared that, although the debtor was described in the bill of sale as being of a certain county in the state, there was no direct evidence upon the question of his residence, nor was it shown that the fact of his residence was conceded. *Held*, that since, under Code 1886, § 2507, exempting the homestead of every "resident" in the state, and section 2511, exempting the personalty of such "resident" to a certain amount, the debtor was not entitled to claim the said notes as exempt unless he was a resident; and since, if he was not so entitled, the transaction was void as an attempt to hinder and delay creditors, the fact of his residence should not have been assumed by the court in its instructions, but should have been submitted to the jury.

Appeal from circuit court, Lowndes county; JOHN MOORE, Judge. Reversed.

This was an action by M. L. Edwards against Robert E. Brinson, sheriff of Lowndes county, and others, to recover damages for an alleged trespass in the seizure under an attachment issued against one Avenger in favor of Goetter, Weil & Co., of certain goods which were alleged to have been the property of the plaintiff. The following facts were undisputed: That the goods had belonged to Avenger; that while they belonged to him he was indebted to Goetter, Weil & Co., a firm doing business in the city of Montgomery, Ala.; that he transferred the same to the appellee; that the alleged consideration for the said transfer was certain debts due to the appellee and to the wife of Avenger, which amounted to $830.54; that the value put upon the goods by Avenger and Edwards at the time of the purchase was $1,231.54; that for the difference between the alleged consideration and the alleged indebtedness Edwards executed to Avenger his promissory note, payable at a future date; that at the time of the sale to Edwards, Avenger owed Goetter, Weil & Co. for the debt upon which the attachment was issued, and other persons, and was insolvent, and these facts were known to the plaintiff, Edwards; that, in addition to the goods sold by Avenger to Edwards, Avenger at the time of the sale owned other personal property, worth between four and five hundred dollars; but there was no evidence as to whether Avenger was at that time a resident of the state of Alabama. There was some conflict in the evidence as to the actual value of the goods sold, some of the witnesses valuing them as low as $800. The court, in its general charge to the jury, instructed them that, "if they believed from the evidence that Avenger owed Edwards and his wife *bona fide* debts amounting to $830.54, and that the amount of the notes taken by Avenger from Edwards, payable to him, Avenger, would not, together with the value of the other personal property owned by Avenger, exceed the sum of one thousand dollars in value, then the jury must find a verdict for the plaintiff." To this part of the general charge the defendants duly excepted, and also reserved an exception to the court's giving the following charge in writing, at the request of the plaintiff:

"The fact that Avenger was insolvent at the time of the sale would make no difference if the debt, as stated in the bill of sale, was honestly due to Edwards, if the goods were taken in absolute payment of the debt, and if the goods taken for the debt were not greatly in excess in value of the amount of the debt." The defendants then requested the court to give several written charges, and reserved separate exceptions to the court's refusal to give each of them; but it is not deemed necessary to set them out in detail. There was judgment for the plaintiff in the amount of $1,120.14. The defendants appeal.

Tompkins & Troy and *A. A. Wiley*, for appellants. *Watts & Son*, for appellee.

WALKER, J. In the record proper no mention is made of any pleas filed by the defendants, nor is there anything in the judgment entry to indicate upon what issues the case was tried. The bill of exceptions recites that "the defendants, in short, by consent plead the general issue and justification under a writ of attachment issued against D. B. Avenger." It is true that it is not a function of the bill of exceptions to show the pleadings in a cause, and that, as a rule, when the pleas are not set out in the record proper, the presumption to be indulged on appeal is that the case was tried on the general issue, and that special pleas were not interposed. Pollak v. Searcy, 84 Ala. 259, 4 South. Rep. 137; Hatchett v. Molton, 76 Ala. 410. In no event can a recital in the bill of exceptions be allowed to contradict the record as to a matter which ought to appear in the record proper, rather than in the bill of exceptions. Courie v. Goodwin, 89 Ala. 569, 8 South. Rep. 9. If, however, the record proper is wholly silent as to what issues were presented by the defendant, but the bill of exceptions states that a certain special plea was filed, and the whole tenor of its recitals shows that the matters urged by both parties and considered by the court without objection were such as could have been properly presented only by the special plea mentioned, then it cannot be said that the statement of the bill of exceptions that such plea was interposed is a contradiction of the record proper in this regard; and, in such case, it seems more reasonable to look to the showing made by bill of exceptions than to disregard it altogether, and indulge an indisputable presumption that the only plea that was filed was one which did not present the question which, without objection of either party, was treated as the main matter of contention in the trial. In Petty v. Dill, 53 Ala. 641, this court declined to ignore a plea which appeared only in the bill of exceptions, though it was fully recognized that that was not the proper place for it. From the recital in the bill of exceptions in this case of the evidence introduced by both the parties, from the part of the general charge of the court to which an exception was reserved, from the charge given at the request of the plaintiff, and from the charges requested by the defendant and refused, it clearly appears that the contest in the trial court was on the question of the validity, as against the defendants, who were attaching creditors of Avenger, of his sale of the stock of goods to the plaintiff. Conceding that that question could have been raised only by a plea of justification under legal process, though the attaching creditors themselves were parties defendant, which was not the fact in the case of Daniel v. Hardwick, 88 Ala. 557, 7 South. Rep. 188, still we do not feel at liberty to indulge the presumption that such plea was not interposed merely because the record proper is silent on the subject, when the bill of exceptions affirmatively states that there was such a plea, and makes such a showing of the proceedings on the trial that a presumption of the non-existence of the plea would involve the imputation upon both the parties litigant and upon the trial court that they addressed themselves almost exclusively to questions not presented by the pleadings. In such circumstances, to avoid imputing error to the trial court, it will be presumed that the issues upon which it is manifest that the case was tried were duly presented by the pleadings. In the present case we cannot presume that the special plea of justification under legal process was not interposed, and the rulings of the trial court upon the question of the validity of said sale will be reviewed. Those rulings appear in their proper place in the bill of exceptions. So far as the pleadings are concerned, the bill of exceptions is looked to only for the purpose of ascertaining that the issue involved by the special plea in question was raised. Chandler v. Chandler, 87 Ala. 300, 6 South. Rep. 153.

There was evidence tending to show that the stock of goods, valued by the parties at $1,231.54, was sold by Avenger at that price, and that he was paid therefor by the discharge of debts against him, amounting to $830.54, and in the two notes of the purchaser for the balance. As only part of the consideration was the payment of antecedent debts, the validity of the sale as against other creditors is to be determined by the rules governing sales by debtors for a new consideration. Owens v. Hobbie, 82 Ala. 466, 8 South. Rep. 145. In such a case, though the purchaser pays a full price, yet, if he is chargeable with notice that the seller is insolvent or in failing circumstances, and that it is his purpose by the sale to put his property beyond reach, or otherwise to hinder, delay, or defraud his creditors, then such sale is invalid as against other creditors. Lehman v. Kelly, 68 Ala. 192. An insolvent debtor has the right to pay one or more of his debts in preference to all others, though by so doing his remaining creditors are left empty-handed; but in securing his own claim the preferred creditor must not fraudulently aid the debtor in putting beyond the reach of other creditors property which they have the right to reach and subject. The other creditors cannot complain of such transaction if it cannot have effect to hinder, delay, or defraud them as to some resource to which they are entitled as a matter of right for the payment of their claims. The sale of his property by an insolvent debtor may be made the means of preferring not only the purchaser,

but other favored creditors. As such preferences are allowable, and the act itself is legal, the fact that the result is to leave other creditors unprovided for does not render the transaction assailable by them, for the appropriation of the property is such as the law permits. Carter v. Coleman, 84 Ala. 256, 4 South. Rep. 151. In the case just cited only a part of the consideration was an antecedent debt due to the purchaser. The seller received the balance in cash, to be used in paying other creditors, and it was so used. The sale was sustained against the attack of creditors who were not provided for. It would have been equally legitimate if such cash balance had been paid to the debtor, to be retained by him as exempt, if such sum, together with his remaining property, did not amount to more than he could claim in that mode. To the extent that exemptions are allowed, the debtor has as much right to prevent his creditors reaching property that may be so claimed as he has to dispose of any of his property for the payment of preferred debts. A provision for the authorized exemptions is as lawful as a provision for the preferential payment of debts. A creditor has no right to complain of the appropriation of the debtor's property to either of these purposes, for in neither case is he unlawfully deprived of an opportunity of reaching property which he has the right to subject. If Avenger, as a resident of this state, was entitled to exemptions of personal property, if the debts which formed part of the consideration for the sale of the stock of goods were justly due, if the two notes made payable to Avenger, together with his remaining personal property, amounted to no more than $1,000 in value, and the sale of the stock of goods was for a fair and adequate consideration, then the whole effect of the transaction was to make an authorized preference among the seller's creditors, and secure to him a sum of money which was not liable to his other debts. It is plain that Avenger had the right to pay the preferred debts with their equivalent in value from the stock of goods, and, if what was left, together with his other personal property, did not amount to more than $1,000 in value, and he was a resident of the state, he could have disposed of such remainder of the stock just as he pleased; for, if the debtor's property does not exceed in value the amount exempted, the exemption privilege is attached to it by operation of the statute, without any act of selection by him, and creditors cannot be prejudiced by any disposition of property which is not liable to their demands. Nance v. Nance, 84 Ala. 375, 4 South. Rep. 699; Alley v. Daniel, 75 Ala. 403; Myers v. Conway, 90 Ala. 109, 7 South. Rep. 639. By selling the whole stock in bulk, and taking notes or cash for the difference between its estimated value and the debts paid, no greater benefit was reserved to the debtor, nor was the position of his creditors changed for the worse. Whether the property that could be claimed as exempt was disposed of in the one way or the other, the result would not be to secure to the debtor anything more than he was entitled to retain, or to put out of the way of other creditors any property which they had the right to have applied to the satisfaction of their claims. No more in the one case than in the other does the debtor acquire any benefit beyond what the law would have secured to him. McDowell v. Steele, 87 Ala. 493, 6 South. Rep. 288. If Avenger was entitled to exemptions, it could make no possible difference to his creditors whether the property retained by him as exempt consisted of a part of a stock of goods or of the equivalent in value thereof in notes or in cash. There is nothing for creditors to complain of in a transaction which cannot have effect to work any detriment to their rights in reference to the property of the debtor. The charges requested by the defendants are framed upon the theory that, though the excess in value of the stock of goods above the sum of the debts paid therewith, together with Avenger's other property, did not amount to more than he could claim as exempt, yet, if notes payable in the future were taken by the debtor for such excess, the law would pronounce the transaction fraudulent as against other creditors. Our conclusion is that such a mere change in form of a part of the debtor's exempt property could not vitiate the transaction, as the change involves no prejudice to the right of creditors, and that the charges were properly refused.

Avenger was not entitled to exemptions unless he was a resident of this state. Code 1886, §§ 2507, 2511. The position assumed by the plaintiff was that the transaction by which he acquired the stock of goods could not be vitiated by the fact that notes were given for the balance of the purchase price, and that they were made payable in the future, because such notes became part of the exemptions allowed by the law to the debtor. To the maintenance of this position proof of the debtor's residence in this state was essential. In the bill of sale Avenger is described as "of the county of Lowndes and state of Alabama," but the record discloses no direct evidence upon the question of his residence; and it is not shown that the fact of his residence in Alabama was conceded. In the absence of an admission as to a material fact, unless it appears that such fact was clearly shown, and that it was not contested, the evidence in regard thereto, though clear and without conflict, must be submitted to the jury; and the trial court, in charging the jury, has no right to assume the existence of such fact as established. 1 Brick. Dig. p. 336, § 8; 3 Brick. Dig. p. 114, § 118 et seq. While it does not appear from the bill of exceptions that there was any dispute in regard to this material fact, yet it is not shown that the existence thereof was conceded, or that the defendant in any way waived the right to take advantage of what was perhaps an inadvertence on the part of the plaintiff in failing to introduce proof on the subject. In the absence of any such showing, the court could not assume that such fact was admitted. Carter v. Chambers, 79 Ala. 223. The part of the general charge to which exception was reserved was faulty in failing

to submit to the jury the question of the debtor's residence. The transaction there hypothesized could not as a matter of law be pronounced valid unless the fact existed which would entitle the debtor to claim exemptions. If that fact did not exist, and the balance of the purchase price for the property sold was paid to the debtor in cash, such circumstances could have been looked to by the jury in determining the *bona fides* of the transaction, (Levy v. Williams, 79 Ala. 171;) and if, as in the present case, such balance was secured to be paid to the debtor in the future, there was involved such a hindering and obstruction of the other creditors as to render the transaction voidable by them, (McDowell v. Steele, supra.) In the instruction under consideration the fact of Avenger's residence in this state should have been hypothesized. The failure to do so renders the charge erroneous. For this error the judgment must be reversed. Reversed and remanded.

(94 Ala. 483)

ODUM v. RUTLEDGE & J. R. CO., (two cases.)

(*Supreme Court of Alabama.* Nov. 11, 1891.)

EMINENT DOMAIN—SUBMISSION TO ARBITRATION—AWARD—DAMAGES FOR RIGHT OF WAY—REFUSAL TO ABIDE BY—TENDER—RECORD ON APPEAL—PLEADINGS—ESTOPPEL.

1. Const. Ala. art. 1, § 24, declares that private property shall not be taken for private use, or for the use of corporations other than municipal, without the consent of the owner, provided, however, that the general assembly may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and regulate the exercise of the rights therein reserved. The Code, art. 2, tit. 2, pt. 3, commencing at section 3207, provides for condemnation proceedings in the probate court. Section 3216 provides that the order of condemnation shall vest in the applicant the easement proposed to be acquired, for the uses and purposes stated in the application, but for no other. *Held*, that under an agreement to submit to arbitration a dispute "concerning a right of way" for a railroad in connection with the said provisions, and providing that "the determination of the location and the damage for the right of way" should be left to the arbitrators, no greater interest in the land was secured to the railroad than would have been secured to it by compulsory proceedings under the statute, and, although it had the right to remove all buildings and improvements on the right of way, the property in such buildings and improvements remained in the owner of the land.

2. Where arbitration is agreed upon for the assessment of damages for a railroad right of way which has been already surveyed, an award which refers to the agreement, and assesses the damages at so much for the right of way taken "according to the survey," is not void for uncertainty.

3. Where a case is tried upon issue joined, and the pleadings are not shown in the record on appeal, but only in the bill of exceptions, they will be disregarded, and the presumption will be indulged that the only issue pleaded was the general issue.

4. Where a land-owner enters into an agreement for arbitration for the assessment of damages for a railroad right of way, and, after the award has been made, the company tenders a deed for his signature, he is entitled to a reasonable time to advise himself as to whether the deed is in accordance with the decision of the arbitrators, and his refusal to sign it, accompanied, however, by the statement that he will sign it if he finds it in accordance with the said decision, cannot be construed into a refusal to abide by his agreement so as to incur a forfeiture therein provided.

5. An agreement between a land-owner and a railroad company, to submit to arbitration the assessment of damages for a right of way, provided that, if either party should fail to observe the decision of the arbitrators, he or it should pay to the other a certain sum as liquidated damages. *Held*, in an action by the railroad company to recover such damages, that testimony by defendant that the president of the company directed the arbitrators not to value the improvements, as the company did not want them, was properly excluded, as, although such proof in a proper case in equity might operate as an estoppel, it would not have that effect in a court of law.

6. Defendant, in such a case, was not entitled to set off under the general issue the award of the arbitrators.

7. An actual tender of money is dispensed with if the party is ready and willing to pay it, but is prevented by the other's declaring that he will not receive it.

8. A tender, accompanied with conditions which the party has no right to impose, is of no avail.

Appeal from circuit court, Crenshaw county; JOHN P. HUBBARD, Judge.

Appeal from probate court, Crenshaw county; JOHN R. TYSON, Special Judge.

This comprises two suits brought by the Rutledge & Julian Railroad Company against B. P. Odum for the condemnation of land for a right of way, and the recovery of a penalty. There was judgment for plaintiff in both cases, and defendant appeals.

Gamble, Bricken & Gamble, for appellant. *J. H. Parks* and *M. W. Rushton*, for appellee.

COLEMAN, J. These two cases were submitted as one case, and will be considered together. The Rutledge & Julian Railroad Company and B. P. Odum agreed to submit to arbitration a matter of controversy in regard to a right of way over the lands of the latter. The articles of agreement, submitting the matter to arbitration, provided that, if "either party shall fail to keep, observe, and perform the decision and award, he or it shall pay to the other party two hundred and fifty dollars as liquidated damages." The railroad company (appellee) claimed that Odum forfeited the penalty, and instituted condemnation proceedings in the probate court, under the statute, to condemn the land to the right of way. From the trial and order of condemnation the appeal is taken to this court. The railroad corporation then sued upon the articles of submission, and recovered the amount stipulated in the agreement. From the judgment rendered on this trial the appeal is taken from the circuit court.

Article 1, § 24, of the constitution, in regard to the exercise of the right of eminent domain, among other provisions declares as follows: "Nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner: provided, however, that the general assembly may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of

the rights herein reserved," etc. Article 2, tit. 2, pt. 3, of the Code, commencing at section 3207, prescribes a system of condemnation proceedings in the probate court, when any corporation, person, or association of persons proposes to take lands, or to acquire an interest or easement therein, for any uses for which private property may be taken, to have the same condemned to such uses. Section 3216 of the Code provides that the order of condemnation upon the payment of the sum ascertained shall vest in the applicant the easement proposed to be acquired for the uses and purposes stated in the application, but for no other uses and purposes. Construing the written agreement between B. A. Walker, president of the corporation railroad, and B. P. Odum, the owner of the land, (in which the matter in dispute is stated to be "concerning a right of way" over the lands of the said Odum, in connection with the constitutional and statutory provisions,) it is clear that no greater interest in the land was to be appropriated to the railroad than a mere easement. In fact the agreement provides "the determination of the location and the damage for the right of way over said lands" should be left to the named arbitrators for decision. The fee of the land, and ownership of improvements thereon, and everything not incompatible with the use intended as a right of way, remained in the owner. Simply to acquire the right to use the land to the same extent, and no more, as if the right of way had been secured by compulsory proceedings under the statute, was the purpose of the arbitration. Alabama & F. R. Co. v. Burkett, 42 Ala. 84; Lance's Appeal, 55 Pa. St. 16, 93 Amer. Dec. 722, and note, 729.

The railroad had the right to remove all buildings or constructions located upon its right of way, or which interfered with its use; but the property interest in such building or improvement remained in the owner, subject to the right of the company to have them removed. The award rendered by the arbitrators seems to be in accord with the matters submitted to them. It refers to the agreement of submission, assesses "the damages at five hundred dollars for the right of way so taken or to be taken according to the survey." It appears from the evidence that the line for a right of way at that time had been surveyed, and the damages assessed were for the right of way "according to the survey." It is not void for uncertainty. *Id certum est quod reddi certum.* We do not doubt that Odum had the right to the buildings and the fences, and his claim to resume them ought not to have been refused or interfered with by the railroad company.

We are not considering the effect of the deed signed by Odum and wife and tendered to the company, but the rights of the parties under the award. The demurrer to the plea of the respondent in the *ad quod damnum* proceedings in the probate court ought not to have been sustained, and we would reverse and remand this case, if this court had jurisdiction of the case. We have held that in *ad quod damnum* proceedings no appeal lies from the probate court to the supreme court, but the appeal must be taken to the circuit court. Postal Tel. Cable Co. v. Alabama G. S. R. Co., 92 Ala. —, 9 South. Rep. 555; Iron Co. v. Cabaniss, 87 Ala. 328, 6 South. Rep. 300; Railway Co. v. Newton, (Ala.) 10 South. Rep. 89. The pleas of the defendant in the appeal from the circuit court do not appear except in the bill of exceptions. It is not the office of a bill of exceptions to present the pleadings and the rulings of the court thereon Petty v. Dill, 53 Ala. 641; Ex parte Knight, 61 Ala. 482. The record does show that "issue was joined," and thereupon came a jury, etc. The rule is that when the record shows that the case was tried upon issue joined, but does not show what pleas were filed, it is presumed that the general issue was pleaded, and this is the only issue, as presented in this record, we are at liberty to regard as having been pleaded. May v. Sharp, 49 Ala. 140; Hatchett v. Molton, 76 Ala. 410. The plea of the general issue cast upon the plaintiff the burden of proving every material allegation of the complaint. The defense had the right to meet such evidence with counter-proof. Petty v. Dill, 53 Ala. 645; 49 Ala., supra.

The deed tendered to Odum for his signature is not set out. The bill of exceptions states it was "in proper form and substance for appropriate conveyance." What these words embrace we do not know. There was evidence tending to show that upon the reading of the deed Odum replied that he would not sign it, unless the railroad would agree for him to move his fences and improvements, and he was notified not to remove any of the improvements. Now, if the deed tendered to him was a conveyance of more than a right of way across the land,—a mere easement,—Odum was not required to sign it by the terms of the award of the arbitrators; and if more was demanded of him as a condition precedent to the payment of the damages awarded by the arbitrators, the railroad was more in default than Odum. Furthermore, Odum was entitled to a reasonable time to advise himself as to whether the deed tendered to him for his signature accorded with the decision of the arbitrators, and his refusal to sign the deed, accompanied with the statement that he would sign it if it was in accordance with the decision of the arbitrators, cannot be construed into a refusal to abide by his agreement so as to incur the forfeiture provided therein, at least until he had a reasonable time, under the circumstances, to inform himself as to the extent of their decision. The award allowed the railroad 10 days within which to pay the damages assessed. Three days after the rendition of the award Odum signified his willingness to abide the decision of the arbitrators, tendered a deed to the right of way, and offered to receive the money, and in no way, at any time, so far as we can discover from the evidence, has he signified a refusal to comply in every respect with the award. If the jury were satisfied from the evidence of the truth of these statements, the defense was made out under

the general issue. There was no error in excluding the testimony offered by the defendant to show that the president of the railroad company directed the arbitrators not to value the improvements, as the railroad corporation did not want them. Such proof, in a proper case, might operate as an estoppel, but this is an equitable rule, not cognizable in a court of law. Set-off is not available under the general issue, and there was no error in refusing to charge the jury as requested in this respect. In regard to a tender of money, the general rule is that the money must be actually produced and proffered. It is well settled, however, that the proffer of the money is dispensed with if the party is ready and willing to pay the same, but is prevented by the creditor's declaring that he will not receive it. Rudulph v. Wagner, 36 Ala. 702. A tender, accompanied with conditions which the party has no right to impose, is not a legal tender. A mere tender of the money due does not discharge the obligation. The debt remains, and, to be available, the tender must be kept up. In the case of the appeal from the probate court, the appeal is dismissed. In the case of the appeal from the circuit court, the judgment of the lower court is reversed, and the cause remanded.

(95 Ala. 103)

AGNEW v. WALDEN *et al.*

(*Supreme Court of Alabama.* Nov. 11, 1891.)

EXECUTORS AND ADMINISTRATORS—PROBATE PRACTICE—FILING CLAIMS—WAIVER OF EXEMPTIONS—ABANDONMENT.

1. Where a claim against a decedent's estate, evidenced by note, was presented at the probate office within the time prescribed by statute, and an entry was made on the record as to the nature of the claim, in whose favor and against whose estate it was, and of the amount, date, and time when due, though neither the note nor a copy was filed there, this is a sufficient compliance with Code Ala. 1886, §§ 2081, 2083, barring all claims not presented to the administrator, or docketed in the probate office within a certain time, by filing therein the claim, or a statement thereof. Agnew v. Walden, 4 South. Rep. 672, 84 Ala. 502, approved.

2. A waiver, in a note, of all exemptions, is a good waiver as regards personal property, but not as regards real estate.

3. Where a note sued on contains a waiver of all exemptions, but the judgment entry is silent as to the waiver, this amounts to an abandonment thereof, and a consent to accept a common judgment.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge. Affirmed.

This suit was brought by Walden & Son, as law partners, against L. D. Agnew, administrator of one J. R. Dorsey, and was commenced June 18, 1886, which was more than 18 months from the grant of letters of administration. The basis of the said suit was a bond or promissory note under seal, which was in words and figures as follows: "$500.00. One day after date I promise to pay Walden & Son, or bearer, five hundred dollars, and to secure the same I hereby waive all exemption or relief laws under the statutes and constitution of Alabama; the said sum being retainer to said Walden & Son as my attorneys in the case of the state of Alabama against me, charged with homicide. Witness my hand and seal, this October 9th, 1884." After the reversal of this cause on former appeal the defendant filed 10 pleas, setting up in different forms that the defendant's intestate did not owe the amount claimed, failure of consideration, and that said claim was barred by the statute of non-claim. Demurrers were sustained to all the pleas except the third, ninth, and tenth, which, respectively, contained the above defenses. There was judgment for plaintiffs, and defendant appeals.

Matthews, Daniel & Carlon, for appellant.

STONE, C. J. This case was tried on pleas numbered 3, 9, and 10, and under them the entire defense was made which could have been presented. We will not consider the rulings on the demurrers to the other pleas, for, whether right or wrong, they worked no injury. Mitcham v. Moore, 73 Ala. 542; Rice v. Drennen, 75 Ala. 335. It is not our intention, however, to intimate there was any error in the ruling. On the former appeal (84 Ala. 502, 4 South. Rep. 672) we held the evidence was sufficient in this case to show that a proper statement of the claim had been filed in time in the office of the judge of probate to meet the requirements of the statute. Code 1886, § 2083. We adhere to what we then said. We confine it, however, to the simple fact of the debt,—$500,—evidenced by the note under seal. Of this claim, as a debt against the estate, the presentation or filing was sufficient. The claim sued on, as described in the complaint, and as the testimony tends to show, contains a waiver of all exemptions or relief laws under the statutes and constitution of Alabama. This is a good waiver of exemptions of personal property, but not of real estate. Neely v. Henry, 63 Ala. 261. The substance of the claim, as filed and recorded in the probate court, states the date of the note, amount when due, names of the payees, and date of filing. It contains no mention of the waiver of exemptions. In Smith v. Fellows, 58 Ala. 467, we stated some of the reasons which go to make up the policy of our legislation requiring claims against decedents' estates to be presented or filed within 18 months. There may be other reasons. Personal representatives, among their first duties, are required to set apart exemptions of personal property, if there be a surviving widow, or minor child or children; and it may be that to constitute a statement of the claim that will cut off exemptions the waiver should be set forth, if there be one. But we need not decide this question. The judgment entry is a simple judgment for money, and is silent as to the stipulation waiving exemptions. This amounts to an abandonment of the waiver, and a consent to accept a common judgment for money. Courie v. Goodwin, 89 Ala. 569, 8 South. Rep. 9; Brown v. Leitch, 60 Ala. 313; Hosea v. Talbert, 65 Ala. 173. Some of the questions sought to be raised are scarcely presented in such form as that we can consider them. Eliminating them, we find no error in the record. Affirmed.

(95 Ala. 172)

McDONALD *et al.* v. WALKER *et al.*

(*Supreme Court of Alabama.* Nov. 11, 1891.)

PLEADING AND PROOF—VARIANCE.

Where a bill for specific performance of a contract for the sale of land alleges that the bond for title was executed by A. M. and M. A. M., and the evidence shows that it was executed by A. M. alone, the variance is fatal.

Appeal from city court of Birmingham; H. A. SHARPE, Judge. Affirmed.

Action by W. J. McDonald and others against W. A. Walker, administrator, and others, for the specific performance of a contract for the sale of land. Judgment for defendants. Plaintiffs appeal.

Watts & Son, for appellants. *Hewitt, Walker & Porter*, for appellees.

MCCLELLAN, J. The general principle that the allegations of a bill in equity and the evidence adduced at the hearing must correspond is applied with the greatest strictness to bills for the specific performance of contracts, to the extent, indeed, of requiring absolute correspondence, not only between every essential averment and the proof, but also between every redundant and superfluous averment with respect to a material fact, or descriptive of a matter or thing necessary to be alleged. Daniell's, Ch. Pr. p. 860; Goodwin v. Lyon, 4 Port. (Ala.) 297; Ellis v. Burden, 1 Ala. 458; Ellerbe v. Ellerbe, 42 Ala. 643; Winston v. Mitchell, 87 Ala. 395, 5 South. Rep. 741; Webb v. Crawford, 77 Ala. 440. Thus where the bill alleged that the payments under a contract sought to be enforced were to be made in five equal annual installments, and the proof was that they were to be made in four or five such installments, it was held that the variance was fatal, and that a decree for specific performance of the contract was properly refused. Aday v. Echols, 18 Ala. 353. And where the bill averred that the contract was made on September 30, 1885, while the proof showed that it was made September 30, 1886, the variance was held to be fatal to relief; and this, notwithstanding the abstract rights of the parties were the same whether the contract bore the one or the other of these dates. The court said: "There is no class of cases in which correspondence between the allegations of the bill and the proof is more rigidly exacted than in suits for the specific performance of contracts. The allegation of the time when the contract is made is descriptive of that which is material, and the variance between the allegation and proof is fatal." Johnston v. Jones, 85 Ala. 286, 4 South. Rep. 748. See, also, Hamaker v. Hamaker, 85 Ala. 231, 3 South. Rep. 611. The same doctrine is somewhat more fully stated by BRICKELL, C. J., as follows: "The rule prevailing in courts of equity is that pleading and proof must correspond. It is not only necessary that the substance of the case made by each party should be proved, but it must be substantially the same case as that which he has stated upon the record; for the court will not allow a party to be taken by surprise by the other side proving a case different from that set up in the pleadings." Floyd v. Ritter, 56 Ala. 356; Alexander v. Taylor, Id. 60.

The averment of the bill is, in general terms, that the debt secured by the deed of trust has been fully paid. This is followed by an averment more precise, stating the time, mode, and source of payment, and describing the particular transaction from which it was derived. The latter averment may have been unnecessary and redundant. A general statement or averment of the payment of the debt would have been sufficient, without descending to a statement of the particular facts or circumstances proving, or conducing to prove, it. If redundant allegations are introduced into pleading, and they are descriptive of that which is material, a variance between the allegations and proof is fatal,—of the same consequence as the variance between the allegation of an essential fact, of that which is material, and the evidence or proof of the fact. 1 Greenl. Ev. § 67. The same measure of relief may be obtainable upon the facts proved as could have been obtained if the particular facts averred had been proved, but the court cannot permit the opposite party to be misled and taken by surprise by the proof of a case differing from that set up in the pleadings, and which, it is presumed, he came prepared to meet, as it is the case he had notice to resist. Floyd v. Ritter, supra; Meadors v. Askew, 56 Ala. 584; Bellows v. Stone, 14 N. H. 175; Gilmer v. Wallace, 75 Ala. 220. The application of the doctrine of the foregoing authorities to the case at bar leads us to the same result attained by the city court. The contract sought to be enforced is evidenced by a bond for title upon payment of purchase money. The bill alleges that this bond was executed jointly and severally by Alberto Martin and Marion A. May. If the evidence establishes the execution of any bond, it is not that of Martin and May, but that of Martin alone. Even if it be conceded that, had the averment been that the bond was executed by Martin alone, the complainants—other considerations being pretermitted—would be entitled to the relief prayed on the evidence we find in this record, even conceding that, although the sale was made by Martin and May, and the land at the time belonged to them as tenants in common, the complainants, in view of Martin's subsequent acquisition of May's interest, would be entitled to the relief prayed on averment and proof of a bond executed by Martin alone. Conceding, for the argument, in short, that the averment that May also executed the bond was not material to complainants' case, but redundant and superfluous, yet it is descriptive of the bond, and the bond is absolutely and essentially material. And this material thing thus laid and described became material as laid and described, and had to be proved with all the particularity, so far as May's relations to it are concerned, that confessedly would have been necessary had complainants' rights in point of fact depended upon the execution of the bond by May. This variance between the averments of the bill and the

proof adduced at the hearing is fatal to the relief prayed, and the decree denying that relief and dismissing the bill is affirmed.

(95 Ala. 456)

GARRETT v. SEWELL.

(*Supreme Court of Alabama.* Nov. 12, 1891.)

INSTRUCTIONS — ASSUMPTION AGAINST EVIDENCE.

Where the complaint in an action for damages for the removal of a partition fence contains three counts,—the first in trover, and the others in trespass,—and the evidence shows that plaintiff was in possession of the land on which the fence was, it is error for the court to give an affirmative charge in favor of defendant, since such charge assumes that plaintiff had at the time of the injury neither possession nor the right of immediate possession.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge. Reversed.

Action by Sarah C. Garrett against M. N. Sewell to recover for the removal of a partition fence. Judgment for defendant. Plaintiff appeals.

J. L. Burnett and *H. W. Cardon*, for appellant.

CLOPTON, J. Appellant brings the suit to recover damages for the removal of the fence dividing her land from that of defendant. The complaint contains three counts: The first in trover, for the conversion of the rails; the second substantially alleges that defendant wrongfully and maliciously removed a fence inclosing in part the plantation of plaintiff, which was a partition fence between plaintiff and defendant, and had been agreed upon and recognized as such by plaintiff and defendant, and those under whom he claims, for more than 10 years, and that its removal left the plantation of plaintiff exposed to depredation by stock; and the third, in terms, claims damages "for trespass committed by the defendant," and makes substantially the same averments as the second, except that the words "wrongfully" and "maliciously," and the averment as to exposure to stock, are omitted. The following facts are uncontroverted: In 1858 or 1859 it was agreed between J. R. Lowe, who owned the land on the west side, and McRandle, who owned the land on the east side, of the fence, that it should be recognized as the line between them, and as a partition fence. After occupying the land on the east side for about 10 years, McRandle sold it to Savage, and Savage to Lowe, so that Lowe became the owner of the land on both sides of the fence. On a division of his real estate between his heirs in 1873 or 1874, after the death of Lowe, the land on the west side was allotted to plaintiff, and that on the east side to Mrs. Aubrey, each of whom entered into possession, treating and recognizing the fence as the dividing line, and as a partition fence. In 1879, Mrs. Aubrey sold the land allotted to her to defendant, who moved the fence, in 1885, about six feet onto his land. The evidence clearly shows that the fence was treated and recognized as on the line, and a partition fence, for 10 years before Lowe purchased from Savage, the respective owners claiming to the fence, and that no complaint was made that the fence was not on the line until claimed by defendant in the latter part of 1884 or early in 1885. Partition fences, as defined by statute, are fences erected on the line between lands owned by different owners. Code, § 1375. Whether it is on the true line, according to survey, or on a line agreed on by the parties, is immaterial. In Henry v. Jones, 28 Ala. 385, it was held: "If a part of the fence was entirely on the land of one of the proprietors, still, if it was recognized as a partition fence by both parties, it would confer the same rights as if it were in fact so. The recognition would operate as an estoppel *in pais*, and neither could complain of any act done by the other which would have been lawful had the fence been on the division line." Though a survey may demonstrate that the fence is not on the true dividing line, neither party loses any rights to the same. Section 942 of the Code provides: "When a resurvey of land is made by a county surveyor for the purpose of straightening section lines, or any subdivision lines of sections, the owners of fences built on the original lines shall not lose their rights to the same when the resurvey changes the original lines, and places the fence on the land of others." Under the provision of section 1370 of the Code, to the effect that partition fences between improved lands are to be erected and repaired at the joint expense of the occupants, which has been the law since the act of 1807, such fences become the joint property of the adjoining proprietors. Walker v. Watrous, 8 Ala. 493. Whenever one tenant in common does an unlawful act, whereby his co-tenant is injured, the law affords an appropriate remedy. He may bring trover or trespass against his co-tenant, when the thing in common is destroyed, or the conversion is equivalent to an exclusion of the right of the tenant suing. Allen v. Harper, 26 Ala. 686. The removal of the fence from the original dividing line onto the land of the defendant, and its appropriation to his exclusive use, was tantamount to the destruction of the thing in common. Symonds v. Harris, 51 Me. 14; 2 Wat. Tresp. § 947. Either owner may lawfully enter upon the land of the other for the purpose of repairing a partition fence, but, if the entry is made for the purpose of destroying the fence, such entry constitutes a trespass. Henry v. Jones, supra. But defendant contends that, notwithstanding the evidence may clearly show the facts as above stated, under the complaint—the first count being in trover, and the others in trespass—the affirmative charge in favor of defendant was rightfully given. The contention is based on the ground that, in order to maintain trover or trespass, plaintiff must have possession, or the right of immediate possession, at the time of the injury complained of. The gist of the action of trespass being the injury to the possession, plaintiff cannot recover on his general property if, at the time of the injury, the right of present possession and enjoyment has been conferred on another. So, also, to maintain trover, the plaintiff must have either possession or the right of

immediate possession. The affirmative charge in favor of defendant assumes that plaintiff had neither. While there is evidence that a tenant of plaintiff was in possession at the time of the removal of the fence, there is also evidence tending to show that only the cleared land had been rented with permission to the tenant to get firewood off the woodland, which was inclosed by the fence. On this state of the evidence the court could not assume, as matter of law, that plaintiff neither had possession, nor the right of immediate possession to the woodland. On the contrary, if the uncontradicted evidence be believed, plaintiff is entitled to a verdict, under the first count, and under the others, if it be shown that in order to remove the fence defendant entered on the land of plaintiff. No question arises as to the measure of recovery. Reversed and remanded.

(95 Ala. 145)

SIMS v. HERTZFELD.

(*Supreme Court of Alabama.* Nov. 11, 1891.)

ACTION ON JUDGMENT—PLEADING—INSTRUCTIONS.

1. Where the complaint in an action on two judgments sufficiently describes the judgments, no description of the contracts on which the judgments were rendered is necessary.

2. In such case it is proper for the court to sustain a demurrer to a plea setting up defenses which could have been urged against the demands before the rendition of judgments on them.

3. Defendant's second plea in an action on judgments alleged to have been rendered against a partnership of which defendant was a member was a denial of the judgments, and his fifth plea was a denial of the recovery on the judgments against the partnership. The demurrer to the second plea was sustained, and issue joined on the fifth plea. *Held* that, if there was error in sustaining such demurrer, it was harmless, as defendant had under the fifth plea full benefit of his denial of the existence of the judgments.

4. Defendant's fourth plea in such case was failure of consideration, which, if available at all, was defective in failing to state the facts showing the substance of the matter relied on as a defense.

5. Where the evidence is pertinent to and supports the allegations of the complaint, and is wholly uncontroverted, it is proper for the court to give a general affirmative charge in favor of plaintiff.

Appeal from circuit court, Tallapoosa county; JAMES R. DOWDELL, Judge. Affirmed.

Action by Reuben Hertzfeld against R. Y. Sims on two judgments. Judgment for plaintiff. Defendant appeals.

This suit was brought by the appellee, R. Hertzfeld, against R. Y. Sims, and was founded upon two judgments alleged to have been recovered by the plaintiff against the partnership of Marable & Sims, of which firm the present defendant was a member. The defendant demurred to the complaint on the grounds (1) that it failed to describe with sufficient certainty the contract upon which said judgments were obtained; (2) misjoinder of counts. The court overruled each of these grounds of demurrer, and the defendant then interposed his pleas, which were: (1) That the notes upon which the said judgments were recovered were given by the plaintiff in payment of property which, after the purchase, was returned to the plaintiff; (2) the denial of the recovery of the judgments as stated in said complaint; (3) the denial that said judgments were obtained upon notes upon which the defendant waived his right of exemption, and also a denial of the statement of waiver of exemption in said judgment as to the defendant; (4) failure of consideration; (5) a denial of the recovery of said judgments against the partnership of Marable & Sims. Plaintiff demurred to these pleas, and the court sustained his demurrer to the 1st, 2d, and 4th pleas, but overruled it as to the 3d and 5th, upon which latter pleas issue was joined. The plaintiff introduced in evidence the record of the circuit court, in which the judgments which are the basis of the present suit were recovered, and also introduced the notes upon which said judgments were recovered. The defendant objected to the introduction of both the record and the notes, and duly excepted to the court's overruling each of his said objections. There was no evidence introduced by the defendant. At the request of the plaintiff, in writing, the court gave the general affirmative charge in his behalf. There was judgment for the plaintiff, and the defendant brings this appeal.

John A. Terrell, for appellant. *H. A. Garrett* and *Sorrell & Sorrell*, for appellee.

WALKER, J. The suit was upon two judgments alleged to have been recovered by the plaintiff against a partnership of which the defendant was a member. The defendant did not, either by his demurrers or by his pleas, raise the question as to his individual liability upon a judgment against his firm alone. In the count added by the amendment there are allegations in reference to the contracts upon which the judgments were recovered, which are not material to the cause of action upon the judgments themselves. No objection, however, was interposed in any way to the presence in the complaint of these superfluous allegations. One ground of demurrer to the complaint was that it failed to describe with sufficient accuracy the contract upon which the judgments were rendered. The judgments themselves were sufficiently described, and there was no necessity of setting out any description at all of the contracts upon which they were rendered. The complaint, as amended, was not a departure from the original. The additional count sets out more in detail the cause of action described in the original complaint, but no misjoinder of counts was effected by the amendment. There is no merit in the demurrer to the complaint.

If the state of facts set up by the defendant's first plea was ever available as a defense against the claims which had been reduced to judgment, such defense should have been made in the suits in which the judgments were recovered. The judgments are conclusive of all defenses which could have been urged against the demands before the rendition of judgments upon them. The demurrer to this plea was properly sustained. Cook v. Parham, 63 Ala. 456; Mervine v. Parker, 18 Ala. 241; 2 Brick. Dig. p. 145.

If there was error in sustaining the demurrer to the second plea, it was error without injury to the defendant; because, under the fifth plea, the demurrer to which was overruled, he had the advantage of the same issue which he sought to present by the second plea. He had the full benefit of his denial of the existence of the judgments alleged in the complaint. Insurance Co. v. Copeland, 90 Ala. 386, 8 South. Rep. 48; Capital City Water Co. v. National Meter Co., 89 Ala. 401, 7 South. Rep. 419. Even if the plea of failure of consideration was available in an action on a judgment, the plea to that effect in this case was defective in failing to state the facts showing the substance of the matter relied on as a defense. Carmelich v. Mims, 88 Ala. 335, 6 South. Rep. 913. There was no consent to accept the plea in short.

The evidence in reference to the judgments, and to the contracts upon which they were recovered, corresponded with the allegations of the complaint as amended. Some of the allegations were superfluous, as has been already indicated. Some of the evidence which was objected to might have been inadmissible if immaterial issues had been excluded from the case, or if the defendant had availed himself of objections which might have been made under a different state of the pleadings. The third and fifth pleas, upon which alone issue was joined, were mere denials that the judgments sued on were obtained on notes in which the defendant waived his exemptions, that there was such waiver in said judgments, and that such judgments as were alleged in the complaint were obtained against the partnership of Marable & Sims at the August term, 1890, of said court. If no proper steps are taken by the defendant to eliminate false issues presented by the complaint, evidence may be received to support them, and they may be submitted to the jury. McKinnon v. Lessley, 89 Ala. 625, 8 South. Rep. 9; Allison v. Little, (Ala.) 9 South. Rep. 388. The evidence was directly pertinent to the allegations of the complaint, and, as it supported them, and was wholly uncontroverted, the defendant could not have been injured by the action of the court in giving the general charge requested in writing by the plaintiff. Affirmed.

(94 Ala. 634)

EAST TENNESSEE, V. & G. R. CO. v. WATSON.

(*Supreme Court of Alabama.* Nov. 12, 1891.)

CARRIERS OF PASSENGERS—NEGLIGENCE—DEFECTIVE PLATFORMS.

A passenger sued to recover of a railroad company for personal injuries occasioned by his stepping into a hole in a bridge, which was constructed on the company's right of way, and connected its depot platform with a hotel. The bridge had been constructed by the hotel proprietor, and turned over to the company for the use of passengers in going to and from the hotel for meals. It was several inches lower than the depot platform, and was not connected with the ticket office, except through another room. The company had never repaired or exercised any control over it, and it had not been used by the company for any purpose within three years prior to the accident. *Held*, that passengers could not be presumed to know in regard to the ownership or control of such a structure, and that the company was liable.

Appeal from city court of Anniston; B. F. CASSADY, Judge. Affirmed.

This was an action by I. E. Watson against the East Tennessee, Virginia & Georgia Railroad Company to recover for personal injuries sustained by the plaintiff by reason of a defective platform. Judgment for plaintiff. Defendant appeals.

Knox & Bowie, for appellant. *Kelly & Smith*, for appellee.

STONE, C. J. This is the second appeal in this case. Watson v. Railroad Co., 8 South. Rep. 770. The opinion on the former appeal gives a full description of the platform on which the injury was suffered, together with its surroundings, by whom it was erected, its use, and everything connected with it, as disclosed in the record then presented. It also states how the injury was sustained, and the extent of it. We will not repeat what is there shown. In the record before us the following additional facts are presented: The railroad's right of way at that place extends each way 50 feet from the center of the track, and the hole into which plaintiff fell is on the right of way. The platform or bridge at the south end of the hotel—the one on which the injury was suffered—was built by the land company, was four inches lower than the other platform. It was not connected with the ticket-office, save by passing through another room; and said lower platform or bridge had not been used for any purpose by the railroad company within three years before the accident happened. Witness stated this as positive fact, and added he did not know it had been so used at any time before the three years. The railroad company had never repaired or taken any control of the bridge. On these newly-disclosed grounds it is contended plaintiff should not recover. The following facts may be stated as fully sustained by all the testimony: The hotel was situated near the railroad track; was an eating-house for passengers traveling on the road; a veranda extended entirely around the building; and each of the bridges or platforms—the one south of the hotel as well as the one connecting with its halls—spanned Crow's creek, and connected the hotel veranda with the railroad's platform at that stopping place. A train moving north and stopping with its forward car opposite the central bridge would place its next car opposite the lower bridge. We cannot suppose that travelers are informed as to the ownership or control of pass-ways thus circumstanced. They act on the appearance of things, and are authorized to so act. Seeing the two bridges or platforms extending from the railroad's platform proper to the ticket-office and eating-house, they may well suppose they are invited to take either. It is sometimes said a man may do as he will with his own. This is not universally true. *Sic utere tuo, ut alienum non lædas.* No man is permitted to place traps or pitfalls, or to maintain them, even on his own lands, where others are likely to

enter, without proper warning of the danger. Eminently is this true when there is likelihood that he will enter, and a *quasi* invitation that he shall do so. In Railway Co. v. Thompson, 77 Ala. 448, we said: "There is a common duty resting on all persons, artificial as well as natural, who own real estate on which the public is expressly or impliedly invited to enter, that it shall be kept free from traps and pitfalls; and, if this duty be neglected, and injury results therefrom to any person, the person suffering by such trap or pitfall may recover damages for the injury. This is a general rule of society, crystalized into law. It partakes of the nature of a public nuisance done or suffered, which inflicts special injury on an individual. To a suit for such injury it is no defense that the injury was not intended. Human conduct must be tested by its known general or ordinary consequences." 16 Amer. & Eng. Enc. Law, 957, and note 2; Railroad Co. v. McLendon, 63 Ala. 266. We do not think the new testimony changes the legal aspects of the question presented, or relieves the railroad company of blame for the injury plaintiff suffered. Graves v. Thomas, 95 Ind. 361; Beck v. Carter, 68 N. Y. 283; Jones v. Nichols, 46 Ark. 207; Ray, Neg. Imp. Dut. 117, 118.

Affirmed.

(94 Ala. 364)

SMITH *et al.* v. KAUFMAN.

(*Supreme Court of Alabama.* Nov. 12, 1891.)

FRAUDULENT CONVEYANCES—PROOF—KNOWLEDGE OF VENDEE—WRONGFUL ATTACHMENT — HARMLESS ERROR.

1. Although a question which the trial court allows to be addressed to a witness, over the objection of a party, may have been improper, no injury, assuming the relevancy of the proposed testimony, can result where the answer is favorable.

2. Where goods are wrongfully levied on as the property of another, the owner is not obliged to make a claim bond, and have a trial as to the right of property in the goods, but may allow them to be carried away, and sue in trespass; and the fact that he told the sheriff "to go ahead and levy," stating at the same time that he would hold him responsible as for a trespass, does not confer upon the officer any right which he did not before possess, or estop the owner from the assertion of any right which would otherwise have been his.

3. In an action of trespass against a sheriff for attaching a stock of goods as that of the plaintiff's vendor, the question being whether the sale was fraudulent, a charge that the "courts will not strive to force conclusions of fraud, and, if the facts and circumstances relied on to sustain the charge of fraud are fairly susceptible of an honest intent, that construction will be placed upon them," is erroneous, as exacting a higher degree of proof than is required in other civil cases. Skipper v. Reeves, (Ala.) 8 South. Rep. 804, followed.

4. The fact that one, while negotiating for the purchase of a stock of goods, has access to invoices from the wholesalers, which show that the stock was purchased on credit, is not of itself sufficient to put him on inquiry as to the seller's solvency, where it does not appear that the invoices were dated, or the time of credit given, and there was nothing to indicate that the amounts they represented might not have been paid, or that they might not have antedated the longest term of credit known in that particular business.

Appeal from circuit court, Jefferson county; JAMES B. HEAD, Judge. Reversed.

This was an action of trespass brought by S. Kaufman against J. S. Smith, sheriff, and his sureties, to recover damages for trespass committed by said Smith by the alleged wrongful levy of an attachment upon the goods of the plaintiff. The defendant pleaded the general issue; that the goods did not belong to the plaintiff, but belonged to the defendant in attachment; that the defendant was sheriff; and that the other defendants, who were sureties, did not commit the trespass complained of. The evidence showed that the attachment was issued against one Jacob Bandman at the suit of creditors of said Bandman, and upon being placed in the hands of one J. H. Sharp, deputy-sheriff, was levied upon the goods which were in the store formerly occupied by said Bandman. It was further shown that Bandman had been in the mercantile business in Birmingham, and had sold his entire stock of goods, furniture, good-will, and license for cash to the plaintiff, Kaufman; that Kaufman went into immediate possession of the goods, and employed said Bandman as clerk for one or two months; and that at the time of the levy of the attachment Kaufman was in possession of and owner of the said goods, and Bandman was in the store as a clerk. The testimony of Bandman, among other things, tended to show that before the purchase he and Kaufman made an inventory of the goods in the store, and used, in making said inventory, bills and statements sent to Bandman by his creditors, and that these bills showed that the goods were bought and shipped on time or on credit. At the request of the plaintiff, in writing, the court gave the following charges: (1) "The court charges the jury that courts will not strive to force conclusions of fraud, and, if the facts and circumstances in evidence relied on to sustain the charge of fraud are fairly susceptible of an honest intent, that construction will be placed upon them." (2) "The court charges the jury that, if the plaintiff's goods were wrongfully levied upon, the law would not require the plaintiff to give a claim-bond, and have a trial of the right of the property in the goods levied on, but the law gave him the choice to allow the goods to be carried away, and, if the levy should be wrongful, to bring such an action as the present case, and secure damages for such wrongful act." The defendants duly excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by them in writing: (1) "If the jury believe from the evidence that the plaintiff said to Sharp before he made any levy on the goods, and before Sharp had taken the goods into his possession, to 'go ahead and make the levy on the goods,' and that Sharp then proceeded to make the levy in this case, in pursuance to what the plaintiff told him to do, then I charge you, as this is a case of trespass, the plaintiff cannot recover in this action, and your verdict must be for defendants." (5) "If the jury believe from the evidence that the plaintiff,

while negotiating for the purchase of said goods from the said Bandman, had access to and did see said bills, showed that said goods had been purchased on credit, that such knowledge was sufficient to put the plaintiff on inquiry as to the solvency of the said Bandman, and, if proper inquiry would have disclosed the insolvency of the said Bandman, then your verdict must be for defendant." (6) "That if the jury believe from the evidence that plaintiff knew that Bandman had purchased the goods which he was offering to sell him, on credit, and that Bandman was selling him all of his stock of goods in bulk, and that Bandman had been doing a retail business in the city of Birmingham up to the time of said sale, and if you further believe from the evidence that Bandman at the time of said sale was insolvent, then I charge you that such circumstances were sufficient to put the plaintiff on inquiry as to the solvency of Bandman; and, if the jury believe that a proper inquiry on the part of the plaintiff would have disclosed the insolvency of Bandman, then I charge that you must find for defendants." There was judgment for plaintiff, and defendants appeal.

Garrett & Underwood, for appellants. *Lea & Bell*, for appellee.

MCCLELLAN, J. The question which the trial court allowed to be addressed to the witness Sharp, against defendants' objection, may have been improper,—it is not necessary to determine whether it was or not,—but, if so, no injury resulted to the appellants, in that Sharp's answer thereto—assuming the relevancy of the proposed testimony—was favorable to them. Holland v. Bergan, 89 Ala. 622, 7 South. Rep. 770; Insurance Co. v. Moog, 78 Ala. 284.

2. It seems that when the sheriff was about to levy on the goods found in Kaufman's possession as the property of Bandman he suggested to him that he make a claim-bond, and that, after consulting with his counsel, Kaufman declined to interpose a claim, preferring, as was stated at the time, to hold the sheriff responsible as for a trespass, and told the officer "to go ahead and levy," or "to go ahead and close the doors." Very clearly he had the unfettered right to make this election; and we are unable to conceive how the expression of the election, in the language we have quoted, could have conferred any right on the officer which he did not before possess, or in any way have prejudiced or estopped Kaufman from the assertion of any right which would otherwise have been his. Charge 2, given at the instance of the plaintiff, states the law correctly in this regard; and charges 1 and 2, requested by defendants, which were addressed to these matters, were well refused, when reference is had to the evidence, on the grounds both that they would have misled the jury, and that they were affirmatively erroneous.

3. Charge 1, requested by plaintiff, is substantially the same as an instruction held to be bad at the last term in the case of Skipper v. Reeves, (Ala.) 8 South. Rep. 804; and, for the reasons there set forth, we hold the giving of this charge to have been erroneous.

4. The insolvency of Bandman, from whom plaintiff purchased the goods, was not controverted. One of the main inquiries in the case was as to Kaufman's knowledge either of his vendor's insolvency or of facts which amounted to constructive notice of it. As pertinent to this inquiry, it was shown that Kaufman, in making an inventory of the stock with a view to its purchase, used invoices of certain of the goods which had been made out by the persons from whom Bandman had bought them, and that these bills showed that the goods had been bought on credit. It was not made to appear what dates the bills have, nor the time of credit in any instance, nor, indeed, that either of these facts were shown by them. For aught that does appear, these bills may have antedated the longest term of credit known in the particular line of business. Moreover, there is no evidence that the bills indicated that the amounts they represented had not been paid. All, in fact, which it can be affirmed that they tended to show was that Bandman at some time in the past had bought some of the goods found in the stock on time. We are far from believing that this fact was sufficient to raise up in the mind of Kaufman suspicion of Bandman's solvency, sufficient to put upon him the *onus* of inquiry on that subject, and to charge him with a knowledge of all the facts which such inquiry, diligently prosecuted, would have disclosed. On the contrary, we apprehend that the naked fact of Bandman's having been able to purchase goods on a credit—and that is all we have here—would rather tend to prevent and allay suspicion of his solvency than otherwise. Charges 5 and 6 of defendants' series, which assert that the facts that Kaufman saw the bills of the goods in question as furnished to Bandman by the merchants from whom he purchased, and that said bills showed the purchases to have been made on credit, were sufficient to put the plaintiff on inquiry, etc., were, in our opinion, properly refused. Stix v. Keith, 85 Ala. 465, 5 South. Rep. 184. The questions arising out of the trial court's refusing charges 3 and 4, requested by defendants, need not arise on another trial, and we deem it unnecessary to decide them. For the error pointed out above, the judgment is reversed, and the cause remanded.

(95 Ala. 66)

ADERHOLD *et al.* v. BLUTHENTHAL *et al.*

(*Supreme Court of Alabama.* Nov. 12, 1891.)

LANDLORD'S LIEN — PRIORITIES — ATTACHMENT — VALIDITY.

1. Where plaintiffs, by their agent, purchased goods subject to a landlord's lien for rent, and the goods remaining in the vendor's possession are sold by regular process to satisfy the lien, the ignorance of their agent that the person from whom the goods were purchased lived in a rented house, which fact was known to the principals, cannot avail them in an action for damages against the landlord for the conversion of the goods.

2. Where an attachment is sued out for rent and levied on goods subject to the landlord's lien, and the attachment is prosecuted to judgment,

the validity of the judgment and the sale of the property under the attachment cannot be invalidated by proof that notes given for the rent had been hypothecated before the suing out of the attachment.

Appeal from city court of Anniston; B. F. CASSADY, Judge. Reversed.

Action by Bluthenthal and Beckett against T. M. Aderhold and others for the conversion of goods. Judgment for plaintiffs. Defendants appeal.

On December 5, 1888, T. M. Aderhold rented a store-house to Harry Toole for the term of one year from January 1, 1889, at a monthly rental of $75, payable in advance. On February 14, 1889, Toole having disposed of substantially all his goods without the consent of his landlord, and without having paid the rent in full for the term, J. E. Aderhold, as the agent of T. M. Aderhold, applied to a justice of the peace and obtained an attachment for rent, returnable to the circuit court of Calhoun county. This attachment was placed in the hands of H. W. Finney, acting as a deputy-sheriff, who in that capacity levied the attachment on the goods, the subject-matter of this suit. T. M. Aderhold was not present when the attachment was levied, and never had possession of the goods. While in the possession of the sheriff under the levy, the house in which the goods were caught fire, and the goods were materially injured by the fire. Aderhold prosecuted his suit to judgment in the circuit court, and all the papers in that cause, with the judgment of the circuit court, appear in this record. Appellees brought this action on April 29, 1889, for damages against the appellants for the conversion of the goods levied on under the attachment. Defendants pleaded "Not guilty," and the regularity of the process, and on November 30, 1889, by leave of the court, filed an amended plea, setting up the contract between Aderhold and Toole, the issuance of said attachment, and the averment that said goods were liable to said attachment for the satisfaction of said landlord's liens. Defendant Finney justified under the process. On the trial of the cause the plaintiffs introduced in evidence as their basis of title a bill of sale by which the property of said Toole was purported to be conveyed unto them, the alleged consideration of such conveyance being the payment of an antecedent debt. It was further shown that this transaction was conducted by A. D. Meadors as the agent of the plaintiffs. He testified that at the time of the transaction he did not know that said Toole was a tenant of said Aderhold, and that he made no inquiry concerning his possession of the said house. But it was shown by Toole's testimony that he was a tenant of said Aderhold, and that the plaintiffs were notified that the house he was occupying was a rented one, and that he had no real estate anywhere in the said county. The defendant offered in evidence the lease, contract, and the certified transcript of the attachment papers. They also introduced J. E. Aderhold, who testified that, in the absence of T. M. Aderhold, he was his agent, and sued out the said attachment, and at the same time had it levied upon the goods in question. He also testified that the notes given by Toole for the rent of the store-house had been given to one Lewis as collateral security for the said T. M. Aderhold's debt to him, and that said notes were held by Lewis at the time of the attachment, but, as the notes fell due, they were taken up by said T. M. Aderhold, some time after the attachment. Judgment was rendered for plaintiffs, and defendants appeal.

Caldwell & Johnston, for appellants. *Gordon Macdonald* and *Blackwell & Keith*, for appellees.

COLEMAN, J. The goods, when purchased by plaintiffs, were in a rented store-house, and subject to the landlord's lien. Code, § 3069. The goods were purchased in bulk, and the consideration was the payment of an antecedent debt. Moreover, the goods had not been removed from the store-house when they were levied upon at the suit of the landlord by attachment for the enforcement of his rent debt. The sale of the goods by the tenant did not displace the prior lien of the landlord. Weil v. McWhorter, 10 South. Rep. 131, (at present term.) It was proven by the witness Toole, and not controverted, that appellees knew that Toole occupied a rented store-house, and owned no real property in Alabama. This was notice that the landlord's lien attached to the goods in the rented store-house. Lomax v. Le Grand, 60 Ala. 537; Boggs v. Price, 64 Ala. 514; Scalfe v. Stovall, 67 Ala. 237. Having notice themselves, the ignorance of their attorney and agent, Meador, through whom the goods were purchased, cannot avail them.

It is contended that as Aderhold, the landlord, had transferred the rent-notes of Toole to Lewis as collateral security to a debt he was owing to Lewis, and as the rent-notes were so held by Lewis when the attachment for the rent was sued out by the landlord against the tenant, the circuit court had no jurisdiction of the case, and that the judgment rendered is a mere nullity. This position is untenable under the facts disclosed in the record. The proceedings of the attachment suit in the circuit court on their face were in all respects regular. The court had jurisdiction of the persons and subject-matter. Its judgment is conclusive, as between the landlord and tenant, of the amount due for rent, and that it was due the landlord. The defendant in that suit, if the facts justified it, might have shown that the plaintiff did not own the debt, and was not the proper person to sue; but a stranger to that suit cannot show in a collateral proceeding that the plaintiff was not the owner of the claim, and not entitled to maintain the action. If neither the holder of the collateral nor the debtor objects to the party suing, a stranger to the action cannot interfere to defeat the suit, or, after judgment, impeach its validity as between the parties to the suit. The case of Ware v. Russell, 57 Ala. 43, is not in conflict with this principle.

Appellees having shown title to the property by their purchase from the tenant, it was competent for them to im-

peach the judgment obtained by Aderhold, the landlord, against Toole, his tenant, for fraud, or to have shown it was not founded on a rental debt, or that the debt had in fact been paid. As to these questions the judgment in the circuit court was, as to the plaintiffs in this suit, *res inter alios acta*. Dryer v. Abercrombie, 57 Ala. 497; Boswell v. Carlisle, 55 Ala. 554. It having been shown, however, that Toole was indebted for the rent of the store-house; that the landlord's lien attached to the goods for the rental debt; that he sued out an attachment for rent, which was levied upon the goods in the store-house, subject to the landlord's lien, and this attachment was prosecuted to judgment in the circuit court,—the validity of this judgment and sale of the property under the attachment cannot be impeached or invalidated by proof that the rent-notes upon which the attachment issued had been transferred as collateral security before the suing out of the attachment; and this would be true even though it had not been proven, as it was, that after the attachment issued, and before judgment, the debt for which the rent-notes were hypothecated as collateral security was fully paid by the landlord, and the rent-notes returned to him. It is thought that these principles will be sufficient to guide the court on another trial without noticing in detail the several questions raised by the pleadings. The ruling of the trial court did not accord with the principles of law as here declared, and the conclusion reached was not authorized by the evidence. The judgment must be reversed, and the cause remanded.

(94 Ala. 641)

GRIEL v. LOMAX *et al.*

(*Supreme Court of Alabama.* Nov. 10, 1891.)

RESCISSION OF CONTRACT — FRAUDULENT REPRESENTATIONS—INSTRUCTIONS.

1. Defendant and one M. and O. purchased land, agreeing to pay one-third in cash, and execute their notes for the balance, payable in one and two years. Plaintiffs agreed to buy defendant's interest, on his representation that to get his title they would have to pay one-third of the cash payment, and execute their separate notes for one-third of the deferred payments. Plaintiffs paid defendant $100 for his interest, but afterwards learned that it would be necessary for them to execute their joint notes with M. and O. for the deferred payments, and this M. and O. declined to do, and thereby defeated the purchase. *Held*, in an action to recover the $100, that it was error to charge that, though defendant may have stated facts which showed that the purchase was joint, and that he, M., and O. were required to execute their joint notes, yet, if he expressed the opinion that under this contract plaintiffs could get his interest by paying one-third cash and executing their separate notes for one-third the deferred payment, and this opinion was fraudulently expressed with intent to deceive, that would avoid the contract, since an expression of opinion, falsely made, with intent to deceive, even though acted on, avoids a contract only when the parties deceived were justified in relying on the opinion.

2. A request to charge which assumes disputed facts, and ignores material testimony, is properly refused.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge. Reversed.

Action by Tennant Lomax and others against Jacob Griel to recover $100. Judgment for plaintiffs. Defendant appeals. For former hearings, see 5 South. Rep. 325, 6 South. Rep. 741.

This was an action for money had and received, brought by the appellees against the appellant to recover $100 paid by them to him on a contract for the purchase of an interest in two lots in the city of Sheffield; and it is based on the alleged fraud on the part of the defendant in the misrepresentation of a material fact by him in regard to the contract of purchase, under which the defendant claimed an interest in the lots in question. The facts relied upon by the plaintiff are substantially as follows: That at the time of the making of the contract referred to the defendant and one Matthews and O'Connell had entered into a verbal contract to purchase said lots from one A. J. Moses, agreeing to pay him one-third of the purchase money in cash, and execute their notes, payable in one and two years, for the deferred payments; that in a conversation with the plaintiffs, which led up to their contract, Griel stated to them that all they would have to do in order to get his title would be for them to pay one-third of the cash payment, and execute their separate notes for one-third of the deferred payments; and on this representation the contract was consummated by plaintiffs paying defendant $100 for his interest in the purchased lots. The plaintiffs, in seeking to get the interest contracted for, ascertained that in order to do so it would be necessary for them to execute their joint notes with Matthews and O'Connell for the deferred payment, instead of executing their separate notes for one-third of that sum, as represented by Griel; and that said Matthews and O'Connell declined to execute said notes with them, and thereby defeated the purchase. It was contended by plaintiffs that, relying upon the statement made by Griel, they were deceived and damaged thereby, and that they had no knowledge of the terms of the contract of purchase between Moses and Griel, Matthews, and O'Connell, further than that told them by Griel, which had preceded the contract between the plaintiffs and defendant. The testimony of Lomax, Massie, and Sayre, respectively, is sufficiently stated in the opinion. The defendant reserved exceptions to several portions of the general charge given by the court, among which was the following: "(5) If merely asserting his opinion as to what was his belief, why then, in order to become a fraud, Mr. Griel must have known it to be a fraud, and used it for the purpose of leading these men into making that contract, and they were thereby misled, and made that contract. When it is a mere misrepresentation, and not the expression of an opinion, it is immaterial whether Mr. Griel knew that it was false or not." At the request of the plaintiffs the court gave the following written charges: "(1) If the jury believe from the evidence that Griel stated to plaintiffs that all they would have to do to get a good title to his (Griel's) interest in the lots in Sheffield would be to pay in

money one-third of the cash payment, and to execute their notes for one-third of the deferred payments, and that this was a statement of a fact, and not merely an opinion, and was accepted and relied on as true by plaintiffs, but was in fact false, then this would be a misrepresentation of a material fact, and would vitiate the contract; and, if plaintiffs were justified in relying on said statement, and did rely on it, and were deceived thereby, they would be entitled to recover if they got nothing by their contract by reason thereof. (2) If the jury believe from the evidence that Griel stated to plaintiffs that all they had to do to get a good title to his (Griel's) interest in the Sheffield lots would be to pay in money one-third of the cash payment, and to execute their notes for one-third of the two-thirds balance, and further believe that this statement was a statement that separate notes were to be given by Griel and his associates, and not joint notes, and that the truth was that joint notes were to be given by him and his co-purchasers, this would be a misrepresentation of a material fact, which would vitiate the contract, if the plaintiffs relied on the statement, and the jury believe said plaintiffs were justified in relying on it as an inducement to the contract, and were thereby deceived and injured, and this would be true, although Griel did not know his statement to be untrue, and if thereby plaintiffs were induced to pay their money to Griel, they would be entitled to recover." The defendant separately excepted to the giving of each of these charges, and also separately and severally excepted to the court's refusal to each of the following charges requested by him in writing: "(1) Before the jury can find for the plaintiffs in this action they must believe from the evidence that Griel knew that the contract with Moses required that joint notes were to be made by himself and Matthews and O'Connell, and not only failed to disclose that fact to plaintiffs, but they must also believe that he failed to disclose such fact with the intent to deceive the plaintiffs, and did deceive them. (2) That it is not necessary for the plaintiffs to have actually known that the purchase of the lots from Moses by O'Connell, Matthews, and Griel was a joint purchase, if there were facts and circumstances which reasonably put them on inquiry as to whether it was or was not a joint purchase. (3) That the written contract offered in evidence by which the defendant sold his interest to plaintiffs in the lots purchased by defendant and Matthews and O'Connell from Moses shows that the purchase by defendant, Matthews, and O'Connell from Moses was a joint purchase, and it was notice to the plaintiffs of that fact. (4) When Griel stated to plaintiffs that he, Matthews, and O'Connell had together purchased the lots from Moses, this put plaintiffs on inquiry as to whether joint notes were to be made by said purchasers to Moses. (5) Before the jury can find for the plaintiffs in this action they believe from the evidence that Griel failed to disclose to the plaintiffs that the notes to be made to Moses were to be joint notes of Griel, O'Connell, and Matthews, and that he failed to disclose that fact with intent to deceive the plaintiffs, or for the purpose of influencing or inducing plaintiffs to make the purchase from him. (6) Before the jury can find for the plaintiffs in this action they must believe from the evidence that the agreement between Moses and O'Connell, Griel, and Matthews was that O'Connell, Griel, and Matthews were to execute joint notes for the purchase of the lots sold by him, and that Griel failed to disclose that fact to the plaintiffs with intent to deceive the plaintiffs, or for the purpose of influencing them to purchase this third interest in said purchase. (7) That the law raises the presumption that when Matthews and O'Connell and defendant jointly purchased the lots from Moses, that they were to execute joint notes for the deferred payments, and the plaintiffs were bound to know this presumption of the law."

Arrington & Graham, for appellant. *G. M. Mauks*, for appellees.

COLEMAN, J. This is the third appeal in this case. Many of the principles of law involved in the present appeal as presented by the present record were settled when the case was here on former appeals. 89 Ala. 420, 6 South. Rep. 741. We then held that if Griel represented that separate notes were to be given, and the truth was that joint notes were to be given by him and his copartners, this would be the misrepresentation of a material fact, which would vitiate the contract, if the plaintiffs relied upon such statement, and were justified, by the circumstances, in relying on it as an inducement to such contract, and were thereby deceived and injured. And this would follow although Griel did not know his statement in this respect was untrue. The testimony of the witnesses Lomax and Massie, if credited by the jury as being a full and correct statement of the transaction, brings the case fairly within the application of this principle of law. The former testifies, among other things, that Griel said all that plaintiffs would have to do to get a title to the land which plaintiffs were contracting to purchase from him was to make a one-third cash payment, and execute their notes for one-third of the two deferred payments. The witness Massie, on cross-examination, testified substantially to the same facts, being more specific in stating that they were to pay one-third cash, and to give separate notes for the one-third deferred payments. The testimony of these two witnesses, fairly construed, excludes the idea that in naming these statements the defendant Griel was merely expressing his opinion as to the effect and meaning of his contract with Moses, from whom he purchased the land. There is nothing in their testimony from which it could be remotely inferred, or even conjectured, that, in order to get a title to the land, it would be necessary for them to execute joint notes with O'Connell and Matthews, and thus obligate themselves to be responsible for the payment of a two-thirds interest of the land sold to other parties; or that their rights and interests in any respect depended up-

on the future action of other parties. There is nothing in all their testimony in regard to Griel's statements which authorizes the inference that they were to become joint purchasers with O'Connell and Matthews, or to put them on inquiry of this fact. The testimony of the witness Sayre is not so full as that of these two witnesses Lomax and Massie, and, as we interpret his evidence, it calls into application a different principle of law. His version of the matter is that Griel stated that he, (Griel,) O'Connell, and Matthews bought two lots from Moses for about $5,000; that they were to pay one-third cash, one-third in one year, and one-third in two years, and when plaintiffs paid one-third cash and executed their notes for the deferred payments, "you will step into my shoes, and I step out." This statement, if made to plaintiffs, tends to show a joint purchase by Griel, O'Connell, and Matthews, and implies that joint notes were to be executed by Griel, O'Connell, and Matthews. 89 Ala., 6 South. Rep., supra. If plaintiffs were informed by Griel that such was the condition of his interest and character of his purchase from Moses, and then stated to plaintiffs all that was necessary for them to do to get title to the land would be to pay one-third cash and execute their separate notes for one-third of the deferred payments, such statement would not be the affirmation of a fact, but the mere expression of his opinion as to the meaning or legal effect of his contract of purchase with Moses. The facts are sufficient to show that plaintiffs had the right to rely upon every statement of fact made by Griel in regard to the terms of his purchase from Moses. And if Griel did not undertake or pretend to state the terms of his purchase from Moses, or the condition of his title, but did state that all plaintiffs had to do to get a deed to his third interest was to pay one-third in cash, and execute their separate notes for the payment of the deferred third interest, transferred to them, plaintiffs had the right to rely upon this statement as representing that Griel's title and purchase from Moses was such that he was authorized to sell it separately, and that his title could be acquired by the execution of their separate notes. Such a statement impliedly affirms the existence of every fact necessary to sustain the statement. It repels every suggestion that the original vendees of Moses were to execute joint notes for the purchase money. Such a misrepresentation was constructively fraudulent, whether willfully and intentionally made or not. On the other hand, if plaintiffs were informed by Griel that he, O'Connell, and Matthews purchased the two lots at a gross sum, and that they were to pay one-third cash and execute their notes for the deferred payment, plaintiffs are held to know the legal effect of such a contract, and that it implies the execution of joint notes for the deferred payment. If Griel thus stated the terms of his purchase, and then said to plaintiffs all they had to do to get a deed to his third interest in the land was to pay one-third cash, and execute their separate notes for the deferred payment, this would be no more than the expression of his opinion as to the legal effect of his contract of purchase from Moses. In one case plaintiffs are not informed as to the terms of Griel's purchase from Moses, and have the right to presume that Griel knows and understands his contract, and states truly his title, and how it may be conveyed. In the other case, plaintiffs are informed of the facts and terms of Griel's purchase from Moses, and, being thus placed in possession of the facts and of his title, in the absence of confidential relations or other special circumstances which do not arise in this case, plaintiffs had no right to rely upon the opinion of Griel as to the legal effect of the contract. A mere opinion of the legal effect of a contract, after stating fairly the facts and condition of the contract, under such circumstances as are developed by the testimony in this case, whether made in ignorance or with the intention to deceive, will not avail plaintiffs. They had no right to rely or act upon Griel's opinion, and, if thereby misled, they must take the consequences. The evidence of the witness Griel throws very little light on the question. In one place he says "he told them the terms of the purchase," but nowhere does he state what he did tell them. Whether the terms were the same as testified to by Lomax and Massie or by Sayre, or whether he gave a different version, or made any statement as to the terms, does not appear. The principle of law which declares that a contract may be avoided as fraudulent upon the ground that the parties were misled and deceived by the expression of an opinion fraudulently made with the intent to deceive, does not arise upon the evidence in the present record. There is no promise of future performance. Birmingham Warehouse & Elevator Co. v. Elyton Land Co., (Ala.) 9 South. Rep. 235.

The material questions are: Did Griel make such a statement of facts in regard to his purchase from Moses as to indicate that he had the right to sell his interest separately, and that his vendees could step into his shoes by paying one-third cash and executing their separate notes for the deferred payment of one-third; or did he, without undertaking to state the terms and conditions of his purchase from Moses, represent to his vendees that upon payment of one-third cash and the execution of their separate notes for the deferred payment of this third interest they could step into his shoes? If he did, and the evidence shows that this was untrue, and that joint notes with O'Connell and Matthews for a much larger sum were required, this would be misrepresentation of facts; and, if the parties relied upon this statement, and were misled by it, and had no information except such as derived from Griel, it was a fraud, and would avoid the contract, whether Griel knew the statements were false, or whether made with the intent to deceive. On the other hand, did Griel tell the plaintiffs, as testified to by Sayre, or otherwise inform them, that his purchase from Moses was jointly with others, and that joint notes with others were to be executed for the whole of the

two lots, or make statements which legally implied it, and, as a matter of opinion of the legal effect of the contract of purchase from Moses, state that plaintiffs could get title to his one-third interest by paying one-third cash and executing their separate notes for the deferred payment of his third interest? If so, under the evidence in this case, the expression of his opinion, whether made ignorantly or with intent to deceive, was not a fraud upon plaintiffs available to them. These are the only material questions in the case not heretofore decided, and whether the evidence sustained the one or the other was a matter for the jury. The fifth exception to the general charge of the court was well taken. The principle asserted by the charge to which this exception applies is to the effect that, although Griel may have stated facts which showed that his purchase from Moses was joint, and that he, O'Connell, and Matthews were required to execute joint notes, yet, if he expressed the opinion that under this contract plaintiffs could get his interest by paying one-third cash and executing their separate notes for the deferred payment for this third interest, and this opinion was fraudulently expressed with intent to deceive, that would avoid the contract. It is not every expression of opinion, falsely made with intent to deceive, even though acted upon, that avoids a contract. As we have shown, it is only in cases where the parties deceived were justified in trusting to and relying upon the opinion that the principle applies. We find no merit in the other exceptions to the general charge, or error in the charges given at the request of the plaintiff. Charges 1, 5, and 6, requested by the defendant, conflict with the law as we have declared it, and were properly refused. There is no evidence calculated to put plaintiffs on inquiry, except it be that of Sayre. His testimony, unexplained, discloses the fact of a joint purchase, and the defendant received the benefit of this phase of the evidence in the charge given by the court; otherwise the charge is abstract. Charge 3 places an improper construction on the written agreement referred to. Charge 4 assumes a disputed fact, and asserts an unauthorized conclusion, and ignores material testimony in the case. Charge 7 assumes that plaintiffs knew of the joint purchase from Moses, and is misleading. For the fifth exception to the general charge of the court the case is reversed. Reversed and remanded.

(94 Ala. 109)

WADE v. STATE.

(*Supreme Court of Alabama.* Nov. 25, 1891.)

VIOLATION OF CONTRACT WITH SURETY—VARIANCE.

In a prosecution under Code, § 3832, for failure of defendant to perform the service stipulated for in a contract made by him in consideration of another becoming his surety on a confession of judgment for a fine and costs assessed against him on conviction of a misdemeanor, the complaint alleged that defendant signed a written contract whereby "he did agree to work on the farm of G. until said fine and costs were paid." The contract introduced in support of the allegation read, "I agree to work on the farm of E.," etc. *Held*, that the variance between the allegation and the proofs were fatal.

Appeal from circuit court, Lee county; W. C. ROBINSON, Judge.

Alexander Wade was convicted of violating his contract with his surety in a confessed judgment for fine and costs, and appeals. Reversed and remanded.

A. & R. B. Barnes, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

WALKER, J. This is a prosecution, under section 3832 of the Code of Alabama, for the alleged failure by the defendant, without a good and sufficient excuse, to perform the service stipulated for by a contract made by him in consideration of another becoming his surety on a confession of judgment for the fine and costs assessed against the defendant on his conviction for a misdemeanor. The complaint or statement by the solicitor, on which the defendant was tried, alleges that the defendant did, in open court, sign a written contract whereby "he did agree to work on the farm of R. B. Goins, in said county, at eight dollars per month and board until said fine and costs were paid." The language of the contract, which was received in evidence against the defendant's objection, is: "I agree to work on the farm of said Ellic Wade in said county at the sum of eight dollars per month," etc. It is plain that the contract which was admitted in evidence does not answer to the description of the contract alleged in the complaint or statement filed by the solicitor. An allegaton that the defendant contracted to work on the farm of one person cannot be sustained by proof of a contract by the defendant to work on the farm of some other person. There is nothing in the contract, as proved, to show that the defendant's agreement was to work on the farm of Goins. If there had been other terms in the written instrument which clearly showed that the services stipulated for were to be rendered on the farm of the person contracted with, then, perhaps, it would have been permissible, in giving effect to the intention of the parties as disclosed by the whole instrument, to treat the insertion, in the clause above quoted, of the name of Ellic Wade instead of that of Goins as a clerical mistake, the correction of which was furnished by the other provisions of the contract. If there had been such other provisions, it would, perhaps, have been proper to construe the contract as binding the defendant to work upon the farm of R. B. Goins. But this meaning cannot be given to the contract as proved, for there is no term in that contract to show that such was the intention of the parties. There is nothing on the face of the instrument to show that a mistake was made in naming the wrong person as the owner of the farm on which the work stipulated for was to be performed. The court cannot disregard the plain terms used by the parties on the assumption that it is impossible or absurd to conclude that the defendant intended to bind himself to render services for another person on his own farm. Indeed, such assumption would be wholly unwarranted. One may as well contract to do an act or to perform services upon his own land as upon the land of another. The person con-

tracted with may have possession of the land as a tenant, and be entitled to the benefit of work that may be done thereon. It is not impossible that the farm of Ellic Wade, which is mentioned in the contract as proved, was the property of some other person bearing the same name as the defendant. However that may be, and whatever may have been the intention of the parties which was not disclosed in the writing, the court is not at liberty to give to their contract a meaning which cannot be deduced from its terms. There was a fatal variance between the allegation and the proof of the contract, and the defendant's objection on this ground to the admission of the instrument which was received in evidence should have been sustained. The charge made against the defendant cannot be supported by evidence of his violation of the terms of the contract, which was proved. Reversed and remanded.

(94 Ala. 226)

ALABAMA G. S. R. CO. v. TAPIA.

(*Supreme Court of Alabama.* Nov. 24, 1891.)

DEMURRER—CARRIERS—EJECTION OF PASSENGER—EVIDENCE—PLEADING.

1. Unless a demurrer to a complaint goes to the whole of the plaintiff's case, it should be overruled, whether the position taken by the demurrant is abstractly sound or not.

2. A complaint in an action against a railroad company alleged that defendant's conductor wrongfully compelled the plaintiff, who had taken passage and paid his fare on one of defendant's trains, to leave the train at an intermediate station, and that in doing so the conductor was abusive, using language which was derogatory to his character for honesty, and which imported a charge that he was attempting to proceed on his journey without paying his fare. The evidence was that the conductor, after an altercation with the plaintiff as to whether the latter had paid his fare, determined upon putting him off, and directed the flagman to look after him. The flagman, in the presence of the conductor, and as part of the said altercation, told the plaintiff that he would have to pay his fare or they would put him off. The flagman testified that he was in the habit of helping the conductor take up tickets, and that he was authorized by the conductor to put off passengers when they would not pay their fare. *Held*, that as this evidence tended to show that the flagman was acting for the conductor, and in execution of the latter's orders, it was admissible in support of the allegation that the conductor himself had wrongfully compelled the plaintiff to leave the train; and although nothing was claimed on account of the abusive language of the flagman, and damages therefore could not be imposed on account of it, it was nevertheless admissible as a part of the *res gestæ* attending the ejection of the plaintiff.

3. Instructions which asserted that there was no evidence that "the conductor used language derogatory to plaintiff's character as an honest man," or that he, "in effect, charged plaintiff with attempting to ride on said train without paying his fare," or "that the feelings or pride of the plaintiff were sorely wounded, or that he suffered any mental distress or humiliation, by reason of being required to get off the train," were properly refused, on the ground that the facts attending the ejection of the plaintiff were such that the jury might well have inferred the existence of the matters therein denied.

4. An instruction which asserted that there was no evidence that the flagman was authorized to put the plaintiff off the train was also properly refused, on the ground that the facts were such that the jury might well have inferred the existence of such authority.

5. The testimony of a witness that the conductor seemed to be anxious to get the matter settled as to whether the plaintiff had paid his fare, and that, in the witness' opinion, the conductor acted as well as a man could do in such a case, was properly refused, as expressing merely the opinion of the witness.

6. An averment of special damages in an action against a railroad company for wrongfully ejecting the plaintiff from one of its trains, in that it was necessary for him to telegraph his family and business associates of his whereabouts, does not apprise the defendant that plaintiff will attempt to prove that he had to send a telegram to his brother to request him to attend to a matter of urgent business, which plaintiff's enforced delay prevented him from attending to in person.

Appeal from circuit court, Jefferson county; H. A. SHARPE, Judge.

This was an action by Joseph R. Tapia against the Alabama Great Southern Railroad Company to recover for being wrongfully ejected from one of the defendant's trains. There was judgment for plaintiff, and defendant appeals. Reversed.

Wood & Wood, for appellant. *Bowman & Harsh*, for appellee.

MCCLELLAN, J. 1. The demurrers to the complaint were properly overruled; and this, whether the legal positions taken by the demurrant were abstractly sound or not. Not one of the grounds assigned, nor all of them together, professed to answer, or did in fact answer, the whole complaint, but each of them was addressed to its supposed insufficiency in respect of some one item or specification of damage, and none of them goes to the denial of the whole cause of action relied on by plaintiff. As was said in Kennon v. Telegraph Co., (Ala.,) 9 South. Rep. 200: "Causes cannot be determined by piecemeal on demurrer. The pleader must answer the whole complaint, and for all purposes, when he resorts to this mode of defense. When the cause of action is sufficiently stated to authorize a recovery * * * of any damages, a partial defense, going to a denial of the right to recover a part of the damages claimed, must be availed of and effectuated by motion to strike out the objectionable averments, or by objections to the evidence, and through instructions to the jury." Hays v. Anderson, 57 Ala. 375; Flournoy v. Lyon, 70 Ala. 308; Daughtery v Telegraph Co., 75 Ala. 168.

2. The *gravamen* of the complaint is that defendant's conductor wrongfully required and compelled plaintiff, who had taken passage and paid his fare from Eutaw to Birmingham on one of defendant's trains, to leave the cars at Cottondale, an intermediate station, a considerable distance short of his destination, and that in and about requiring plaintiff to thus leave the train the conductor was abusive and insulting to him, using language which was derogatory to his character as an honest man, and which imported a charge that he was attempting to proceed on his journey without paying his fare, etc. The evidence was without conflict to the point that soon after passing

Tuscaloosa the conductor determined upon putting plaintiff off the train, informed him that he must get off, and directed the flagman to look after him. Plaintiff's testimony tended to show that the conductor told him he must get off at the next station, which was Cottondale. It was also in evidence that the flagman, in the presence of the conductor, and as a part of the altercation as to whether plaintiff had paid his fare, said, "We will put you off," and told the plaintiff, when the latter proffered a check which he claimed the conductor had given him, that it was not his check, and that he would have to pay his fare or get off. The flagman himself testified as follows: "I was in the habit of helping the conductor take up tickets and of putting checks in the hats of passengers. * * * I never put any passengers off before unless they were without their tickets. The conductor did authorize me to put them off when they would not pay their fare. When a man is trying to beat the road, we put him off." All this afforded the basis for an inference to be drawn by the jury that the flagman acted in the premises for the conductor, and in execution of the latter's directions; and when this evidence is considered, in connection with the common knowledge that conductors have the superintendence and control of their trains and of all other trainmen, and that it is one of the ordinary duties of flagmen and brakemen to assist and carry out the orders of conductors with respect to refractory passengers, we cannot be in doubt but that all that was said and done by the flagman in this instance, in and about ejecting plaintiff from the train, was properly allowed to go to the jury in support of the averments of the complaint that the conductor wrongfully required and compelled the plaintiff to leave the train; the flagman being the mere instrument for the effectuation of the conductor's orders, and the act done, and the circumstances under which it was done, being as much that of the conductor, and as fully characterized as his act by the attendant circumstances, as if no intermediary or agency had been employed to its consummation. Railroad Co. v. Frazier, (Ala.) 9 South. Rep. 303. Nothing is claimed in the complaint, however, on account of harsh or abusive language on the part of the flagman towards the plaintiff, and the language employed by him while executing the determination of the conductor to put plaintiff off the cars could not be made the basis for the imposition of damages, but it was none the less admissible as a part of the *res gestæ* of the main fact,—the ejection of the plaintiff,—and as going to show that the plaintiff was required and compelled to leave the train by the conductor, acting as to the final accomplishment of his purpose in this regard through the instrumentality of his assistant, the flagman. The several exceptions reserved in this connection are without merit.

3. A part of the court's general charge bearing upon defendant's liability for language used by the flagman is set out in the bill of exceptions, and properly so, at the instance of the presiding judge; and this very accurately and succinctly guards the jury against the imposition of any damages on account of the mere words of the flagman. No exception whatever was reserved to the part of the charge thus incorporated in the record, but argument is submitted here against its correctness. For this reason we refer to it here only to observe that in the first place the charge is unobjectionable, and, in the next, that, whether objectionable or not, it is not presented here for review.

4. There was no error in excluding from the jury the testimony of the witness Barnes, with respect to the efforts of the conductor to ascertain whether the plaintiff had paid his fare to Birmingham, as he claimed to have done, to the effect that "the conductor seemed to be anxious to get the matter settled;" that "the conductor's actions showed that he was doing his utmost to get the matter settled without further trouble;" and that, "in my opinion, Conductor Ford conducted himself as well as a man could do in such a case." These were not "short-hand" renderings of fact, but patently the opinion and conclusions of the witness upon certain facts which themselves should have been adduced in evidence, and upon which the jury alone were to pass judgment and make up their opinion and conclusion as to whether the conductor was at fault in the premises immediately involved. Tanner v. Railroad Co., 60 Ala. 621; Hames v. Brownlee, 63 Ala. 277; Loeb v. Flash, 65 Ala. 526; Baker v. Trotter, 73 Ala. 277; Poe v. State, 87 Ala. 65, 6 South. Rep. 378.

5. The complaint claims damages, for that the plaintiff "lost a long time, to-wit, five days, from his business, and was put to great inconvenience and expense; and, among other things, he was compelled to pay a large amount, to-wit, twenty-five dollars, for board and lodging and necessary personal expenses in Cottondale, and for telegrams necessary to inform his family and business associates of his whereabouts, and for transportation to his said destination;" and further damages for that plaintiff was humiliated and sorely wounded in his feelings and pride, and injured in his reputation, by reason of being compelled to leave the train under the circumstances alleged. Special damages are such as result naturally, but not necessarily, from the wrong complained of. This principle is aptly illustrated in the present case on the claim for damages, which is made to rest upon the necessity under which the ejection of plaintiff from the train placed him to send telegrams "to his family and business associates to inform them of his whereabouts." Manifestly this was not a necessary result to plaintiff from being put off the train, and forced to remain for a time at Cottondale,—not such a result as in all cases would ensue from the facts alleged,—and yet it was a natural consequence of those facts, filling the definition of "special damage." It is a familiar rule of pleading that before such damages can be recovered they must be specially alleged, to the end that the defendant, apprised by general averments of damage of a claim of such only as necessarily result from the wrong, may not be

taken by surprise on the trial. And upon such special averment there must be strict correspondence of proof. The defendant has a right to assume that that which is thus particularly alleged, and that only, will be attempted to be proved, and to prepare for the trial accordingly. Now, under the averment we have quoted, the plaintiff, against defendant's objection, was allowed to prove, not that he had "to send telegrams to his family and business associates to inform them of his whereabouts," but that he sent a telegram to his brother in the city of Montgomery, requesting him to attend to a matter of urgent business, which plaintiff's enforced delay at Cottondale prevented his attending to in person. It does not appear that there was any necessity for plaintiff to inform his brother of his whereabouts, or that he did in fact so inform him; nor does it appear that plaintiff's brother was a business associate or a member of the latter's family, in the usual acceptance of that term, or in the sense implying a necessity that the plaintiff should advise him that he was at Cottondale. After much consideration, accompanied with reluctance to reverse the judgment of the trial court on a point involving so small a part of the damages claimed and found by the jury, we are forced to the conclusion that the averment of a necessity to acquaint his family and business associates by telegram of his whereabouts did not apprise the defendant that plaintiff would attempt at the trial to prove that he had, by telegram, requested his brother to attend to the matter of business in question, and hence that evidence of the last-named necessity was improperly received.

Charge 8, requested by the defendant in this connection, to the effect that there was no evidence in the case of a necessity upon plaintiff to inform his family and business associates of his whereabouts, was, however, it would seem, properly refused; as, while no testimony was directly adduced in that regard, there was yet room for an inference to be drawn by the jury of such necessity.

6. Charges 3, 5, 6, 26, and 34, requested by defendant, were properly refused, on the ground that there was evidence before the jury from which they had the right to infer the existence of every fact which they severally would have put the court in the attitude of declaring, which found no lodgment in any tendency of the testimony. Charges 3, 5, 6, and 34, respectively, assert that there is no evidence that "the conductor used language derogatory to plaintiff's character as an honest man," or that he, "in effect, charged plaintiff with attempting to ride on said train without paying his fare," or that "the feelings and pride of the plaintiff were sorely wounded," or that plaintiff "suffered any mental distress or humiliation by reason of being required to get off the train." Now, there was evidence going to show that the plaintiff had paid his fare; that he asserted that he had done so; and insisted that he should be allowed to continue on the train, and protested against being put off. The conductor denied the truth of his statements, and told him he would have to get off, and had him put off, notwithstanding his assertions, protestations, and insistence. That he was trying to ride to Birmingham without paying his fare again was manifest. The conductor, by denying that he had paid, in effect, the jury might have inferred, charged him with attempting to go on without paying; and it will not be contended that such a charge, by whatever language promulgated, was not derogatory of plaintiff's character as an honest man. And, from the mere fact of plaintiff's being required and compelled to leave the train under the circumstances which were shown by one aspect of the testimony, the jury were authorized to infer that his feelings and pride were wounded, and that he suffered mental distress and humiliation. Railroad Co. v. Flagg, 43 Ill. 364; Railway Co. v. Chisholm, 79 Ill. 584. Similarly, charge 26 asserts that there is no evidence that the flagman was authorized to put the plaintiff off the train, when, as we have seen, there were many facts and circumstances adduced from which the jury might well have inferred such authority. For the error pointed out above, in the admission of testimony, the judgment is reversed, and the cause remanded.

(99 Ala. 19)

ALABAMA STATE LAND CO. v. REED.

(*Supreme Court of Alabama.* Nov. 24, 1891.)

WRONGFUL ATTACHMENT — NONSUIT — ACTION ON BOND—SET OFF—BURDEN OF PROOF — INSTRUCTIONS.

1. A land company having sued to recover the statutory penalty provided by Code Ala. § 3296, for willfully cutting down certain trees upon its lands, and having executed a bond for garnishment process, afterwards took a nonsuit. Defendant then sued upon the garnishment bond to recover for the wrongful suing out of the said garnishment. Defendant company complained of the court's refusal to permit a witness to testify that he found a person cutting the trees, who told him that he was cutting them for plaintiff. The testimony was afterwards admitted, but limited to the question of the wrongful suing out of the garnishment. There was no offer to connect plaintiff with the act of the person engaged in cutting the trees, further than by the declaration itself. *Held*, that the admission of the said testimony, limited as it was, furnished no ground of complaint.

2. Defendant having pleaded a set-off of the statutory penalty originally sued on by it, the burden, in order to sustain it, was upon defendant to show that the plaintiff had willfully and knowingly cut the trees or had them cut.

3. Plaintiff in his complaint alleged the injury to his credit by suspending the amount due him in the hands of the garnishee. Issue was joined upon the said count, and plaintiff, without objection, introduced evidence to support it. *Held*, that whatever error may have existed in the court's refusal to charge, as requested by defendant, that such damages were not recoverable in the said suit, it was not available to him, under the pleadings and the evidence.

4. An instruction that the nonsuit taken in the garnishment suit was not a breach of the bond, if not positively erroneous, was, at least, calculated to mislead.

5. An instruction that the jury could not consider for any purpose what happened on the trial of the garnishment suit, or the fact that in that suit defendant took a nonsuit, did not assert a correct proposition of law.

6. An instruction that, the affidavit for the garnishment having been made by the agent of

defendant, defendant would not be responsible for malice on the part of the agent, was faulty, in that it ignored all consideration of the question of the participation in or ratification of the intent of the agent.

7. An instruction that if any persons had cut down any trees upon the lands of defendant, and had removed the timber and sold the same to plaintiff, plaintiff was liable for the value of the trees, although he and the person who did the cutting were ignorant of the fact that the lands upon which such cutting was done belonged to defendant; and that if such liability existed, and the agent of defendant, who made the affidavit for the garnishment, believed that garnishment was necessary to obtain satisfaction of such claim, plaintiff could not recover,—was argumentative and defective, in that it precluded any recovery for the mere wrongful suing out of the said garnishment; the true rule being that, although an honest belief that the writ was necessary might furnish a defense against a recovery, for a vexatious suing out of the writ, it was no answer to a claim for a wrongful suing out of the writ.

8. An instruction that if any trees had been cut upon the land of defendant willfully and knowingly, without the consent of defendant, and plaintiff assented to such cutting, or purchased the said trees with knowledge that they had been so cut, he thereby made himself liable to the penalty imposed by Code Ala. § 3296, upon any one who so cuts or takes away trees from the lands of another, did not assert a correct proposition of law, for the reason that the penalty of the statute attaches only to those who participate in the cutting or taking.

Appeal from circuit court, Jefferson county, JAMES B. HEAD, Judge.

This was an action brought by C. M. Reed against the Alabama State Land Company to recover damages for the breach of a bond given by defendant, as principal, to secure the issuance of a writ of garnishment. It was alleged in the complaint that suit was brought by the defendant in this action against C. M. Reed, the present plaintiff, to recover the statutory penalty for willfully and knowingly cutting down 176 trees, which were upon the land of the Alabama State Land Company, without the consent of said company; and that the bond now sued on was made and garnishment issued to debtors of said C. M. Reed for the purpose of collecting the said claim; but that before the termination of said suit against Reed the plaintiffs therein took a nonsuit. The defendant pleaded the general issue, and interposed several pleas, offering to set off their claim against the plaintiff for willfully and knowingly cutting down trees upon its land without its consent. In the present action the plaintiff introduced evidence tending to show that he was not, at the time of the execution of the bonds sued on, indebted in any amount to the Alabama State Land Company; that the garnishment sued out by the defendant caused the garnishee to withhold from the plaintiff several thousand dollars for several months after the same became due and payable to him; and that as the result of the issuance of such garnishment his credit was greatly impaired, and he was put to serious inconvenience. The testimony for the defendant tended to show that, at the time of the execution of the bond and the issuance of the garnishment in the suit against said Reed, he was indebted to the defendant in this action. The tendency of all the evidence for the defendant was to controvert the testimony introduced by the plaintiff. At the request of the plaintiff in writing, the court gave the following charge: "In the set-off claimed by defendant for the penalty of $10.00 per tree, the burden of proof is on defendant to satisfy you reasonably that Reed willfully and knowingly cut the trees or had them cut; and if, after considering all the evidence, you are not reasonably satisfied that Reed willfully and knowingly cut the trees, or had them cut, then you will not allow said set-off." The defendant duly excepted to the giving of this charge, and also separately and severally excepted to the court's refusal to give each of the following written charges asked by it: (1) "Damages for injury to credit resulting solely from the failure of Reed to get the amount suspended by the garnishment are not recoverable in this suit." (2) "The defendant asks the court to charge the jury that the nonsuit taken in the garnishment suit was not a breach of the bond." (3) "The jury cannot consider, for any purpose, what happened on the trial of the garnishment suit." (4) "The jury cannot consider, for any purpose, the fact that the plaintiff in the garnishment suit took a nonsuit." (5) "The affidavit for the garnishment having been made by Howard, the agent of the Alabama State Land Company, the said company would not be responsible for malice on the part of Howard." (6) "If the jury believe from the evidence that at the time of the suing out of the garnishment, and during the year 1888, prior thereto, any persons had cut down upon the lands of the Alabama State Land Company any trees, and such persons had removed the timbers so cut from said lands, and had sold the same to the plaintiff, Reed, that the plaintiff, Reed, became liable for such purchase to the Alabama State Land Company for the value of such trees, although the persons who did such cutting and said Reed were ignorant of the fact that the lands upon which such cutting was done belonged to the Alabama State Land Company; and if such liability existed, and Howard, the agent of said company, who made the affidavit for the garnishment, believed that garnishment was necessary to obtain satisfaction of such claim, then the plaintiff in this action cannot recover." (7) "If the jury believe from the evidence that at the time of the suing out of the garnishment any oak or pine trees had been cut down upon the lands of the Alabama State Land Company, willfully and knowingly and without the consent of said company, and that the plaintiff, Reed, assented to such cutting at the time thereof or afterwards, then said Reed, by such assent, would make himself a party to such trespass, and liable for the penalty imposed for such cutting." (8) "If the jury believe from the evidence that at the time of suing out the garnishment, and during the year 1888, previous thereto, any trees upon the lands of the Alabama State Land Company had been cut down by any person or persons, knowingly and willfully, and without the consent of said company, and that the plaintiff, Reed, purchased such trees with

knowledge that they had been so cut down, he thereby assented to such trespass, and became liable for the penalties for such cutting." There was judgment for the plaintiff in the sum of $500, and the defendant appeals.

Smith & Lowe, for appellant. *Chisolm & Whaley*, for appellee.

COLEMAN, J. The Alabama State Land Company sued C. M. Reed to recover from him the statutory penalty, provided in section 3296 of the Code, for having willfully and knowingly cut down 176 trees, which were on the lands of the plaintiff. The plaintiff in that suit, by its agent, Howard, made affidavit and executed bond for the issuance of garnishment process. That trial resulted in plaintiff taking a nonsuit. The present suit was brought by Reed upon the garnishment bond to recover damages for the wrongful or vexatious suing out of the garnishment process. The first assignment of error is that the court refused to permit the witness Howard to testify that he found a person cutting the trees, who told him that he was cutting for Reed. The record shows that this evidence was admitted after the objection, but limited by the court to the question of the vexatious or malicious suing out of the garnishment. There was no offer to connect Reed with the act of this person engaged in the cutting of the trees, further than by the declaration itself. The admission of this evidence, limited, as it was, to the question of vexatiously or maliciously suing out the garnishment, furnishes no ground of complaint to appellant. In the charge given, at the request of the plaintiff, the court properly placed the burden of proof on the defendant to reasonably satisfy the jury that Reed had willfully and knowingly cut the trees, or had them cut, in order to sustain defendant's plea of set-off. Credit is a conclusion of fact, partly based on opinion, founded more or less on reputation. Pollock v. Gantt, 69 Ala. 373. An injury to credit is a legitimate ground for the recovery of actual damage. Durr v. Jackson, 59 Ala. 203; Flournoy v. Lyon, 70 Ala. 308. The only damages recoverable in this state for failing to meet a purely moneyed obligation at maturity is the interest which subsequently accrues. Damages resulting from the mere delay to collect the money when due gives no cause of action. Such damages are too remote, and are purely speculative.

The record fails to show that the court ruled on the demurrer to the amended complaint. In such case, we must presume that the defendant waived his right to have judgment pronounced upon them. Whatever error, as a legal proposition, may have existed in the refusal of the court to give charge No. 1, requested by the defendant, it is not available to him, under our system of pleading. The plaintiff in his complaint counted, as a cause of damage, the injury done to his credit, by tying up the money due him in the hands of the garnishee. Issue was joined upon the count, and the plaintiff, without objection, introduced evidence in support of it. Referring the charge to the pleadings and proof, there was no error in its refusal. The taking of a nonsuit in an attachment suit is not conclusive of the fact of indebtedness *vel non*, and in a suit upon the attachment bond the record of the attachment suit is always admissible. Dothard v. Sheid, 69 Ala. 135; Pounds v. Hamner, 57 Ala. 346.

Charge No. 2, requested by defendant, was calculated to mislead, if not positively erroneous; and charges Nos. 3 and 4 assert incorrect propositions of law. The principal is not responsible for the malice, vexation, or wantonness of the agent, unless the principal authorized or participated in it, or subsequently ratified it, and such authority or participation cannot be inferred from the mere relation of principal and agent. Jackson v. Smith, 75 Ala. 97; Burns v. Campbell, 71 Ala. 271; Pollock v. Gantt, 69 Ala. 373; Bank v. Jeffries, 73 Ala. 186–196; Kirksey v. Jones, 7 Ala. 629.

Charge No. 5 is faulty, in that it ignores all consideration of the question of participation in or ratification of the intent of the agent by the principal. Charge 6 is argumentative, and is defective, in that it precludes any recovery for the mere wrongful suing out of the garnishment. An honest belief, founded upon reasonable grounds, that the writ was necessary, may furnish a defense against a recovery for a vexatious suing out of the writ, but is no answer to the claim for actual damages sustained by reason of a wrongful suing out of the writ of garnishment. The case of Pounds v. Hamner, 57 Ala. 342, was not intended to assert a contrary rule. Charges 7 and 8 assert incorrect propositions of law. Although Reed may have purchased the trees with the knowledge that they had been cut down and taken away from the lands of another in violation of the statute, (Code, § 3296,)[1] the simple fact that he purchased the trees with such knowledge, not having participated or aided or abetted in the cutting or taking away, does not subject him to the statutory penalty. We find no error in the record included in the assignment of errors. Affirmed.

(95 Ala. 91)

STEINER *et al.* v. CLISBY *et al.*

(*Supreme Court of Alabama.* Nov. 25, 1891.)

MORTGAGES—PRIORITIES—RECORDING.

L. executed to A. a mortgage on land, which mortgage was transferred to plaintiffs. L. afterwards executed another mortgage on the same property to A. and one J. and D. Both mortgages were subsequently recorded by A. on the same date. Neither J. nor D. had notice of the prior mortgage. *Held*, that the rights of J. and D. under the mortgage executed to them were not affected by the prior mortgage; Code, § 1811, declaring all mortgages to be void as to purchasers for a valuable consideration, mortgagees, etc., without notice, unless recorded before the accrual of the rights of such purchasers, mortgagees, etc.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

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[1] This section provides that any person who willfully and knowingly cuts down or takes away any trees on land not his own, without the consent of the owner, must pay to the owner $10 for every such tree.

Action by Steven Bros. against A. A. Clisby and others to foreclose a mortgage. Upon the final submission of the cause on the pleadings and proof, the chancellor decreed that the plaintiffs in both the original bill and in the cross-bill were entitled to relief; but that Robert Jemison and W. L. Deloach, defendants to the original bill and complainants to the cross-bill, had a prior lien upon the land, which was to be satisfied before the lien existing in favor of the plaintiffs. Steiner Bros.' lien was subordinate to that of Jemison and Deloach. The plaintiff in the original bill brings this appeal, and assigns the decree of the chancellor as error.

White & Howze and *Watts & Son*, for appellants. *John S. Jemison* and *W. R. Houghton*, for appellees.

CLOPTON, J. On November 15, 1886, the Birmingham Land & Loan Company sold to Deloach and Cobbs the land in the bill mentioned for $11,000, one-third of which was paid in cash, and notes for the deferred payments executed by them; the company giving a bond conditioned to make title on payment of the purchase money. On January 20, 1887, Deloach and Cobbs sold the land to Cheatham and L. Clisby for $15,000, one-third to be paid in cash, the balance in one and two years, with interest. By arrangement between the parties, Cheatham and Clisby gave two notes to the land and loan company for the amount of the purchase money, with interest, owing by Deloach and Cobbs, and notes to Deloach and Cobbs, respectively, for the excess of the $15,000 agreed to be paid by them. Deloach and Cobbs surrendered to the company the bond for title held by them, and the company executed to Cheatham and Clisby a bond conditioned to make title to them. In order to make the cash payment, L. Clisby borrowed from A. A. Clisby $5,000, for which he gave his note, dated April 25, 1887, payable one year after date at the First National Bank of Birmingham. To secure this note, and in consideration of the extension of payment for 12 months, L. Clisby signed and delivered to A. A. Clisby a mortgage on the land. This mortgage, which bears date July 23, 1888, was not, at the time of delivery, attested or acknowledged, as required by statute. In consequence thereof it was returned to L. Clisby, and acknowledged by him before a justice of peace, who appended thereto his official certificate of acknowledgment, September 28, 1888, and then returned it to A. A. Clisby. Cheatham transferred his interest to L. Clisby in consideration of his assuming to pay the notes given by them for the purchase money. Jemison having purchased from the land and loan company the notes of Cheatham and Clisby, and A. A. Clisby having acquired the note given to Cobb by agreement of all the parties, L. Clisby executed to Jemison, Deloach, and A. A. Clisby, respectively, notes in substitution and renewal of the notes of Cheatham and Clisby held by them; and to secure the same, and in consideration of the extension of the indebtedness, executed a mortgage on the land, at which time the land and loan company executed to L. Clisby a deed to the property. Though the notes, mortgage, and deed bear date September 26, 1888, they were not, in fact, delivered until the 9th day of October. On October 11, 1888, A. A. Clisby filed the mortgage of L. Clisby to him, and the mortgage to Jemison, Deloach, and Clisby, in the office of the judge of probate of Jefferson county, for registration. On February 18, 1889, A. A. Clisby transferred and assigned without recourse, for value, the note for $5,000 and the mortgage to secure the same to M. L. and C. Ernst, who transferred and assigned them thereafter to Steiner Bros. For the foreclosure of this mortgage Steiner Bros. filed the present bill. L. Clisby, Deloach, and A. A. Clisby and Jemison are made defendants. Jemison and Deloach filed separate cross-bills.

Though the note for $5,000 recites that it was given for the purchase money of the land, this is untrue. It was given for money borrowed to make the cash payment for the land. The recital does not create a lien on the land. Whether, by the transaction of September 26, 1888, Jemison and Deloach waived or abandoned the vendor's lien, or whether complainants had notice of such lien,—questions elaborately discussed by counsel,—it is unnecessary, in the view we take of the case, to decide. The inquiry is, which mortgage has priority of lien? We shall consider the question of the superiority of lien as if the mortgage under which complainant's claim was legally executed on the day it bears date, and the mortgage under which Jemison and Deloach claim was not executed until October 9, 1888. Section 1811 of the Code declares that all conveyances of real property, mortgages, or deeds of trust, to secure any debt, other than a debt created at the date thereof, are inoperative and void as to purchasers for a valuable consideration, mortgagees, and judgment creditors without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees, and judgment creditors. The statute, the purpose of which is the prevention of fraud, is imperative in its terms. The right of Jemison and Deloach accrued October 9, 1888. The prior mortgage was not recorded until the 11th day of October, two days thereafter. At the time of the accrual of their right, the prior mortgage was inoperative and void as to them, unless they had notice thereof. Wood v. Lake, 62 Ala. 489. The fact that both mortgages were filed for record at the same time does not change the effect of the statute of registration. It does not require the second mortgage to be recorded before the first is recorded, in order to preserve its preference. It simply declares the unrecorded prior mortgage inoperative and void as against the subsequent mortgagees, when their mortgage is executed and received without notice of the first. Coster v. Bank, 24 Ala. 37. Neither does the fact that A. A. Clisby, one of the mortgagees in the second mortgage, knew of the prior mortgage affect the rights of Jemison and Deloach. Their debts are separate and distinct. There is no community of interest in respect to

them. The mere circumstance that the mortgage was executed to all three does not create a mutual agency, so that notice to one will affect the others. Snyder v. Sponable, 1 Hill, 567; Wade, Notice, § 684. Conceding that M. L. and C. Ernst and complainants had no notice of the mortgage to Jemison, Deloach, and Clisby at the time they respectively purchased the first mortgage, the absence of such notice does not impart validity and superiority, as against the subsequent mortgagees, to the prior mortgage, which is declared by the statute to be inoperative and void at the time they purchased it. On the undisputed facts, Jemison and Deloach are mortgagees entitled to protection under the statute against the lien of the mortgage under which complainants claim, if without notice thereof. There is no pretense, no effort to show, that Deloach had notice. A. A. Clisby testifies that he believes he told Jemison of the mortgage before the second mortgage was delivered. But notice thereof is positively denied by Jemison, who swears that Clisby did not tell him about it until after he had transferred the mortgage to M. L. and C. Ernst. The burden of proving notice rests on complainants. We find from the evidence that neither Jemison nor Deloach had notice of the prior mortgage, nor information of facts sufficient to put them on inquiry at the time of the accrual of their right under the second mortgage. The decree of the city court in accord with these views is affirmed.

(94 Ala. 163)

ALBA v. STRONG.

(*Supreme Court of Alabama.* Nov. 24, 1891.)

SPECIFIC PERFORMANCE — SUFFICIENCY OF CONTRACT.

In a suit for the specific performance of a land contract, the bill described the land in dispute as "the Fernland mill-site and pine lands near thereto, comprising 8,000 acres, more or less, near Portersville, Mobile county, Alabama," and alleged as a contract a letter to plaintiff, in which defendant said: "Now, I would like very much to see you have the lands you want, and will give you the preference at 75 cents per acre, and trust you will see fit to close the thing at once," etc.; which offer plaintiff sought to accept the following morning, (the letter being received Sunday,) when defendant stated that he had sold the land to another. *Held*, that the bill was bad on demurrer, since the writing relied on neither expressed the quantity of land nor contained any description by which it could be determined without proof by parol what land was intended to be sold.

Appeal from chancery court, Mobile county; W. H. TAYLOE, Chancellor.

Suit in equity by Peter F. Alba against Joseph C. Strong for the specific performance of a land contract. Defendant had judgment on demurrer, and plaintiff appeals. Affirmed.

The bill in this case was filed by the appellant, Peter F. Alba, against Joseph C. Strong, as assignee, and prayed the specific performance of a contract alleged to have been entered into between the complainant and defendant. The bill avers that the defendant, Strong, as assignee of the Danner Land & Lumber Company, held large tracts of land in Alabama and Mississippi, including what was known as "the Fernland mill-site and pine lands near thereto, comprising 8,000 acres, more or less, near Portersville, Mobile county, Alabama." That the complainant went to see said Strong for the purpose of purchasing the said 8,000 acres, and finally offered him 65 cents per acre for said land. That in response to this offer said Strong replied by letter as follows: "Dear Sir: After talking with the parties interested in regard to your offer for certain lands of the Danner Land & Lumber Co., I have concluded to say that I feel compelled to decline your offer. I had other parties from the north here late yesterday evening looking at the plats of all the lands with the view of buying the whole thing. I offered to sell them the whole thing at the rate of 80 cents per acre, and, while we did not trade, the proposition is still open, and, I think, favorably considered. Now, I would like very much to see you have the lands you want, and will give you the preference at 75 cents per acre, and trust you will see fit to close the thing at once. I feel reasonably sure that I will close out every acre of our land at the rate of 75 cents or better within the next few months." The bill then alleges that on the following Monday (the letter from Strong having been received Sunday morning) the complainant met Strong and verbally accepted the offer contained in said letter, but that Strong told him it was too late, as he had sold the land to others, —one Lyons. It is then averred that such sale was an executory contract to sell; and that on September 10, 1890, after the present bill was filed, the said purchaser paid the purchase money, and received a conveyance from said Strong to his wife, with the understanding that Strong would hold the purchase money to abide this suit. The defendant interposed demurrers to the bill, which are substantially as follows: (1) That the contract sought to be enforced was void under the statute of frauds, as the lands—the subject-matter of the contract—are not therein described, and cannot be ascertained without recourse to parol evidence; (2) that the bill, as amended, shows that the rights of John B. Lyons, the purchaser, had intervened before knowledge of complainant's alleged equity; (3) that the offer by Strong in his letter was gratuitous, without consideration, and revocable at any time before the acceptance by the complainant; and (4) that the bill does not sufficiently describe or identify the lands alleged by the complainant to have been sold to him. The chancellor sustained the demurrers, and, the complainant failing to amend his bill within the time fixed by the decree, the bill was dismissed.

Hannis Taylor, for appellant. *Pillans, Torrey & Hanaw*, for appellee.

STONE, C. J. The following propositions must be regarded as settled by the former decisions of this court beyond controversy: *First.* That to authorize the specific enforcement of an agreement to sell land all the terms of the agreement must have been agreed on, leaving nothing for negotiation. *Second.* That all the

terms of the agreement, viz., the names of the parties, the subject-matter of the contract, the consideration and the promise, must be in writing, signed by the party sought to be charged, or by his agent thereunto authorized in writing. Code, 1886, § 1732. *Third.* That it is not essential that the paper evidence of the agreement be in any particular form, provided it contain the substance, as stated above. *Fourth.* That the written evidence of the terms of the agreement need not all be expressed in one paper. If expressed in two or more papers it will be sufficient, if collectively they contain enough, and refer to each other, and show the connection with sufficient clearness, without the aid of oral testimony. If, however, oral testimony is required to connect the papers, or to supply any essential term of the contract, then there is a failure to make a case for specific performance. Wat. Spec. Perf. § 231; Fry. Spec. Perf. § 72; Carter v. Shorter, 57 Ala. 253; Phillips v. Adams, 70 Ala. 373; Horton v. Wollner, 71 Ala. 452; Norman v. Molett, 8 Ala. 546. Jenkins v. Harrison, 66 Ala. 345, is not opposed to these views. On the contrary, it reaffirms them. In that case the original memorandum was conceded to be insufficient, but a formal deed was signed, which, though not delivered, was sufficient of itself to take the case without the influence of the statute of frauds. Speaking of that deed and another, simultaneously signed, this court said: "Of themselves the deeds import a bargain and sale of the fee-simple estate in lands, which are particularly described; and the bargainor and bargainee are clearly stated." If the original, imperfect memorandum had been entirely omitted, the non-delivered deed contained all the terms of the contract, was signed by the party sought to be charged, and was sufficient. In the case in hand the writing neither expresses the quantity of the land, nor any description by which it can be determined what land was intended to be bought or sold. This, according to the averments of the bill, rests entirely in parol. The chancellor did not err in sustaining the demurrer to the bill.

HART *et al.* v. STEELE.

(*Supreme Court of Alabama.* Nov. 25, 1891.)

ACTION FOR BREACH OF CONTRACT — PLEADING.

One of the stipulations of a contract entered into by plaintiffs and defendant was that defendant pay plaintiffs six cents a foot for all logs at the landings on a creek when delivered at the mouth of said creek. The complaint in the action for the breach of said contract alleged as one breach thereof that "defendant failed and refused to pay to plaintiffs at the rate of six cents per foot for logs which were measured at their landings on said creek, when the same were delivered to him; and they aver that they delivered to him at the mouth of said creek ten thousand logs, which had been measured at their said landings, which were of the value, to-wit, five thousand dollars." *Held*, that it was error for the court to sustain a demurrer to the entire complaint on the ground of indefiniteness and uncertainty, as the above allegation set forth a good cause of action.

Appeal from circuit court, Covington county; JOHN P. HUBBARD, Judge.

Action by Hart & Watson against W. B. Steele for the breach of a contract. From the judgment sustaining a demurrer to the complaint plaintiff appeals. Reversed.

Chas. Wilkinson, for appellant. *John D. Gardner*, for appellees.

STONE, C. J. The present suit is brought by Hart & Watson against Steele, and counts for the breach of a written contract bearing date October 8, 1887. The summons was issued November 19, 1889. One stipulation of the contract is in the following language: "Party of the first part [Steele] * * * agrees to pay the parties of the second part [Hart & Watson] at the rate of 6 cents per foot for all logs measured at the landings on said creek [Hogfoot creek] when the same are delivered by the said parties of the second part at the mouth of said Hogfoot creek." The fifth breach assigned in the complaint is in the following language: "And these plaintiffs allege that the defendant failed and refused to pay to the plaintiffs at the rate of 6 cents per foot for logs which were measured at their landings on said creek, when the same were delivered to him; and they aver that they delivered to him at the mouth of Hogfoot creek ten thousand logs, which had been measured at their said landings, which were of the value, to-wit, five thousand dollars." There was a demurrer to the complaint, specifying grounds—six—the number of specifications. The first ground assigned is that the contract declared on "is void for indefiniteness and uncertainty." The other specified grounds are to special breaches, each based on the indefiniteness and uncertainty of some stipulation of the contract, the breach of which is, in the complaint, counted on as a ground of recovery. There was no special demurrer to the fifth breach, copied above. The judgment of the court on the demurrers was that they be "sustained; and, the plaintiffs declining to plead further, or to amend their complaint, it is considered by the court that this cause be dismissed." The breach we have copied above sets forth a good cause of action, and is not obnoxious to the charge of indefiniteness and uncertainty. The circuit court erred in sustaining the demurrer to the entire complaint. All the other grounds of demurrer are well taken, because the breaches assigned as to each of them, save the one, are too indefinite to maintain a suit. Neither of them furnishes *data* by which to determine the extent of defendant's obligation, or of his liability for the alleged breach. No actionable breach can be assigned on either of the other stipulations of the contract, which could be compensated by any criterion of damages furnished by the contract itself, unless, possibly, the obligation by Steele to furnish "all the land he owned accessible to Hogfoot creek" be an exception. Upon this we express no opinion, for the complaint fails to show that Steele owned any land accessible to "Hogfoot creek." For this reason, if for no other, this assignment of breach

is bad. Moore v. Smith, 19 Ala. 774; Erwin v. Erwin, 25 Ala. 236; Kirksey v. Kirksey, 8 Ala. 131.

Reversed and remanded.

(43 La. Ann. 1161)

ANGELOVICH v. HIS CREDITORS.

(No. 10,717.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

INSOLVENCY—CREDITORS' MEETING—CONSTRUCTION OF MANDATE—DISCHARGE OF INSOLVENT.

1. A mandate to represent creditors at the meeting of creditors in an insolvent proceeding, which authorizes the agent or proxy to vote for an extension of time, and that he vote for a settlement of the indebtedness in such manner as two-thirds in number and amount of the creditors may determine, or to vote for the sale of the assets surrendered, for cash or on terms of credit, or "for such other matters as may come before the meeting of creditors as may benefit him, the insolvent, or the creditors, and as may be proper and necessary" will not authorize the vote for the discharge of the insolvent.

2. In order to discharge the insolvent there must be, in accordance with article 2177 of the Civil Code, a vote of a majority of all the creditors, who are also creditors for more than half of the whole sum due by the insolvent.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge.

Petition of P. R. Angelovich, an insolvent, for a discharge from all his debts. Judgment denying the petition. Petitioner appeals. Affirmed.

Aug. Bernau, for appellant. *James B. Guthrie* and *E. Howard McCaleb*, for Matthew Dean & Co. *A. M. & J. Solari*, for appellees.

MCENERY, J. The plaintiff, on January 11, 1890, filed his petition in the civil district court for the parish of Orleans for a surrender of his property for the benefit of his creditors. The cession of his property was accepted, and a syndic appointed. At a meeting of the creditors the insolvent was discharged from all his debts. At this meeting the insolvent, under a power of attorney, voted for the discharge. The *bilan* shows 102 creditors, and the schedule shows debts aggregating $28,117. At the meeting of the creditors there were 54 votes, the insolvent voting by proxy for 46 creditors representing an indebtedness of $4,617.58. The 54 creditors voting represented $12,169.12,—less than one-half of the amount of the debts shown by the schedule. Dean & Co. and A. M. and J. Solari opposed the homologation of the meeting of creditors. The ground of this opposition is that the votes cast by the insolvent discharging himself from debt were illegal, as the power of attorney under which he acted gave no such authority. The power of attorney is as follows: "Civil District Court No. 29,004. Division C. P. R. Angelovich v. His Creditors. We, the undersigned creditors of Peter R. Angelovich, insolvent, do hereby authorize the said Peter R. Angelovich to himself or by substitution represent us at the meeting of his creditors to be held before Ferdinand Kirchner, notary public, on February 15, 1890, or at any subsequent meetings, to, in our name and behalf, vote that nine, eighteen, and twenty-four months be given him within which to pay his debts in full in equal installments, or, if all the creditors do not agree thereto, that he vote for a settlement of his indebtedness to his creditors in such manner as two-thirds in number and amount of his creditors may determine, or to vote for the election of a syndic for the sale of the assets surrendered, for cash or on terms of credit, for such other matters as may come up before said meeting of the creditors as may benefit him or the creditors, and as may be proper and necessary." It is very plain that the above instrument only authorized the insolvent to vote for a certain time in which his debts should be paid in full, and for a general settlement of his debts with his creditors for his and their benefit. There is nothing said about the discharge of the debtor, and from the context of the power of attorney it is evident that this was excluded, and was never contemplated by the creditors who executed it. Conceding that these votes were legally cast, there is still wanting a majority of creditors in number, and who are also creditors for more than the half of the whole sum due by the insolvent. Civil Code, art. 2177. The insolvent urged that article 2177, Civil Code, should have the same interpretation placed upon it as has been given to article 3086 in Anderson v. Creditors, 33 La. Ann. 1155, and Herwig v. Creditors, 36 La. Ann. 760. This last article was amended by Act No. 83, 1843, now section 1822, Rev. St. Article 2177 was not in any way affected by said act. The two articles of the Code—3086 and 2177—relate to subjects distinct from each other. The one—3086—has reference to the respite to be granted to debtors, and not to the absolute discharge of the debtor; and the other article—2177—to his absolute discharge from the debts appearing on his schedule. It is very plain that the creditors cannot have their debts canceled except on a strict compliance with the law, and with their consent made manifest by their participation in the proceedings, and expressed by a majority of the creditors in amount, who are also creditors for more than half of the whole sum due by the insolvent. There is no question raised as to the appointment of the syndic. The judge *a qua* maintained the opposition as far as to order another meeting of creditors, to which the discharge of the insolvent should be referred. Under the circumstances of this case we do not think he erred in thus giving an opportunity for further proceedings in relation to the discharge of the insolvent. Judgment affirmed.

Rehearing refused.

(43 La. Ann. 1180)

CITY OF NEW ORLEANS v. LAGMAN *et al.*

(No. 10,837.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

MASTER BUILDER'S LICENSE TAX—WHO LIABLE—MECHANICS.

1. A mechanic who contracts and shapes materials with his own hands is engaged in a mechanical pursuit.

2. He will be exempt, although he employs other mechanics, who work with him, and, like him, follow a mechanical pursuit.

(*Syllabus by the Court.*)

Appeal from second city court of New Orleans; CHARLES H. LA VILLEBEUVRE, Judge.

Action by the city of New Orleans against A. Lagman & Son to enforce the payment of a license. Judgment for defendants. Plaintiff appeals. Affirmed.

Walter B. Sommerville, Asst. City Atty., and *Carleton Hunt*, for appellant. *B. R. Forman*, for appellees.

BREAUX, J. Plaintiff sued defendants to enforce the payment of a license tax for the years 1888, 1889, and 1890, and claims that they are liable as master builders. The licenses are claimed under section 12 of ordinance 2661, Council Series. Defendants, in their answer, denied the allegations of the plaintiff, and alleged that they are carpenters, and were engaged during the years 1888, 1889, and 1890 in a mechanical pursuit,—building and repairing houses. They also allege that they are exempt from a license tax under article 206 of the constitution. From a judgment in favor of defendants, plaintiff appeals.

The record discloses that the defendants are carpenters. They build houses and other structures. Their labor was manual and in its performance they used the spirit-level, the squares, the saw, hammer, and other carpenter's tools. They manipulated and gave shape to the material in building. The witness Lagman testifies: "I contracted for buildings in 1888 and 1889. It was pretty near all days' work. I followed the carpenter's trade all along. I performed manual labor on the buildings myself, from the first piece of timber, in framing, in finishing, to the very completion of the house." The testimony is not disputed. The plaintiff states in the brief: "These defendants, unless it may be A. Lagman & Co., are not engaged in a mechanical pursuit." They employed other carpenters, who worked with them and under their direction in constructing houses. The phrase "those engaged in mechanical pursuits," as incorporated in article 206 of the constitution, has been interpreted in several decisions. In City of New Orleans v. Bayley, 35 La. Ann. 545, the defendant worked at his trade with his own hands. In the performance of a contract he employed other plasterers to assist him. The court decided that the superior law prohibited the imposition of a license tax on a plasterer, and that the employment of assistance did not exclude him from the exemption. This interpretation was affirmed in Theobalds v. Conner, 42 La. Ann. 787, 7 South. Rep. 689, from which we copy: "Undoubtedly that opinion is correct, for Bayley was a plasterer, and worked at his trade with his own hands." The attempt to hold the defendants responsible for the payment of a license as master builders must fail. The undisputed evidence before us establishes that they were engaged as carpenters, and, as the house was constructed, "continued to use the tools and appliances of that mechanical pursuit." The fact that others assisted cannot exclude them from the exemption. As in the Bayley Case, they worked at their trade with their own hands, and were therefore engaged in mechanical pursuit. A mechanic is any skilled worker with tools,—a workman who shapes and applies material in the construction of houses; as interpreted by our court, one actually engaged with his own hands in constructive work. The defendant having testified, in answer to a question propounded, that he did perform manual labor in building from the first piece of timber to the last,—this evidence being undisputed,—we conclude that he is exempt. The judgment appealed from in the cases of the other defendants (consolidated) being different, in so far as relates to the occupation followed by them, will be hereafter decided. The judgment appealed from is affirmed, in so far as A. Lagman & Son are concerned, at plaintiff's costs.

(43 La. Ann. 1182)

CITY OF NEW ORLEANS v. O'NEIL *et al.*

(No. 10,837.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

BUILDER'S LICENSE TAX—POWERS OF CITIES—CONSTITUTIONAL LAW.

1. The ordinance under which the city claims a license tax from every individual carrying on the business of master builder is not contrary to article 206 of the constitution.

2. The master builder or contractor who employs workmen in executing his contract is not exempt from the payment of a license tax.

3. To be exempt, the training of the mechanic and his skill must be applied by himself, with his own hands, in the execution of his contract.

(*Syllabus by the Court.*)

Appeal from second city court of New Orleans; CHARLES H. LA VILLEBEUVRE, Judge.

Action by the city of New Orleans against T. O'Neil, Albert Thiéson, Charles Garvey, and Muir & Fromherz, to enforce payment of certain license taxes. Judgment for defendants. Plaintiff appeals. Reversed.

Carleton Hunt, City Atty., and *Walter B. Sommerville*, Asst. City Atty., for appellant. *B. R. Forman*, for appellees.

BREAUX, J. The city sued to recover a license tax from the following named defendants: Charles Garvey, Muir & Fromherz, T. O'Neil, Albert Thiéson, and J. R. Turk, claiming they were each liable as "master builders." The defendants answered that they were following a mechanical pursuit as carpenters during the years for which license is demanded. They also allege that they are exempt, under article 206 of the constitution, from the payment of license. There is an agreement of record, in accordance with which these cases were submitted in one transcript. The petition and answer in one case were to be copied and to be considered the same in all, with the change of the name and year. In carrying out the agreement, the petition in one case is considered the same against all the defendants, with the change of the name and year. The facts in these cases are not

similar to those in the Case of Lagman & Son, (10 South. Rep. 244, just decided.) The record discloses that the defendants have been in business since a number of years. That they are carpenters. That they contract for the building of houses and other structures. They employ other carpenters. They laid off the works, used the squares, the spirit level, and the straight edge, and, as the building progressed in the construction, they used the plumb-line; they superintended. The following is part of the evidence in each case: "Question: You simply take contracts for building? Answer. Yes, sir. Q. And superintend? A. Yes, sir. Q. You have probably several of them at one time? A. Well, for five years I had many; for the last three years I have not had so much." The affirmative statements of the witnesses with reference to their occupation as "master builders" are followed by the answers as above. These witnesses are sincere in their defense and in their testimony. Being mechanics, they candidly claim exemption. The exemption clause of the constitution and the jurisprudence of the subject must prevail in determining whether they be exempt. The exception does not include all mechanics without regard to their pursuits. A dividing line, we must observe, is drawn. The constitution exempts those engaged in mechanical pursuits. In Theobalds v. Conner, 42 La. Ann. 788, 7 South. Rep. 689, the defendant was a contractor or master builder. A brick-layer himself, he employed others to do the mechanical part of the work, and he superintended. As contractor or master builder he was not exempt. The constitution declares that persons pursuing a trade are liable to a license tax, except those engaged in mechanical pursuits. In City of New Orleans v. Bayley, 35 La. Ann. 545, the defendant was a plasterer, worked at his trade with his own hands, and, when executing a contract, and having more work than he could conveniently do, employed other plasterers to assist him. The court decided that he was engaged in a mechanical pursuit, and that the employment of assistance in his occupation did not alter the nature of his occupation. The theory of the decisions is to exempt, protect, and encourage the mechanic who actually works at his trade. The testimony in the pending cases does not disclose that the defendants "worked at their trade with their own hands." If the article applies to them, it would equally exempt the masters, the contractors, and even the architects, for they have also occasion frequently to use the plumb-line, the square, and the spirit level. It was necessary, in complying with the constitution, to interpret the exemption clause and draw a dividing line, otherwise all trades would be exempt, although the article authorizes and directs the general assembly to impose a license on all trades except those especially enumerated. There are no trades but what at times, in following them, the pursuit is partly mechanical. The artist, the photographer, and others at times follow a mechanical pursuit. They are not exempt from the payment of a license. The defendants argue that the exemption of the laborer covers every man who labors with his own hands, and that the law-maker, after exempting the laborer, went further, and included the mechanic who follows a mechanical pursuit. Without the additional exemption phrase, especially including the mechanic, he would not be exempted at all. The word "laborer" does not include the mechanic. The possibility suggested by defendants' counsel, and illustrated by him for the purpose of showing that carpenters, plasterers, plumbers, slaters, may have to pay "two or three times over," is exceedingly remote. In the first place, those who work at their trades are exempt, and the illustration cannot apply to them. In the second, objection to the method of graduation is not made in the pleading, and, in any event, does not make it possible to decide as exempt trades and occupation not exempted under article 206 of the constitution. The general assembly shall graduate the amount of license tax. It is not in the power of the courts to lay down rules for graduating license tax. State v. Chapman, 35 La. Ann. 76; State v. O'Hara, 36 La. Ann. 94; State v. Schonhausen, 37 La. Ann. 42; Police Jury v. Marrero, 38 La. Ann. 897; State v. Insurance Co., 40 La. Ann. 463, 4 South. Rep. 504. The master builder and contractor not being exempt, the city is authorized to enforce the ordinances imposing a license tax.

The "annual gross receipts" of each defendant were more than $12,000, except those of J. R. Turk, for 1890, which were more than $10,000, and less than $12,000. It is therefore ordered, adjudged, and decreed that the judgment appealed from, in so far as relates to the defendants herein named, be annulled, avoided, and reversed, and it is now decreed that there is judgment for plaintiff against each of the following named defendants, viz.. Charles Garvey, Muir & Fromherz, T. O'Neil, and Albert Thiéson, for the sum of $285, with interest as claimed, and against the defendant J. R. Turk for the sum of $270, with interest as claimed; appellees to pay costs of both courts.

ON REHEARING.

(Dec. 14, 1891.)

FENNER, J. In disposing of this application, which is made in behalf of the cast defendants, O'Neil and others, we have to say:

1. The admissions of record conclusively established the amount of the gross receipts on which our judgment is based.

2. In relieving Lagman & Son, and in holding the others bound, we have simply applied the rule of *stare decisis*, as established in the cases heretofore decided, viz.: City of New Orleans v. Bayley, 35 La. Ann. 545; Theobalds v. Conner, 42 La. Ann. 787, 7 South. Rep. 689. They are cases which require a firm adherence to the rule, and we see no reason to disturb our former rulings.

3. If hardship results from grading licenses according to gross receipts, it is nevertheless the law, and relief must be sought from the legislature.

4. Absolute justice is unattainable in

tax-laws. We are not responsible for any inequity which may result from exempting Lagman & Son while taxing the other defendants. The exemption is made by the constitution. Rehearing refused.

(43 La. Ann. 1108)

STATE v. CHAMBERS. (No. 10,932.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

NEW TRIAL—GROUNDS.

1. Newly-discovered evidence, the only effect of which is to impeach the credit of a witness, is no ground for new trial.

2. Surprise can furnish no ground for new trial, when no complaint was made or relief asked on that ground when it arose in course of the trial.

(*Syllabus by the Court.*)

Appeal from district court, parish of Grant; A. V. Coco, Judge.

Prosecution of Jack Chambers. After his conviction, defendant moved for a new trial, which was denied, and he appeals. Affirmed.

Hunter & Hunter and *W. C. Roberts*, for appellant. *Walter H. Rogers*, Atty. Gen., for the State.

FENNER, J. The record presents two bills of exception, one taken to the refusal of a motion for new trial, and the other to certain action of the judge in the course of the argument. The first bill excepts to the overruling of two of the grounds set forth in the motion. One ground was that the defendant and his counsel were surprised by the course of the prosecution in entering a *nolle pros.* as to one Jennie Jones, who had been indicted as an accessory to the crime, and in using her as a witness for the state. The judge *a qua* in the statement of his reasons aptly says: "The accused cannot be permitted to take the chances of an acquittal, and then set up surprise after the trial. He might have secured a continuance or a delay of the trial if he had urged his reasons at the time the *nolle pros.* was entered, and the state's attorney had expressed his intention to use her as a witness. He was then fully informed of the action of the state, and he should have complained there if he felt aggrieved." This is sufficient and conclusive. The other was that of newly-discovered evidence. It appears, on the face of the motion, that the evidence had no purpose or effect other than to impeach the testimony of a witness for the state. The well-established general rule is that such evidence is not ground for new trial, and the facts of the case suggest no reason for making an exception in its favor. State v. Burt, 41 La. Ann. 787, 6 South. Rep. 631; also, State v. Gauthreaux, 38 La. Ann. 608; State v. Offutt, Id. 364; State v. Williams, Id. 361; State v. Diskin, 35 La. Ann. 46; State v. Fahey, Id. 9; State v. Young, 34 La. Ann. 346; State v. Tessier, 32 La. Ann. 1227. The second bill excepts to certain statements and rulings of the judge in the course of the trial. It is sufficient to say that, under the full statement by the judge to the bill, the exception is left without a shadow of force or merit. Judgment affirmed.

(43 La. Ann. 1073)

OTIS v. SWEENY. (No. 10,838.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

RES ADJUDICATA—APPEAL.

1. The general rule is that, when the transcript presents no evidence and no note of evidence, this court will presume that the judge *a qua* had before him sufficient evidence to support his judgment, and will affirm the same; but this rule cannot be applied when the record shows that the judge acted without evidence and upon consideration of the law only.

2. The plea of *res adjudicata* presents an issue of mixed law and fact, and a judgment sustaining it upon consideration of the law alone, and without evidence of the prior judgment propounded as its basis, is necessarily error.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Action by Henry Otis against James Sweeny. The trial court maintained an exception of *res adjudicata*. Plaintiff appeals. Reversed.

William S. Benedict, for appellant. *T. M. Gill*, for appellee.

FENNER, J. This is an appeal taken from a judgment maintaining an exception of *res adjudicata*. We have nothing else before us. The record presents a complete certificate of the clerk that it contains "all the proceedings had, documents filed, testimony and evidence adduced upon the trial of the cause. The record contains no evidence of any kind, and no note of evidence. The appellee invokes the rule laid down by this court in many decisions, that in such a case we will presume that the judge *a qua* had before him sufficient evidence to support his judgment, and will affirm the same. Succession of Pilcher, 39 La. Ann. 364, 1 South. Rep. 929; Miller v. Cappel, 39 La. Ann. 883, 884, 2 South. Rep. 807; Nugent v. Stark, 34 La. Ann. 631; Verges v. Gonzales, 33 La. Ann. 415; Hefner v. Hesse, 26 La. Ann. 148; State v. De Monasterio, Id. 734; Bank v. St. Amans, 23 La. Ann. 293; Graham v. Rice, Id. 393; Simmons v. Howard, Id. 504; Parham v. Ogle's Estates, 22 La. Ann. 73; Bank v. Bringier, Id. 118. That presumption is properly applied to cases where the judgment appears on its face to be based on a consideration of the law and the evidence, or where the record otherwise shows that the judge acted on evidence. But the record in this case fails to show that the judge received or acted on any evidence whatever, and, indeed, completely negatives the presumption that he did. Thus the minutes show that the exception was submitted "after hearing pleadings and counsel;" and the judgment recites as its reason only the statement: "The law being considered, and for the reasons orally assigned." These entries exclude the idea that the judge had before him or considered any evidence whatever, and this is confirmed by the clerk's certificate. The plea of *res adjudicata* necessarily presents an issue of mixed law and fact. A judgment maintaining such a plea upon consideration of the law alone, and without evidence of the prior judgment propounded as its basis, is obviously erroneous, and must be reversed.

We shall simply reverse, without, however, overruling the exception. It is therefore adjudged and decreed that the judgment appealed from be avoided and reversed, and that the case be remanded to the lower court for a new trial of the exceptions and for further proceedings according to law, appellee to pay costs of appeal.

(43 La. Ann. 1140)

SMITH v. SMITH. (No. 10,828.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

DOMICILE OF WIFE — SEPARATION FROM HUSBAND —DIVORCE IN FOREIGN STATE—VALIDITY.

1. Although the law fixes the domicile of the wife as being that of the husband, universal jurisprudence recognizes an exception in the case where the husband's conduct has been such as to furnish lawful ground for a divorce, and which justifies her in leaving him, and necessarily authorizes her to live elsewhere, and acquire a separate domicile.

2. If a wife who had been married in Maine, on discovering proofs of her husband's adultery, leaves him, and returns to her former home in Maine, and establishes there a *bona fide* domicile, her marriage *status* becomes subject to the jurisdiction of that domicile, whose courts may lawfully entertain her action of divorce.

3. If the defendant in such action has had actual or constructive notice in accordance with the statutory provision of the state, the divorce will be held valid as to both parties by comity in such states as have adopted the policy of such divorce proceedings by similar legislation.

4. Article 142 of the Civil Code of Louisiana is strikingly similar to the statute of Maine in authorizing the wife who was married in the state to return thereto, and, on establishing her domicile, to obtain divorce from her non-resident husband, who has given her lawful cause therefor. This authorizes the courts of either state to give effect to such divorces granted in the courts of the other in such cases.

5. In such cases, however, *bona fide* residence or domicile is an essential prerequisite to jurisdiction, and the decree is not conclusive on jurisdictional facts, and the absence of jurisdiction for want of *bona fide* residence may be shown in any court.

6. This court will not recognize the validity of such foreign divorces where the husband has maintained his Louisiana domicile without full and conclusive proof of the *bona fides* of the wife's separate domicile.

7. Without determining its validity *vel non*, the Maine divorce in this case is held to be one presenting on its face no intrinsic nullity, and subject to attack only on proof of extrinsic facts destroying the jurisdiction; and therefore entitled to weight in determining the good faith of a second marriage, contracted between the husband and a third party.

8. The sole condition prescribed by the law to give civil effects to a putative marriage is good faith on the part of one or both of the parties. Such good faith means a belief, both honest and reasonable, that the marriage is valid, and in violation of no legal prohibition. The facts in this case satisfy us beyond doubt of the good faith of plaintiff.

9. The law in attributing to a putative marriage "civil effects" uses those words without restriction, and necessarily means all civil effects given to marriage by the law. Such a marriage, contracted in good faith, produces all the civil effects of a valid marriage up to the moment when its nullity is judicially pronounced.

10. The right to the marital portion conferred by article 2382, Rev. Civil Code, is a civil effect of marriage, and arises in favor of the plaintiff as well as of the legitimate spouse. The marriage has not been annulled during the life of the deceased. Spanish, French, and Roman law on the subject referred to.

11. The terms "necessitous circumstances," used in article 2382, Rev. Civil Code, are used relative to the fortune of the deceased, and to the condition in which the claimant lived during the marriage.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Action by Jessica Smith against E. P. Smith, guardian, to recover the marital fourth of her deceased husband's estate. Judgment for defendant. Plaintiff appeals. Reversed.

Rice & Armstrong, for appellant. *E. Howard McCaleb*, for appellee.

FENNER, J The action is brought by plaintiff, as the surviving wife of Alexander Smith, to recover the marital fourth of his estate, as provided by article 2382 of the Revised Civil Code, which declares: "When the wife has not brought any dowry, or when what she has brought as a dowry is inconsiderable with respect to the condition of the husband, if either husband or wife die rich, leaving the survivor in necessitous circumstances, the latter has the right to take out of the succession of the deceased what is called the 'marital portion;' that is, the fourth of the succession in full property if there be no children, and the same portion in usufruct only when there are but three or a smaller number of children; and, when there are more than three children, the survivor, whether husband or wife, shall receive only a child's share in usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife who died first." Alexander Smith was twice married. He was first married to Elizabeth P. Sewall in 1870, at her home in Wiscasset, Me., but he was at the time a resident of Louisiana, and immediately after the marriage the pair came to Louisiana, and established the conjugal domicile in this city. Here they lived together until June, 1881, and four children, still surviving, were the fruits of their union. At that time, the wife having discovered, as she charges, proofs of the husband's adultery, abandoned the conjugal domicile, and returned to her antenuptial home in Wiscasset, Me. On the 21st of September, 1881, she filed a libel of divorce against her husband in the supreme judicial court of the county of Lincoln, state of Maine, in the caption of which she describes herself as "Elizabeth P. Smith, of Wiscasset, in the county of Lincoln," and in which she alleges the facts of her marriage, her former domicile, her children by the marriage, and the grounds for divorce. She further alleged that her husband had a large estate, and prayed for a decree granting a divorce, decreeing her entitled to the care and custody of the children and a reasonable allowance for her own and their maintenance. The court made its order thereon, directing notice to appear on a day fixed to be served on the libelee personally "by any sheriff or deputy-sheriff authorized to serve civil process in the place where respondent

is found." The record further shows that personal service was accordingly made on Alexander Smith in this city by a deputy-sheriff of the parish of Orleans. Smith did not appear, and, being held in default, the cause was heard on evidence introduced by the wife, and the decree was entered according to the prayer of the libel, including a judgment against Smith for $20,000 as an allowance in lieu of alimony. Some two weeks after the entry of this decree Mrs. Smith left Wiscasset, and went to Nashville, Tenn., where her children were being educated; remained there until February, 1882; then returned to New Orleans, where she spent six years; and finally removed to New York, where she now resides. From the date of the above decree of divorce both parties have lived and acted as, and in all respects assumed the character of, divorced man and wife. On the demand of the wife's attorney, Alexander Smith paid the $20,000 decreed by the judgment. Shortly afterwards he filed a suit in the civil district court of this city, entitled, "Alex. Smith v. His Divorced Wife, E. P. Smith," in which he averred the fact of divorce, his payment of the $20,000, the dissolution of the community of acquest and gains thereby, the failure of the wife to accept the community within the prescribed delay, and asked for a decree declaring his estate to be his separate property, and free from any claim growing out of the former community. Mrs. Smith answered, admitting the validity of the divorce, and judgment was rendered as prayed for.

Both parties undoubtedly accepted the decree of divorce as valid, and undoubtedly believed it to be so. Even after the death of Alexander Smith, in her petition filed in his mortuary proceedings for recognition as guardian of her minor children, she describes herself as his "divorced wife," and in other petitions she describes herself similarly. The evidence shows that they both assumed the *status* of divorced man and wife; that their most intimate friends and acquaintances regarded them as such; and that there was never in the community the slightest question as to their *status*. Under these circumstances, in October, 1889, Alexander Smith married the plaintiff, Jessica McFarland, a young girl living in his immediate vicinity, and whose mother had long known both Smith and his former wife, and who accepted, without question, the universal belief of the community, based on the actions and declarations of both, that they were divorced. Smith died in December, 1889. The first wife, as guardian of her minor children, has had them recognized as heirs of their father, and sent into possession of his estate; and against her, as guardian aforesaid, the present action is brought. The guardian defends on the ground that the Maine decree of divorce was absolutely null and void for want of jurisdiction *ratione personæ*, and *ratione materiæ;* that, consequently, plaintiff's marriage was illegal and null; that she is not the surviving wife of Alexander Smith, and has no rights as such upon his estate; and, further, denies that she is in necessitous circumstances. The case presents the following questions, viz.: (1) Was the Maine decree of divorce valid? (2) If invalid, was the subsequent marriage of plaintiff contracted in good faith, and entitled to produce its civil effects? (3) If the marriage produced the civil effects, is the claim to the marital portion one of such civil effects embraced in the law? (4) Is the plaintiff in necessitous circumstances, and otherwise entitled to claim the marital portion?

1. The validity of the Maine divorce depends upon the question of fact whether or not the libelant, Mrs. E. P. Smith, had at the commencement of the proceedings acquired a *bona fide* residence or domicile in Maine. Although the law fixes the domicile of the wife as being that of her husband, universal jurisprudence recognizes an exception to the rule in the case where the husband's conduct has been such as to furnish lawful ground for a divorce, which justifies her in leaving him, and therefore necessarily authorizes her to live elsewhere, and to acquire a separate domicile. Cheever v. Wilson, 9 Wall. 108; Barber v. Barber, 21 How. 582; 2 Bish. Mar. & Div. 475; Schouler, Husb. & Wife, § 574; 5 Amer. & Eng. Enc. Law, p. 76. Where such a separate domicile, based on lawful cause, is *bona fide* established by the wife, her marriage *status* becomes subject to the jurisdiction of the court of that domicile. Says Mr. Cooley: "We conceive the true rule to be that the actual *bona fide* residence of either husband or wife within a state will give to that state authority to determine the *status* of such party, and to pass upon questions affecting his or her continuance in the marriage relation, irrespective of the locality or of any alleged offense, and that any such court in that state as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions and annul the marriage. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring the divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that state or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party." Cooley, Const. Lim. (4th Ed.) p. 502. See, also, authorities above cited, and Pennoyer v. Neff, 94 U. S. 714. The statute of Maine provides: "A divorce from the bonds of matrimony may be decreed by the supreme judicial court in the county where either party resides at the commencement of proceedings, when the judge deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society, if the parties were married in this state or cohabited here after marriage." Article 142 of the Civil Code of Louisiana provides: "Whenever a marriage shall have been contracted in this state, and the husband, after such marriage, shall remove or shall have removed to a foreign country with his said wife, if said husband shall behave or have behaved towards his wife in said foreign country in such a manner as would entitle her, under our laws, to demand a separa-

tion from bed and board, it shall be lawful for her, on returning to the domicile where her marriage was contracted, to institute suit there against her said husband for the purpose above mentioned, in the same manner as if they were still domiciliated in said place. In such case an attorney shall be appointed by the court to represent the absent defendant. The plaintiff shall be entitled to all the remedies and conservative measures granted by law to married women, and the judgment shall have force and effect in the same manner as if the parties had never left the state." It thus appears that both states have adopted a similar policy on this subject, and the comity of states authorizes us to give full effect to such decrees as to both parties, under the rule which we find well formulated as follows: "A divorce granted by the court of the defendant's domicile or of the complainant's domicile in a case in which the defendant has been summoned or has voluntarily appeared is probably valid as to both parties everywhere by comity. If the defendant, though not regularly appearing or summoned, has actual notice, or even if he has had only constructive notice by publication or otherwise, the divorce will be regarded valid as to both parties by comity in such states as have adopted the policy of such divorces by similar legislation or otherwise." 5 Amer. & Eng. Enc. Law, p. 760; Doughty v. Doughty, 28 N. J. Eq. 581; Van Orsdal v. Van Orsdal, 67 Iowa, 35, 24 N. W. Rep. 579. In this case the defendant received actual notice, and while such notice, served extraterritorially, could not subject him to the personal jurisdiction of the court, it was at least equivalent to any other constructive service, and was made in accordance with the statute of Maine and with the direction of the court based thereon. Rev. St. Me. 1871, p. 619. We conclude, therefore, that the only question affecting the validity of the Maine decree of divorce is the question of fact as to whether the complainant had acquired such *bona fide* residence or domicile in Maine as gave the courts of that state jurisdiction over the marriage *status*. The better opinion is that the decree is not conclusive upon the jurisdictional facts essential to its maintenance, but that its invalidity due to want of jurisdiction may be shown in any court. Sewall v. Sewall, 122 Mass. 156; People v. Dawell, 25 Mich. 247. The United States supreme court has referred to this question, but declined to decide it. Cheever v. Wilson, 9 Wall. 108. We conceive it to be our duty in such a case to require very full and conclusive proof of the *bona fides* of the required domicile; and the evidence on the point here presented is not entirely satisfactory. We should hesitate, on such proof, to maintain the validity of a divorce so obtained. But we find it unnecessary now to decide this point, and have discussed it so fully mainly to show the exact *status* of the divorce decree as one presenting, upon its face, no intrinsic nullity, and subject to attack only on proof of extrinsic facts undermining the jurisdiction. This is important, as affecting the question of good faith in the subsequent marriage contracted between the plaintiff and Alexander Smith.

2. Article 117 of the Civil Code provides: "The marriage which has been declared null produces nevertheless its civil effects, as it relates to the parties and their children, if it has been contracted in good faith." And article 118: "If only one of the parties acted in good faith the marriage produces its civil effects only in his or her favor and in favor of the children born of the marriage." The sole condition prescribed by the law to give civil effects to a putative marriage is good faith on the part of one or both of the parties. Without assuming to legislate, we cannot add to the requirements of the law. 1 Marcadé, p. 522; 1 Baudry, Lacantinerie, p. 329. The good faith referred to means an honest and reasonable belief that the marriage was valid, and that there existed no legal impediment thereto. Succession of Taylor, 39 La. Ann. 823, 2 South. Rep. 581; Barfield's Case, 30 La. Ann. 1297; Navarro's Case, 24 La. Ann. 298; Abston's Case, 15 La. Ann. 137; Patton v. Philadelphia, 1 La. Ann. 98. The party alleging good faith cannot close her ears to information or her eyes to suspicious circumstances. She must not act blindly, or without reasonable precautions. In Taylor's Case we had before us a woman who acted simply on the statement of the man that he was divorced, although he was not so in fact, and although she knew his living wife, by whom she had been informed there was no divorce, and had been warned by others that there was none. We held that good faith could not be credited under such circumstances. The facts of that case are in such pointed contrast with those of the instant one that they need no comment. We have already detailed the facts, which show conclusively that the plaintiff's belief in the validity of her marriage was shared by both the former husband and wife, accepted by their friends and by the community generally, and, in point of fact, supported by a decree of divorce valid upon its face, never questioned by any one, and which could only have been annulled on proof of extrinsic facts destroying the jurisdiction of the court. A stronger case of good faith could not be presented.

3. The Code provides, as we have seen, that the putative marriage produces its "civil effects" as it relates to parties in good faith. The words "civil effects" are used without restriction, and necessarily embrace all civil effects given to marriage by the law; or, in the language of Marcadé in commenting on the identical article in the French Code, such a marriage, "although actually null, has the same effects as if it were not null,—the ordinary effects of a valid marriage. * * * Every marriage, though invalid, if contracted in good faith, produces the effects of a valid marriage in the interval between the celebration and the judicial declaration of nullity. When once such declaration intervenes, the marriage produces no further effect; but, be it understood, the effects produced remain forever." 1 Marcadé, 525. The marriage of plaintiff was never declared null during the life of Alexander

Smith. It existed as a putative marriage at the instance of his death, and the civil effects resulting therefrom were then complete and indestructible. That the right to the marital fourth, under the circumstances defined in the law, is one of the civil effects of the marriage, does not, as it seems to us, admit of dispute. If not such an effect, what kind of effect is it? It is true that the article of our Code allowing the marital portion is directly derived from the Spanish law, being taken from Partida vi. tit. xiii. law 7. It is equally true that under the Spanish law only the legitimate wife under a valid marriage could claim it, and not a merely putative wife. But why? The answer is self-evident: Because the Spanish law contains no general provision giving all civil effects to putative marriages. The only civil effects allowed by that law to the putative marriage are such as are sanctioned by special provisions, and the right to the marital fourth received no such sanction. Partida iv. tit. xiii. law 1; White, New Recop. bk. 1, tit. xii. § 6; Patton v. Philadelphia, 1 La. Ann. 105, and Spanish authorities there cited. So the commentators on the French Code, in enumerating the civil effects produced by the putative marriage, do not include the marital portion for the very simple reason that the French Code does not recognise or provide for any such portion. Reference to those systems is therefore futile. Differing from both of them, our Code embodies both provisions, viz., that of the French law, giving to putative marriages all the civil effects of a valid marriage; and that of the Spanish law, authorizing the claim of the marital portion as one of the civil effects of a marriage. We may add that, while the Roman law established the marital portion in the 53d and 117th Novels of Justinian, we are not advised that the civil effects of marriage were, under that system, given to putative marriages, and therefore the authorities under that system are equally inapplicable. We are bound to hold that the right to the marital portion is one of the civil effects of marriage, and that it was produced by the marriage of plaintiff, even conceding that it was only putative, although we do not decide against validity.

4. The final question is whether the plaintiff's case presents the conditions entitling her to the marital portion. She brought no dowry. Smith died rich. The only question is whether he left plaintiff "in necessitous circumstances." It is well settled in our jurisprudence that the terms "necessitous circumstances" are used relatively to the fortune of her husband and to the condition in which she lived during the marriage. As said in one case: "In estimating her necessities the law requires that we should take into consideration the condition of her husband and the habits of life which his ample fortune must have engendered in his family. The rule derived from the Roman and Spanish laws in such cases is that the surviving wife is entitled to the marital portion, unless she has the means *bene et honeste vivere*, according to the condition of her husband." Dunbar v. Heirs of Dunbar, 5 La. Ann. 159. The evidence satisfies us that she has not such means. She has nothing except certain donations made to her by him, consisting of a painting, valued at $300; some furniture, valued at $500; and a house, stated to be worth $3,750. In her prayer for judgment she allows that proper and reasonable deductions shall be made on account of said donations. We think she is entitled to the judgment prayed for. It is therefore adjudged and decreed that the judgment appealed from be avoided and reversed, and that there be now judgment in favor of the plaintiff and against the defendant and guardian, declaring plaintiff to be entitled to, and to have and receive out of the succession of Alexander Smith, deceased, and from his said heirs, in possession thereof by their said guardian, a child's share, or one-fifth part or share thereof, in usufruct, less such deductions on account of certain donations made to plaintiff by said Smith during his life-time as may be just and reasonable, and that she be put in possession of the same; defendants to pay costs in both courts.

Rehearing refused.

(43 La. Ann. 1151)

Succession of SALOY. (No. 10,860.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 43 La. Ann.)

ADMINISTRATION OF ESTATES—INVENTORY OF SUCCESSION PROPERTY—CONSERVATION OF EFFECTS.

1. Article 1213, Civil Code, authorizes the attorney of absent heirs, in the interval between the opening of the succession and the appointment of an administrator, to perform conservatory acts, the delay of which may injure the succession; and, when advised that certain effects in the possession of a third person do or may belong to the succession, he is authorized to inform the court, and to invite such action as may secure the noting of such effects upon the inventory.

2. The law commands the probate judge to cause an inventory of succession property, and prescribes that such inventory shall embrace a proper description of all effects of the succession.

3. In the confection of an inventory, neither the judge nor the notary decides questions of title or possession. But when particular effects are pointed out, even in the possession of a third person, as claimed to belong to the succession, it is proper to have such effects noted and properly described in the inventory, though without prejudice to the rights of the third possessor.

4. Finding that the order of the judge complained of had no other purpose or effect except to secure a proper inventory, and did not divest either the title or right of possession of appellant, and in absence of any showing of injury or reason why they should be reversed, we decline to interfere with them.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

The succession of Carmelite Carcagno, widow of Bertrand Saloy, deceased. Order directing a bank to hold possession of a box containing valuables of deceased until inventory of its contents could be taken. Mrs. Louque claimed ownership of the box by manual gift from deceased, and from the above order appeals. Affirmed.

Charles Louque, for Mrs. Carmelite

Louque, appellant. *Benjamin C. Elliott*, for heirs, appellees.

FENNER, J. The succession of Mrs. Bertrand Saloy was opened upon the petition of one who represented herself as a resident heir of deceased, who stated in her petition that certain of the heirs were absent, who prayed for the appointment of an attorney of absent heirs, and for an inventory of the property of the succession, and who also prayed for her own appointment as administratrix. The judge entered his order directing that the petitioner's application for appointment as administratrix be advertised according to law, ordering an inventory of all the property and effects left by deceased to be taken by Charles T. Soniat, notary public, and appointing B. C. Elliott, Esq., as attorney of absent heirs. After qualifying according to law, the attorney of absent heirs presented to the court the following petition: "The petition of B. C. Elliott, duly appointed and sworn as attorney to represent the absent heirs of the deceased in this succession, shows that he is informed and believes that a bank-box, containing a very large amount of valuables lately belonging to the deceased, is now in the vault of the Whitney National Bank, deposited in the name of Mrs. Louque or her husband, Louque, or Victor Pedelahore, under the claim or allegation that said box and its contents were received as a manual gift from deceased, and that it is necessary for the preservation of the rights of the absent heirs that said box and contents should be included or noted in the inventory. Wherefore he prays that said Whitney National Bank be ordered to retain said box in its possession until the same shall be examined by the notary ordered to take the inventory herein, and its contents duly noted, or until further orders of this court, without prejudice to the rights of any one claiming said box, and for general relief," etc. On this petition the judge entered the following order: "Let the Whitney National Bank be, and it is, ordered to retain possession of the box herein described, and its contents, until the same shall have been examined and noted by the notary, Charles T. Soniat, Esq., and until further orders of the court. New Orleans, April 11th, 1891. [Signed] N. H. RIGHTOR, Judge." Thereupon Mrs. Louque appeared by a rule upon the attorney of absent heirs, in which she set up her claim as owner of the box and contents under a manual gift from deceased made some days before her death, and called on him to show cause why the above order "should not be quashed and set aside, and why your mover should not be recognized as sole owner of said box and contents." To this rule certain heirs of Mrs. Saloy personally intervened, specifically denying the title of Mrs. Louque, averring that the property belonged to the succession, and praying for an order directing that the box and its contents be turned over to the succession to be distributed among the heirs according to law. These interveners also filed another petition for an order directing the Whitney National Bank to produce the bank-box in open court on a day fixed, to which the bank filed answer that the box was deposited in a steel compartment of its deposit vault, of which Mr. and Mrs. Louque held the key, and which could not be opened without the production of that key. Thereupon it appears that the judge, of his own motion, entered the following order or direction to the notary as supplementary to his original order: "*Mem.* Mr. Chs. T. Soniat, notary, designated to take the inventory of this succession, will communicate the within order to the Whitney National Bank, and if the officers of said bank should seem unable to give access to the box and contents in question, by reason of the key of said box not being in their possession or under their control, then the notary, having informed himself as to the person who may have possession or control of said box, whether it be Mrs. Geo. A. Louque, *née* Carmelite Pons, or other person, shall demand and receive said key, and, having completed the inventory of said box and contents according to law, shall, without unnecessary delay, report his action to this court. [Signed] N. H. RIGHTOR, Judge." The *procès-verbal* of the notary shows that, under this direction, he demanded the key of Mr. George A. Louque, who admitted its possession, but declined to deliver it. On the same day Mrs. Louque discontinued the rule which she had taken, and on the following day she applied for and obtained a suspensive appeal from both the orders above referred to.

We have thus fully stated the proceedings, because they are violently assailed in this court as operating an unwarranted and usurpatory divestiture of plaintiff's title and possession without due process of law. Her counsel has referred us to the following authorities, which we have carefully examined, and which substantially hold that adverse possession and title of third persons of property claimed also by a succession cannot be divested under summary proceedings (and still less by *ex parte* orders) in the mortuary proceedings, but that the succession, like any other person, must assert its rights in the appropriate ordinary action: Lavigne v. Chalambert, 11 La. 18; Succession of McKinney, 5 La. Ann. 748; Succession of Mielke, 8 La. Ann. 11; Succession of Moore, 18 La. Ann. 512. The correctness of these decisions is too obvious to admit of dispute, and we are quite sure the learned district judge would never have violated the principles therein announced. The orders complained of did not purport either to determine the title, or to transfer the possession, of the property. Their sole and evident object was to subject the property, in the possession in which it stood, to the view of the notary charged with taking the inventory, in order that he might inspect the same, ascertain its nature and value, and make a note thereof on the inventory as property in the adverse possession of a third person, to which the succession had or might have a claim. This clearly appears from the terms of the original petition and order, and the supplemental order must be construed in accordance therewith. The

order only directed the bank to retain possession of the box and contents "until the same shall have been examined and noted by the notary." The concluding words, "and until further orders of the court," could only have been intended to hold the order in force until the court, having first satisfied itself that the purpose of the order had been accomplished, should revoke it. If Mrs. Louque had complied with the order by exhibiting the contents of the box to the notary, to be noted on the inventory, we cannot doubt that the order would have been canceled, and her possession relieved from all restraint. If, indeed, after such action, she had demanded the discontinuance of the order, and it had been refused, she would have had grave cause of complaint, which would have justified redress at the hands of the court. But she chose to pursue a different course. Without applying for any explanation or modification of the order, she simply declined to permit access to the box, and filed a rule in the case, in which she herself put her title at issue, and asked for a judgment recognizing her as owner. It was only after the other alleged heirs had intervened, accepting this issue, denying her title, and asserting title in the succession, that she hastily discontinued her rule, and took the present appeal. The action of the attorney of absent heirs, in calling the court's attention to the situation of this property, and in inviting some action in order to ascertain its nature and value, in order that it might be noted on the inventory as a basis for the assertion of any claim the succession might prove to have thereto, was certainly proper, and within the line of his duties as prescribed by article 1213, Civil Code. Nor do we think that, in these orders, as we construe them, the judge exceeds the broad powers conferred upon him in the exercise of his probate jurisdiction. The law makes it his duty to have an inventory taken. Civil Code, arts. 316, 1035, 1036, 1039. The same articles prescribe that the inventory shall include all the effects of the succession, or, in the language of Mr. Cross, "an exact and particular description of all the effects, movable and immovable, of the succession." Cross, Succession, p. 9. In the confection of an inventory, neither the judge nor the notary determines questions of title or possession. But when particular effects are pointed out, even in the possession of a third person, which are claimed to belong to the succession, it is proper to note such claim upon the inventory, and to give a proper description of the effects so claimed, without prejudice, of course, to the rights of the third possessor. Otherwise it might turn out that all the effects of the succession were not included in the inventory, and the mandate of the law would be violated. The only way of giving a description of these effects, or of arriving at any estimate of their value, was by opening the box and examining them. The order of the judge was therefore natural and proper, and presumably not injurious to the rights of any one. We are not to be construed as authorizing anything like a right of search; as to which, under the facts of this case, we express no opinion. *Non constat* that the judge would have enforced the opening of the box against the will of the possessor. Under the terms of the order, its only effect was to hold the box where it was until its contents were ascertained, and, when the possessor prevented its opening, the box simply remained in the custody of the bank until further order of the court. The effect, in that case, would have been simply that of a judicial sequestration, which we think, in such a case, would have been authorized under article 273 of the Code of Practice, at least until the succession could be represented by the appointment of an administrator, who could invoke the proper conservatory process to protect the interest of the succession. Appellant has suggested no injury suffered by her from these orders, and no reason why they should now be interfered with. On the contrary, her counsel admitted in argument that she had voluntarily exposed the contents of the box, and that the title thereto was now regularly at issue in pending litigation. Judgment affirmed.

(43 La. Ann. 1164)

STATE *ex rel.* SCARBOROUGH, District Attorney, v. JUDGES OF THE CIRCUIT COURT OF APPEALS. (No. 10,935.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 43 La. Ann.)

CIRCUIT COURT OF APPEALS — JURISDICTION—RECOVERY OF PENALTIES—PROHIBITION.

Act 118 of 1890, which requires all railroad companies throughout the state of Louisiana to put up bulletin boards in a conspicuous place at all regular or way stations where they have a telegaph operator, and to keep posted thereon, for the information of the traveling public or people generally, the time of the arrival and departure of all regular trains, on pain of a fine of not less than one hundred and not more than five hundred dollars for each violation of its provisions "without just cause," "to be recovered in any court of competent jurisdiction within the parish where said violation may take place," is not a criminal statute in the sense of the jurisdictional articles of the constitution relative to the appellate courts of the state; and the procedure indicated for the recovery of the fine thereunder to be imposed is civil, and not criminal, in character. Of such a proceeding the circuit court of appeal has appellate jurisdiction, and prohibition will not lie to restrain the judges thereof from hearing and adjudging such a cause.

(*Syllabus by the Court.*)

Application of D. C. Scarborough, district attorney, for a writ of prohibition to the judges of the circuit court of appeals, first circuit, to restrain further action in a suit pending before them. Application denied.

D. C. Scarborough, Dist. Atty., *pro se.* *Howe & Prentiss*, for respondents.

WATKINS, J. Relator seeks to restrain further action on the part of respondents in the suit depending in their court entitled State ex rel. D. C. Scarborough, District Attorney, v. The Texas & Pacific Railroad Company, on the ground that said suit is a criminal, and not a civil, proceeding, over which class of cases the organic law has given circuit courts of appeal no jurisdiction, and therefore they can exercise none in that case, and any at-

tempt on their part to exercise jurisdiction in the premises would be, in effect, a usurpation of power on their part. In respondents' brief we note a suggestion to the effect that relator had proceeded somewhat irregularly in the court below, by appearing in their court to try the said cause on appeal therein, and only urging complaint after it had been unfavorably decided, and first presenting objection to the jurisdiction thereof on a rule taken for a rehearing. As, in our opinion, that makes no essential difference,—consent not conferring jurisdiction *ratione materiæ*,—we will go to the main question at once. State v. Judge, 41 La. Ann. 540, 6 South. Rep. 821.

Referring to the constitution, we find that courts of appeal are declared to "have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil or probate, when the matter in dispute * * * shall exceed two hundred dollars," etc. Article 95. We find further that "the supreme court * * * shall have appellate jurisdiction only, which jurisdiction shall extend to * * * criminal cases on questions of law alone, whenever * * * a fine exceeding three hundred dollars ($300.00) is actually imposed." Article 81. If, as claimed by relator, the suit or proceeding referred to be "a criminal case" in the sense of the constitutional articles referred to, respondents are without jurisdiction, and the alternative writ must be made peremptory; not otherwise. From the record it appears that relator inaugurated the proceeding in question against the railroad company under and in pursuance of the provisions of Act 118 of 1890, for the purpose of recovering therefrom the pecuniary penalty denounced in the act against "any railroad company violating the provisions thereof." Section 2, Act 118 of 1890, p. 160. Section 1 of that act declares "that all railroad companies throughout the state of Louisiana are hereby required to put up bulletin boards in a conspicuous place at all regular and way stations where they have a telegraph operator, * * * and to keep them up continuously, and keep posted thereon, for the information of the traveling public, * * * the time of the arrival and departure of all regular trains," etc. Section 2 declares "that any railroad company violating the provisions of this act without just cause shall for each offense pay a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars, to be recovered in any court of competent jurisdiction within the parish where said violation may take place." On the face of the statute, we are of opinion that the law-giver did not contemplate the collection or recovery of the fine thereby imposed by means of a criminal proceeding. It provides that any railroad company violating its provisions "without just cause shall pay a fine." That phrase is not of the essence of a criminal statute, as it appears to involve judgment and discretion on the part of the railroad company in determining the justness of the "cause" of its neglect in the premises. It further provides that, in case of non-payment by the railroad company, such fine may be "recovered" from said company; and that must mean by execution against the company's property. It further provides that such fine may "be recovered in any court of competent jurisdiction within the parish where said violation may take place," and that provision leads irresistibly to the conclusion that there is more than one court in each parish of the state competent to test the justness of the company's cause of dereliction, and to assess the fine, in case the cause assigned is not found just; and which fine shall be "not less than one hundred ($100.00) dollars and not more than five hundred ($500) dollars." In country parishes, like Natchitoches is, the only courts possessing the necessary civil jurisdiction to award such recovery are the district courts (Const. art. 109) and justices of the peace, (article 125.) And the only courts possessing the necessary criminal jurisdiction to assess such a fine are the district courts, as "they shall have unlimited original jurisdiction in all criminal * * * matters," (Const. art. 109;) justices of the peace therein being given only "criminal jurisdiction as committing magistrates," (article 126.) It is manifest that, as a committing magistrate in a criminal proceeding, a justice of the peace could not assess a fine of $100; and it is equally clear that, as exercising civil functions, he could both hear and determine the "cause" assigned, and fix and assess the fine. He could also award process for its recovery.

To construe the act in question as a criminal statute would be to negative its provisions, or to effectually read out of it the phrase, "any court of competent jurisdiction within the parish," etc. But if it be accepted and treated as a criminal statute, it would seem to follow logically and necessarily that the district attorney should have initiated proceedings by way of information or indictment; for the constitution declares that "prosecutions shall be by indictment or information," (article 5;) and "in all criminal prosecutions, the accused shall enjoy the right to a speedy public trial by an impartial jury," (article 7.) And just here another formidable obstacle presents itself, and that is the serious difficulty there appears to be in proceeding criminally by indictment or information against a corporation. The statute under consideration deals with "railroad companies." The duties that are specified in the act are imposed on the companies, and not against their officers or employes. It declares that "any railroad company violating the provisions of this act * * * shall pay a fine," etc. Our Code, in treating of corporations, declares that "a corporation cannot commit the crime of treason, or any other offense, in its corporate capacity, although its members may be guilty of those crimes in their individual and respective capacities." Rev. Civil Code, art. 443. Our constitution, in treating of criminal prosecutions, appears to contemplate only natural persons. Articles 5–11. In the case referred to, relator commenced proceedings against the railroad company by petition

and citation in the ordinary form. His petition concludes with a prayer for citation and judgment against the Texas & Pacific Railroad Company in the sum of $1,950, with 5 per cent. interest thereon from judicial demand, and costs. The judgment therein pronounced decrees, *inter alios*, the state of Louisiana to have and recover from the Texas & Pacific Railroad Company the sum of $600, with 5 per cent. per annum interest thereon from the date of decree, and "costs of suit." From this judgment defendant company prosecuted an appeal to the respondents' court, and by it said judgment was amended and affirmed. Said suit and judgment, like the statute authorizing same, possess all the incidents and elements of an ordinary civil action and decree against a railroad corporation for the assessment and recovery of the fine contemplated therein for its violation. The statute seems rather to comprehend *quasi* offenses, the *gravamen* of which is fault or negligence, for the consequences of which railroad corporations may be compelled to respond civilly, than offenses for the commission of which natural persons may be criminally punished by fine. *Vide* Code Prac. arts. 31, 32; Rev. Civil Code, art. 2316; Insurance Co. v. Werlein, 42 La. Ann. 1047, 8 South. Rep. 435; Knoop v. Blaffer, 39 La. Ann. 23, 6 South. Rep. 9. The following decisions are germane to the question under consideration, and support our conclusions that the statute provides a civil, and not a criminal, proceeding for the recovery of the fine therein provided for in case of violation. Adams v. Woods, 2 Cranch, 336; State v. Williams, 7 Rob. (La.) 266; State v. Linton, 3 Rob. (La.) 55; State v. Thomas, 12 Rob. (La.) 48; State v. Thompson, 10 La. Ann. 122; State v. Hollin, 12 La. Ann. 677. It is therefore ordered and decreed that relator's application be denied, at his cost.

(43 La. Ann. 1157)

KELLY v. TAYLOR. (No. 10,850.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 43 La. Ann.)

PARTY-WALLS — RIGHTS OF OWNERS — EFFECT OF ACQUIESCENCE.

1. A wall of brick which is used in common, as the wall of two adjacent properties in a city or town, is a party-wall, if erected partly on the soil of each, and has been so used for many years, without question or complaint by either.

2. Where each of said parties, by actual measurement, appears to possess a little beyond the boundaries fixed in his title, neither is at liberty to question the encroachment of the other, in order to disturb the *status quo* between them.

3. In such case the acts, conduct, and apparent acquiescence of the parties, respectively, serve to interpret questions of doubt between them, and courts of justice will not readily interfere therewith.

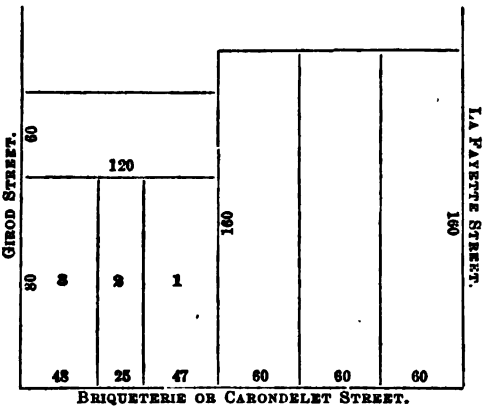
(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge.

Suit by Mary A. Kelly against J. D. Taylor to test defendant's right to make openings in a party-wall. Judgment for plaintiff. Defendant appeals. Affirmed.

J. Q. A. Fellows and *James B. Rosser*, for appellant. *Henry P. Dart*, for appellee.

WATKINS, J. The litigants are proprietors of adjoining premises situated on Carondelet street, in the city of New Orleans, and which are indicated as Nos. 1 and 2 on the sketch of the *locus in quo* which we have extracted from the brief of defendant's counsel, as a means of enabling us to give a clearer and more exact expression of our views. On the sketch plaintiff's property is indicated by the figures "47," as having a front measurement on Carondelet street of 47 feet; and that of the adjoining premises is indicated by the figures "25," as having a front of 25 feet on said street.



BRIQUETERIE OR CARONDELET STREET.

This sketch shows the front of the square between Girod and La Fayette streets. The houses of each of the proprietors are built of brick, and are of two and one-half stories in height, with a single wall separating their properties. Recently the defendant opened windows or made openings in this intervening wall, and this suit is to compel him to close them.

The salient and leading averment of the plaintiff's petition is that the wall in question is a party-wall, or a wall in common, and has been so established, recognized, and used by the occupants of said two adjoining premises for more than 30 years, and that "no one has ever claimed or exercised the right to make openings in the same." She charges that said openings overlook the bedrooms in her house, and destroy its renting value. Defendant, in answer, claims ownership of the lot adjoining that of plaintiff, and the buildings thereon, and the exclusive ownership of the said intervening wall; and he also claims four inches of the soil beyond said wall; and avers that said wall was constructed and now stands on his lot and property, and hence it is not a party-wall; and plaintiff is without right of action or ground of complaint. On the trial there was judgment for plaintiff, and the defendant has appealed. The case was tried in the court below upon expert testimony; and the experts consisted of three skilled and competent surveyors, Pilie, Grandjean, and Brosnan, who seem, from their profiles, maps, etc., to have gone into the question thoroughly. The testimony leaves no doubt of the fact that the defendant's building was erected on the lot (the municipal number of which is 157 Carondelet street) something like 30 years

ago, perhaps longer. Plaintiff traces title through Benjamin Kendig, who purchased from Charles Gardiner and heirs of A. Babcock on the 4th of June, 1835, and by the following description, viz.: "All that lot of ground situated in the suburb St. Mary, * * * measuring forty-seven (47) feet front on Carondelet street, by eighty-two (82) feet in depth, (opening about three feet in said depth,) and giving about fifty feet, French measure, on the rear line; bounded on the side next to Hevia street by the property now or formerly belonging to Widow Brogrard; and on the side next to Girod street by that now or formerly belonging to Edward Colesward. This lot of ground is sold by the boundaries, be the measurement more or less than is above specified," etc. This is the same description by which Babcock and Gardiner purchased on the 18th of March, 1833, from the estate of Robert Lewis; and the same description is given in the deed of Louis Robert to Robert Lewis on the 22d of September, 1833. In 1818 this lot was conveyed by Jean Laurent to J. P. L'Aubry, as having a front of forty-seven (47) feet, French measure, or fifty (50) feet one (1) inch, American measure; and Jean Laurent seems to have derived title from his father, Jean Louis Laurent, subsequent to 1804,—date not specified. It appears from the profile and exhibits executed by Pilie and Grandjean jointly that since 1833 the titles of plaintiff and of her authors call for a front measurement on Carondelet of 50 feet and 1 inch, American measure,—just the same as that called for in the deeds of the Laurents, in 1810–1818. It also appears from the same evidence that in 1814, when the property of the defendant was owned by Generior Metoyar, that his deed called for 25 feet, French measure, or 26 feet 7 inches and 6-10, American measure. The measurement is just the same in the deed of Euphrasine Duvieux in 1817; and in the deeds of the defendant and his intermediate authors the same American measurement is preserved, viz., "*26′ 7″ 6‴*, fixed." Thus it appears, irresistibly, to our minds, that the ancient boundaries of these two properties have been well and faithfully preserved. While it is true that the said exhibits do show that plaintiff possesses 7 inches over and above the calls of her title, "*i. e.*, 50′ 8″," instead of 50′ 1″, "more or less;" yet they do not show that same was absorbed from the property of the defendant; for said exhibits show that while defendant's titles call for 26 feet 7 inches and 6-10, he has in possession 26 feet 10 inches and 5-10,—an excess above the calls of his title of 2 inches and 7-10 of an inch. They also show that Fannie Cholard, on the corner of Girod and Carondelet, occupies 2 inches and 3-10 less than her titles call for; and that the M. E. Church (which adjoins the plaintiff on the Canal-street side) is in possession of 1 foot and 3 inches and 5-10 less than the calls of its title. But, as there is an alley-way intervening between the plaintiff and the church edifice, that may be easily adjusted. The defense set up is not good.

In addition to the foregoing argument, we incline to the belief that the title of the plaintiff's authors was one *per aversionem*, being a designated space within fixed boundaries, that have never been changed. In relation to the actual *situs* of the wall in controversy, the evidence satisfies us that it only infringes on the plaintiff's premises to the extent of about 5-10 of an inch, *i. e.*, the superstructure, but having about 2 feet of basement or foundation thereon. There was a good deal of proof adduced to show that the wall in controversy, and which was anciently an outer wall, gave evidence of its having been used as a party-wall; but, as our opinion is that the facts stated constitute it in law a party-wall, it is needless to discuss this question. Rev. Civil Code, arts. 677, 685. The acts, conduct, and apparent acquiescence of the parties and their authors are in keeping with the view we entertain of the testimony. It seems to have impressed the judge of the court below as it has impressed us. There is no reason apparent why we should alter his finding.

Judgment affirmed.

Rehearing refused.

(43 La. Ann. 1163)

STATE v. BAKER. (No. 10,877.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 43 La. Ann.)

CROSS-EXAMINATION OF ACCUSED.

The only error assigned on this record relates to the ruling of the judge in permitting the state, on cross-examination of the accused as a witness, to ask a question objected to on the ground that the matter thereof was not referred to in the direct examination. The statement of the judge negatives the ground of objection by showing that the matter of the question was directly and closely connected with matters testified about on the examination in chief. The rule restraining the state on cross-examination never went further than to exclude questions on matters not connected with those referred to on the direct examination.

(*Syllabus by the Court.*)

Appeal from criminal district court, parish of Orleans; JOSHUA G. BAKER, Judge.

Prosecution against Philip Baker. From a judgment of conviction he appeals. Affirmed.

Lionel Adams, for appellant. *Walter H. Rogers*, Atty. Gen., for the State.

FENNER, J. The only complaint brought to our notice by this record arises under a bill of exceptions taken to the ruling of the court in permitting a question propounded to the accused on his cross-examination by the state, which was objected to on the ground that the question related to mattter about which he had not been asked and had not testified in his direct examination. The statement of the judge appended to the bill clearly shows that the question related to a subject closely connected with the matters testified about in the direct examination, and this is sufficient. State v. Poynier, 36 La. Ann. 573; State v. Stuart, 35 La. Ann. 1015. The rule never went further than to restrain the state from cross-examining defendant's witnesses on matters not connected with matters stated on the examination in chief. 1 Greenl. Ev. p. 521, No. 445; State v. Swayze, 30 La. Ann. 1323;

State v. Thomas, 32 La. Ann. 349; State v. Willingham, 33 La. Ann. 538. The case here is entirely without the inhibition.

Judgment affirmed.

(95 Ala. 55)

PATTISON v. BRAGG *et al.*

(*Supreme Court of Alabama.* Nov. 25, 1891.)

FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—EQUITABLE RELIEF.

1. Where a bill to set aside a conveyance for fraud called for a sworn discovery from the purchasers, and their answers denied all knowledge of or participation in the vendor's fraudulent intent, or any knowledge of his indebtedness beyond what he provided for in such conveyance to them, and the evidence fails to overcome the denials, a decree dismissing the bill will not be disturbed.

2. Though on his failure to have the conveyance set aside complainant might have been entitled to recover the amount of his claim out of the purchase money owing by the purchasers, yet, where the bill contained neither averment nor prayer which could raise that issue, he was in no position to ask that relief.

Appeal from chancery court, Wilcox county; THOMAS W. COLEMAN, Chancellor.

Bill by Thomas H. Pattison against Thomas Bragg and Willis Bragg and others to set aside a conveyance of certain real and personal property on the ground of fraud. Decree dismissing the bill. Complainant appeals. Affirmed.

The appellant, Thomas H. Pattison, being a creditor of Thomas Bragg, filed the present bill to have a conveyance of property, real and personal, executed by said Thomas Bragg on May 16, 1887, to Willis Bragg and one Carson, annulled and set aside as fraudulent and void; and to have the property therein conveyed, condemned to pay the complainant's debt. The bill charges at length, and with great particularity, that Thomas Bragg was embarrassed and insolvent; that this was known to his vendees, said Willis Bragg and Carson; that the property was sold for greatly less than its real value; that the intention of Thomas Bragg was to hinder, delay, and defraud the complainant; and that this intent was participated in by the vendees. The bill required the respondents to file sworn answers. As is stated in the opinion of the chancellor, "each and every allegation of fact upon which the charge of fraud rests has been squarely denied by the answers." Upon the submission of the case on the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed, and ordered the bill dismissed. The complainant appeals, and assigns the decree of the chancellor as error.

Brutus Howard and *J. N. Miller*, for appellant. *R. Gaillard* and *S. J. Cummings*, for appellees.

STONE, C. J. We have examined the pleadings and testimony in this case with great care. We agree with the chancellor in finding that Thomas Bragg's intent in selling and conveying his property to Willis Bragg, his brother, and to Carson, his cousin, was fraudulent; and, if he alone were concerned, we would not hesitate to declare the property subject to Pattison's claim. Borland v. Mayo, 8 Ala. 104; Marshall v. Croom, 52 Ala. 554; Crawford v. Kirksey, 55 Ala. 282; Hubbard v. Allen, 59 Ala. 283; Donegan v. Davis, 66 Ala. 362; Lehman v. Kelly, 68 Ala. 192; Hodges v. Coleman, 76 Ala. 103. The complainant in his bill called for a sworn discovery from the purchasers, and propounded to them searching interrogatories. Their answers are a very full denial of all knowledge on their part of Thomas Bragg's fraudulent purpose, and of his indebtedness beyond what he provided for in his sale to them. They equally denied all participation in any and all fraudulent intent on the part of Thomas Bragg, if he entertained such intent. The testimony fails to overcome these denials, and it results that in this phase of the case complainant must fail.

It is contended here that, if complainant fails in this leading aspect of his case, then he is entitled to recover the amount of his claim out of the $1,600 of purchase money which Willis Bragg and Carson owed when this bill was filed and process served on them. A sufficient answer to this contention is that the bill contains neither averment nor prayer which could raise that issue, even if it be conceded such purpose could be conjoined with the main object of the bill. Caldwell v. King, 76 Ala. 149; Coffey v. Norwood, 81 Ala. 512, 8 South. Rep. 199; Parsons v. Johnson, 84 Ala. 254, 4 South. Rep. 385; Shealy v. Edwards, 78 Ala. 176. The decree of the chancellor is in all respects affirmed.

(95 Ala. 147)

WHITE v. BLAIR.

(*Supreme Court of Alabama.* Nov. 26, 1891.)

APPELLATE JURISDICTION—NEW TRIAL—REVIEW.

1. Under Sess. Acts 1890–91, p. 779, which provide for appeals from orders of circuit courts granting new trials, and empower the supreme court to grant new trials, or to correct any errors of the circuit court in granting the same, the power conferred is purely appellate, and cannot be invoked until motion has been made and acted on in the circuit court.

2. On appeal from an order granting a new trial, where the evidence did not plainly support the verdict, such order will not be disturbed.

Appeal from circuit court, Barbour county; J. M. CARMICHAEL, Judge.

Suit by W. S. White against D. S. Blair to recover on a promissory note. Verdict and judgment for plaintiff. From an order granting a new trial plaintiff appeals. Affirmed.

H. D. Clayton, for appellant. *J. N. Williams* and *G. W. Peach*, for respondent.

STONE, C. J. This was a suit by White, transferee, against Blair, on a promissory note alleged to have been made by the latter. The note purports to be payable to T. P. Cawthorn. Defendant interposed a sworn plea denying the execution of the note which is correct in form. Code 1886, p. 796, form 33. On the trial of the issues there were verdict and judgment for the plaintiff. Thereupon defendant moved for a new trial on several grounds, which the court granted, setting aside the verdict and judgment. From that order, granting a new trial, plaintiff prosecutes

the present appeal, under the act "to allow appeals to the supreme court from decisions of the city and circuit courts in this state, granting or refusing to grant motions for new trials." This act was approved February 16, 1891, (Sess. Acts 1890-91, p. 779.) Before that time our statutes made no provision for appeals in such cases. The appellate power conferred on this court by that statute is expressed in its last clause,—"to grant new trials, or to correct any errors of the circuit or city court in granting or refusing to grant the same." A correct reading of the statute clearly shows that our power is purely appellate, and cannot be invoked until motion has been made and acted on in the circuit or city court.

The rules for granting or withholding new trials after a verdict has been rendered are not always expressed in the same terms. Some courts give greater weight to the findings of a jury than others do, or, at least, they seem to do so. We are not inclined to adopt extreme views on either side of this question. We hold that no higher duty rests on a court of original jurisdiction than to assert his manhood, and grant, or refuse to grant, a new trial, as the merits of the controversy may point out his duty. Railroad Co. v. Powers, 78 Ala. 244. The case of Cobb v. Malone, 9 South. Rep. 738, (at the last term,) brought this statute before us for the first time. In that case, as in this, the main ground of the motion was that the verdict was contrary to the evidence. In that case the motion had been denied by the trial court, and we were asked to reverse his ruling. We gave the question careful consideration, and declared two rules, which we intended should become a guide and precedent. We said: "The decision of the trial court, refusing to grant a new trial on the ground of insufficiency of the evidence, or that the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions in favor of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust." When the lower court grants a new trial, and the appeal is from that ruling, we said the decision "will not be reversed unless the evidence plainly and palpably supports the verdict." The bill of exceptions in this case is very full. It sets out all the testimony given on the trial in chief, and on the motion for a new trial. We have scrutinized it with care, and fail to find it "plainly and palpably supports the verdict" which the jury rendered. The order of the circuit court granting a new trial must be affirmed.

(94 Ala. 295)

CROCKER v. SMITH *et al.*

(*Supreme Court of Alabama.* Nov. 24, 1891.)

WHAT CONSTITUTES WILL.

An instrument, duly executed and registered, which provides that from natural love and affection towards his wife, and that she may have a permanent estate, "and, further, that my said wife has aided me in the accumulation of the estate I am possessed of, I hereby give, convey, and confirm unto my said wife, and her heirs, in absolute right, all my" estate, "which I now, or may hereafter, own," and which reserves a life-estate, and provides for the payment of the maker's debts, and sufficiently executed to operate as a deed or will, is a will.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Ejectment by B. F. Smith et al. against Wiley E. Crocker to recover their undivided interest in certain lands. The rights of the parties rested on the construction of a certain instrument executed by one David Fleming, and the case was submitted on an agreed statement of facts. Plaintiffs had judgment, and defendant appeals. Reversed, and judgment rendered for defendant.

W. L. Parks, John Gamble, Sr., and *Alex. T. London*, for appellant. *P. O. Harper*, for appellees.

CLOPTON, J. The parties having agreed in the circuit court that if the instrument executed by David Fleming, September 17, 1887, is construed to be a deed, judgment should be rendered for plaintiffs; and if a will, for defendant; and, this being the only question on which any ruling was asked or made by the court, the judgment on this appeal must also depend on the interpretation of the instrument. The general characteristics which distinguish deeds from wills have been repeatedly declared, yet no definite uniform test has been stated by which to determine the character and operation of each particular instrument, and none can well be. The intention of the maker is the ultimate object of inquiry,—whether it was intended to be ambulatory and revocable, or to create rights and interests at the time of execution which are irrevocable. If the instrument cannot be revoked, defeated, or impaired by the act of the grantor, it is a deed; but if the estate, title, or interest is dependent on the death of the testator, if in him resides the unqualified power of revocation,—it is a will. Jordan v. Jordan, 65 Ala. 306. Ordinarily the intention is to be collected from the terms of the instrument, considered in the light of the surrounding circumstances; but, there being no proof of the circumstances under which the instrument was executed, consideration is necessarily limited to the operation of its terms. The purpose and consideration are expressed as follows: "Being moved and influenced, as I have uniformly been, from the natural love and affection which I have and bear for and towards my beloved wife, Sarah Ann Fleming, being able to provide well for her in after life, as well as for her present comfort, and that she may have and enjoy a permanent and substantial estate and property, and from the further consideration of one dollar, and, further, that my said wife has aided me in the accumulation of the estate I am possessed of;" followed by these words of conveyance: "I hereby give, convey, and confirm unto my said wife, and her heirs in absolute right, all my entire estate, real and personal, lands, negroes, stock, and all manner of property which I now, or may hereafter, own," excepting a negro girl, which was

given to his sister-in-law. The instrument was sufficiently executed to operate as a deed or will, and has appended a certificate of proof of execution and of registration. It has been said that these facts raise the presumption of delivery, and are persuasive to show that the maker regarded the instrument as a deed; but they bear little, if any, significance, in the absence of proof that the instrument was delivered or recorded in the life-time of the donor. The fact that it is designated on its face as a deed of gift is ordinarily regarded of little moment; though it may become of more or less importance when, upon a comparison of the terms of the instrument, and consideration of the bearing of each on the others, the meaning is ambiguous, and the mind is left in doubt as to the intention of the makers. Though the instrument may be in the form of a deed of gift, and designated as such, it is a will, if its purpose be testamentary, if it cannot operate during life, and is only consummated by death. Dunn v. Bank, 2 Ala. 152. While the passing of present and immediate right of possession and enjoyment is not essential to constitute the instrument a deed, and the reservation of the use and enjoyment of the property to the grantor during his life does not, of itself, make it a will, yet if it has not present effect in fixing the terms of such future enjoyment, and requires the death of the alleged testator for its consummation,—when the interest and enjoyment are posthumous,—it is a will, if properly executed as such. Trawick v. Davis, 85 Ala. 342, 5 South. Rep. 83; Griffith v. Marsh, 86 Ala. 302, 5 South. Rep. 569; Sharp v. Hall, 86 Ala 110, 5 South Rep 497; Elmore v Mustin, 28 Ala. 309. By reference to the instrument, it will be observed that the right or interest which it purports to pass is not only of all the property, real and personal, which the maker then owned, but also of all that he might thereafter own. It is manifest, in the absence of covenants of warranty, it is ineffectual to convey property thereafter acquired. As to such property, it can have no operation as a deed, but may as a will. In doubtful cases, the instrument will be pronounced a will when it cannot have operation as a deed, but may as a will. Sharp v. Hall, supra. The inclusion of after-acquired property seems to indicate an intent that the instrument should not pass any present right or interest. Also the last clause reads as follows: "Reserving a life-time estate and enjoyment of said property to myself, and for the payment of my just debts. This deed of gift to take effect absolutely at my death, and to be valid and conclusive." The reservation is not only of a life-time estate and enjoyment, but also of all the property for the payment of his just debts. All the property is made subject to the payment of debts thereafter contracted, and only so much of the estate as remains after the death of the donor, and the payment of his debts, can pass by the terms of the instrument,—tantamount to a general power of disposition. Furthermore, it expressly provided that it shall not take absolute effect until his death, at which time it is to be valid and conclusive. When there is a reservation of a general power of revocation or disposition, and a provision that the instrument shall not be in force or take effect until the death of the maker, it is in its nature ambulatory and revocable. "When there is a general reservation, or something like a reservation, of the maker's right to deal with the property as his own, notwithstanding the instrument, and no conclusive effect can be given to it until the death of the maker, the law regards the instrument as testamentary." Gillham v. Mustin, 42 Ala. 365. The reservation of the property for the payment of his debts, and the provision as to the time when it should take effect, seem to have been incorporated for the purpose of limiting or qualifying what might otherwise be the legal operation of the preceding words, "give, convey, and confirm in absolute right." Applying the foregoing principles and tests, we are forced to pronounce the instrument to be a will. Reversed, and judgment rendered for defendant.

(94 Ala. 606)

ANNISTON PIPE-WORKS v. MARY PRATT FURNACE CO.

(*Supreme Court of Alabama.* Nov. 25, 1891.)

PROMISSORY NOTES—ACTION BY PAYEE—INDORSEMENTS.

1. In an action on a note by the payee against the maker, the payee makes out a *prima facie* case by showing possession, and he need not, therefore, set out in the complaint or establish by evidence indorsements on the back of it.

2. In an action on a note by the payee, where only the general issue has been filed, it is in the discretion of the court to deny defendant's request, made during the trial, to file a plea denying plaintiff's title, so as to allow the introduction of an indorsement on the note by payee to a third party.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Assumpsit by the Mary Pratt Furnace Company against the Anniston Pipe-Works on a promissory note executed by defendant to plaintiff. Judgment for plaintiff, and defendant appeals. Affirmed.

The note was set out in the complaint without any indorsement. When the note was offered in evidence there appeared on the back of it an indorsement by plaintiff to a third party, and defendant objected to the introduction of the note without the introduction of the indorsements, which objection was overruled.

Knox & Bowie, for appellant. *Kelly & Smith*, for appellee.

MCCLELLAN, J. To a recovery on a bill or promissory note it is only necessary for the plaintiff to prove such of the indorsements as carry the title into him. All others may be pretermitted in averment, and, of course, in the evidence. 2 Greenl. Ev. § 166. If the paper, though indorsed and transferred, gets back into the hands of the payee, the presumption is that he has paid the sum evidenced by it to the indorsee, and thus become *prima facie* again the legal owner. Dugon v. U. S., 3 Wheat.

172; Herndon v. Taylor, 6 Ala. 461; Oil Co. v. Perry, 85 Ala. 158, 4 South. Rep. 635. And upon such title he may maintain an action on the note against the maker. Pinney v. McGregor, 102 Mass. 186; Oil Co. v. Perry, supra. It results necessarily from these principles that, where the note is in the possession of the payee, the law converts that possession into a *prima facie* legal title, upon which suit may be prosecuted wholly regardless of the condition of the paper as to indorsements, and puts the *onus* of showing the absence of the title on the defendant. Such indorsements, of themselves, do not stand in the way of recovery, and, whether they import a final indorsement back to the payee or not, they need not be alleged or proved. In the case at bar, therefore, it was no part of plaintiff's case to set forth in the complaint or establish by the evidence the indorsements found on the back of the paper. Its title to maintain the suit did not depend upon them, and its right to recover was not in any degree—certainly in the absence of a plea denying ownership—affected by any possible conditions with respect to them; and the court properly, in our opinion, admitted the note in evidence without the indorsements, and without requiring plaintiff to adduce the indorsements. Upon these rulings of the court being made and put on the ground that no plea denying plaintiff's title had been interposed, the defendant, after pleas had been filed and the issues made up, and after the time for pleading had lapsed, and, indeed, in the midst of the trial, asked leave to file such special plea, duly verified. We are clear to the conclusion that at this stage of the proceeding it was in the discretion of the court to allow or refuse to allow the filing of this new and additional plea, and that its action in refusing the leave prayed cannot work a reversal of the judgment. Jones v. Ritter, 56 Ala. 270.

Affirmed.

(94 Ala. 291)

ZEIGLER v. CARTER *et al.*

(*Supreme Court of Alabama.* Nov. 27, 1891.)

FRAUDULENT CONVEYANCES—EVIDENCE—INJUNCTION.

In a suit to enjoin the sale by judgment creditors of S. of land conveyed by S. to complainant, claimed by complainant to be in consideration of an antecedent debt of $700, and by defendants to be in fraud of creditors, it appeared by the testimony of complainant that she lent S. $200, all the property that she had, except a home worth $700, that she afterwards borrowed $400, and lent this to S., and that these sums, with interest, a small account, and $50, made up the consideration for the conveyance of the property, consisting of two lots and two tracts of land, worth $950. Soon afterwards complainant sold one of the tracts for $150; leased to the wife of S., who was not shown to have had any property, one of the lots for $30 a year, on which a livery stable worth $400 or $500 was then erected, and kept in the name of the wife of S., but superintended and managed by S. The other lot was sold to the wife of S. for $650. *Held*, that the injunction was properly refused.

Appeal from chancery court, Cullman county; THOMAS COBBS, Chancellor.

Suit by Margaretha Zeigler against Carter Bros. & Co. and others to enjoin the sale by defendants, under executions on judgments obtained by them against Christ Scheuing, of certain real estate, claimed by complainant under a conveyance from Scheuing, which conveyance was claimed by defendants to be in fraud of creditors. From a decree dismissing the bill of complaint, complainant appeals. Affirmed.

Will Brown and *Geo. H. Parker*, for appellant. *W. F. L. Cofer*, for appellees.

STONE, C. J. That Scheuing's failure in business was fraudulent—glaringly fraudulent—is very clearly manifest in the record before us. Mrs. Zeigler's contention is that she was a creditor of Scheuing in the sum of about $650; that in payment she received from him real property, valued at $700, paying the difference, $50, in money; and that $700 was the reasonably fair market value of the property at the time she received it. The next day after this transaction with Mrs. Zeigler, Scheuing, by one sale in gross, sold all his remaining property, except what was exempt from execution under our statutes. The property thus sold consisted mainly of a stock of merchandise then recently purchased, and which the testimony tends to show was sold at a great sacrifice. There is, however, no attempt to prove that Mrs. Zeigler, when she made her purchase, had any notice of Scheuing's intention to sell his merchandise and retire from business. So the transaction must stand or fall by the testimony relating to it, without reference to the sale of the merchandise. The chancellor pronounced her purchase fraudulent, and from that decree she appeals to this court. The principles of law applicable to this case have been so often declared that a mere statement of them is all that is necessary. It is every man's duty to pay his debts as far as he is able, and any attempt to hide or secrete his property for his own benefit is fraudulent. And every one, having knowledge, actual or constructive, of such intent, who aids him in his attempted fraud by purchasing his property, even at its full value, and for money, is a participant in the fraud, and acquires no title against the claim of creditors of the seller. 3 Brick. Dig. p. 515, § 119; Crawford v. Kirksey, 55 Ala. 282; Kellar v. Taylor, 90 Ala. 289, 7 South. Rep. 907; Gibson v. Furniture Co., (Ala.) 9 South. Rep. 370. There is an exception to the rule. A creditor having a just and legal demand against the failing debtor may save himself, without incurring the law's displeasure. This he may do by receiving money or property at its reasonably fair value, in payment of his claim. And even though he may know his debtor is failing, and that the effect of the collection or purchase will be to leave him without means to pay his other debts, unless some benefit beyond what the law provides is secured to the debtor by the arrangement, the transaction will stand. 3 Brick. Dig. p. 517, § 137; Hodges v. Coleman, 76 Ala. 103; Gordon v. McIlwain, 82 Ala. 247, 2 South. Rep. 671; Tompkins v. Henderson, 83 Ala. 391, 3 South. Rep. 774; Dollins v. Pollock, 89 Ala. 351, 7 South. Rep. 904. There was a great deal of testimony taken in this case. Much of it relates to the value of the property

at the time Scheuing conveyed it to Mrs. Zeigler. On this question the witnesses differ very widely. We will state our own conclusion, drawn from the testimony, further on. Many questions were asked Mrs. Zeigler as to her means and resources. These were objected to. So there was testimony tending to show that Mrs. Scheuing had no estate of her own. For reasons which will be presently made apparent, we think each of these lines of inquiry was legitimate. Mrs. Zeigler was a widow with three children. She had an humble home in Cullman, estimated to be worth $700. With industry and economy, working at laborious occupations, she testified that she had saved $200. This was January 1, 1886. It was her intention with this money to purchase goods, and start a little notion store. There is no proof of any other means or resources then owned by or available to her. About this time Scheuing embarked in merchandise in Cullman. Mrs. Zeigler lent Scheuing the $200, taking as security for its repayment the joint note of himself and wife, with waiver of exemptions. This note bears date January 1, 1886, and was made due six months after date, with interest from date. On April 6, 1886, Mrs. Zeigler borrowed from her friend Mrs. Mehne, living near Cincinnati, Ohio, $400, and to secure its repayment, with 8 per cent. interest, gave her a note, with waiver of exemptions, due at 12 months, or April 6, 1887. This sum, in bank-bills, was sent by ordinary, unregistered letter, through the mail, from Cincinnati, Ohio, to Mrs. Zeigler, at Cullman, Ala., and was received by her April 7th, 8th, or 9th. On April 12, 1886, Mrs. Zeigler lent this $400 to Scheuing, and for its repayment took from him the waive note of himself and wife, due at six months, bearing 8 per cent. interest. It is not stated that the money was or was not borrowed from Mrs. Mehne to be lent to Scheuing, or that Mrs. Mehne knew it was to be lent, or was lent to him. These two notes, with their accrued interest, a small account, and $50 in money, making in all $700, were the consideration on which the deed from Scheuing to Mrs. Zeigler was executed. Mrs. Zeigler did not engage in any business until June, 1886, when she opened a little notion shop, with goods valued at $75. Mrs. Zeigler, Mrs. Mehne, and Scheuing were neither of them related to each other. The foregoing is Mrs. Zeigler's account. Mrs. Mehne confirms her in her testimony as to the loan of the money, and remitting it through the mail in unregistered letter; and Mrs. Scheuing confirms her as to borrowing the two sums of money, and giving the two waive notes. Scheuing was not examined as a witness. There was some testimony tending to show that when these two transactions, and those after noted, took place, Mrs. Scheuing had no property. There was none that she owned any property or means with which to make purchases. There are other noteworthy features and some discrepancies in the testimony of Mrs. Zeigler and that of Mrs. Mehne, but we will not point them out. It will be seen in what we have stated that the business transactions of these parties, as testified to, while not altogether impossible, are nevertheless peculiar, and outside of the customary paths of human dealings. They do not command assent by their reasonablenesss. The second, or larger, of Scheuing's notes to Mrs. Zeigler matured October 12, 1886. Ten days afterwards,—October 22, 1886,—Scheuing and wife, on the recited consideration of $700, conveyed to her two lots in the town of Cullman, and two tracts of land in the country,—one of 80, and one of 40, acres. We have stated above the items which it is claimed made up this $700 of consideration. Soon after the purchase Mrs. Zeigler sold to Abels the 40-acre tract for $150, and leased to Mrs. Scheuing, for the balance of that year, one of the lots, on which were standing some old stables. The terms of this lease are not clearly shown. Another formal letting was made by written lease from Mrs. Zeigler to Mrs. Scheuing, commencing January 1, 1887, and to run 10 years. By the terms of this lease the tenant had the privilege of erecting a building or other structure on the lot, and was to pay an agreed annual rent of $30 a year. Under this lease a livery stable was erected worth four or five hundred dollars. The livery stable has been kept in the name of Mrs. Scheuing, but has been superintended and managed by Scheuing himself. The other of the town lots was sold by Mrs. Zeigler to Mrs. Scheuing for $650. It is thus shown that for the two pieces of property she has received back $100 more than she claims to have paid for the four. After weighing the testimony with some care, we have reached the conclusion that the entire property when sold to Mrs. Zeigler was worth $950. Giving due weight to the very peculiar and unusual circumstances brought to view in this transcript, our ruling would have been the same as that of the chancellor, if the case had come before us in the first instance. Affirmed.

(94 Ala. 459)

BROWN *et al.* v. PETERS.

(*Supreme Court of Alabama.* Nov. 27, 1891.)

NEW TRIAL — SPLITTING JUDGMENT — BREACH OF WARRANTY — ACCEPTANCE OF GOODS.

1. An order granting a new trial declared the "motion granted to this extent, judgment set aside as to all but $77.50, and parties allowed to litigate as to any balance claimed by plaintiff." *Held*, that if this was an exercise of the power to split up the demand as a matter of right, and therefore unauthorized, the subsequent payment by defendants of the amount for which the judgment was allowed to stand was an acceptance of the grant of the new trial in the manner awarded, and therefore estopped them from denying the court's authority.

2. Where lumber sold is of such a quality as to justify the purchasers in refusing to pay the contract price, and they notify the seller of this, and refuse to take it except at a price named by them, their subsequent use of it, on not hearing from the seller, renders them liable for at least its market value.

Appeal from circuit court, Dale county; J. M. CARMICHAEL, Judge.

Action by J. E. Peters against J. M. Brown & Co., counting on the common counts. Judgment for plaintiff, and defendants appeal. Affirmed.

The claim of plaintiff was founded upon an alleged contract by which he was to furnish the defendants hewed lumber, for which he was to receive $16.66⅔ per thousand feet. Defendants pleaded the general issue, and that the plaintiff did not comply with his contract to furnish them hewed lumber, but had furnished them sawed and planed lumber, which was not worth as much as they agreed to pay for the hewed lumber, and hence there was not due the plaintiff the full amount claimed. On the trial from which this appeal is taken, as is shown by the bill of exceptions, the plaintiff's evidence tended to show that he had delivered to the railroad, for transportation to the defendants, lumber which had been sawed and planed; that the defendants, upon the receipt of the said lumber, informed the plaintiff that it was not the lumber contracted for, and that they would only give $10 per thousand feet for it; that, if this was not satisfactory to him, the lumber was subject to his order; that plaintiff had not replied, and that three days afterwards defendants used the lumber, and tendered the amount to the plaintiff, which he had offered for said lumber, to-wit, $10 per thousand feet. Defendants testified that the lumber contracted for was to be used for piling, and that hewed lumber was far superior to any other kind for this purpose, and was the only kind of lumber they used for piling. The bill of exceptions stated that, "under the rulings of the court, the market value of the sawed and planed lumber at the time of delivery was the amount for which defendants were liable. Upon this point the evidence was in conflict, some witnesses saying that it was worth $16.66⅔ per thousand feet, and some saying that it was worth only $10. The jury found for the plaintiff, and assessed damages at $16.66⅔ per thousand feet. The defendants asked the court in writing to charge the jury 'that if they believed the evidence they should find for the defendants.' This charge was refused by the court, and the defendants duly excepted." The first trial in this case was had at the January term of the Dale circuit court, 1890, at which term judgment was rendered for the plaintiff in the sum of $122.61, the full amount claimed. On motion of the defendants to set aside the verdict as above rendered, and grant a new trial, the court granted said motion, and the judgment entry recited as follows: "Judgment set aside as to all but $77.50, and the parties allowed to litigate as to any balance claimed by plaintiff." At the July term, 1890, of said court, the defendants made a motion to strike the said cause from the docket of said court, on the ground that the record of said court showed that the judgment had been rendered in said court at the January term in favor of the plaintiff, and that said judgment had been satisfied by the defendants, and that said cause is merely a redocketing of the cause in which judgment has been rendered, and the record shows that said judgment has been satisfied. This motion was overruled by the court. On the second trial of the cause, at the January term, 1891, the defendants pleaded *res adjudicata*, in addition to the other pleas, and among other facts offered to introduce in evidence the record of the former trial between the same parties, about the same subject-matter, and upon the same pleadings. But this evidence was disallowed by the court, and the defendants duly excepted to this ruling. After the rendition of the judgment in favor of the plaintiff at the January term, 1891, the defendants again moved the court to set aside the verdict of the jury in this cause on the ground that one of the jurors which then tried the case was a juror at the January term, 1890. The court overruled this motion. On this appeal the various rulings of the court upon the motions and evidence, and the refusal to give the general affirmative charge to the defendants, are assigned as error.

Sayre, Stringfellow & Le Grand and *Borders & Carmichael*, for appellants. *H. L. Martin*, for appellee.

CLOPTON, J. Issue having been joined, and a verdict thereon returned against defendants for the sum of $122.60, judgment was rendered at the January term, 1890, in favor of plaintiff for that sum. During the same term the court, on motion of defendants for a new trial, set aside the judgment, except as to $77.50, and granted a new trial as to the residue of plaintiff's demand. Defendants, by motions to dismiss the suit, made at subsequent terms of the court, and by plea, raised the question of the power of the court to grant a new trial as to a part of plaintiff's demand, leaving the judgment to stand in reference to the balance, and also the legal effect of such order. On the principle that a judgment is an entirety, it may be conceded, as a general proposition, that when issue has been formed, and verdict thereon, the court has no authority to sever the matter thus put in issue and found by the jury. It was so held in Dale v. Mosely, 4 Stew. & P. 371, which was a trial of the right of property to two slaves. Judgment of condemnation as to both having been rendered, a new trial was granted as to one, and refused as to the other, which, it was held, the court had no authority to do. In the subsequent case of Edwards v. Lewis, 18 Ala. 494, though the decision of the question was not necessary to its determination, Justices PARSONS and DARGAN affirmed the same principle, on the ground that a judgment "cannot be severed, so as to authorize one execution for one part, and another for another part." In both of these cases the power of the court to impose terms as a condition on which a new trial will be granted is recognized. In the first it is said: "It would have been competent for the court below to have offered the complainant his choice, to take a new trial for one of the slaves on condition of his relinquishing claim to the other;" and in the latter, DARGAN, C. J., says: "The courts can always, in the exercise of their discretion, impose terms, as a condition upon which a new trial will be granted;" suggesting, however, that when the court may be disposed, in its discretion, to grant a new trial after judgment is rendered as to part of what is recovered by the ver-

dict, it should be set aside entirely, and the cause continued to await the second verdict; and that the terms should not be the rendition of judgment for part of the demands sued for, and the cause continued for the purpose of litigating the residue. It may be that this mode of proceeding is more technically correct, but the practice of requiring a party asking a new trial to confess judgment for the part of plaintiff's demand not contested, or to pay it, as a condition on which a new trial is awarded, has prevailed too long, and been too uniformly followed, to be now departed from without sufficient reason therefor. As said by CHILTON, J., in Edwards v. Lewis, supra: "There is no necessity for departing from the practice of requiring parties, who admit a portion of a demand to be justly due, to confess a judgment for that portion, or even to pay it, as a condition for granting a new trial or a continuance. * * * I concede that the court has not the power to split up demands as a matter of legal right, but can, in the interposition of terms, require the party asking a new trial to submit to such terms as a condition upon which it will be awarded; and it is well settled no writ of error will lie for the purpose of reversing the exercise of such discretion." This practice subserves the ends of justice; the plaintiff receiving that part of his demand admitted by the defendant to be due, or at least not contested, and the defendant is allowed the right to litigate as to the disputed portion. The same principle has been declared in respect to requiring a confession of judgment for a part of the demand sued for as a condition of continuance. Davis v. McCampbell, 87 Ala. 609. It is true the order granting a new trial as to a part of the amount recovered by plaintiff does not expressly prescribe a confession of judgment, or a consent that it may stand for the undisputed part of plaintiff's demand, as a condition on which the new trial was awarded. Its terms are: "Motion granted to this extent; judgment set aside as to all but seventy-seven 50-100 dollars, and parties allowed to litigate as to any balance claimed by plaintiff,"—apparently an exercise of the power to split the demand as a matter of legal right. If conceded that the order was unauthorized, so far as it allows the judgment to have effect as to a part of the sum recovered by the verdict, the legal effect of the order granting the new trial as to the residue would be to set aside the judgment *in toto*, and to continue the cause for a new trial as to that part of plaintiff's demand which by the order the plaintiff was allowed to litigate on another trial, only that part of the order leaving the judgment unaltered to a partial extent being unauthorized and void. In Dale v. Mosely, supra, it was held that the new trial should be entire, or not at all; and a writ of error taken to reverse the judgment of condemnation as to the slave in reference to whom the new trial was refused, while the suit as to the other was pending, was held to be irregular and dismissed. It also appears that the sum for which the judgment was allowed to stand was subsequently paid by defendants. This may be regarded as a virtual consent to, and acceptance of, the grant of the new trial in the manner in which it was awarded, and operated to estop them from a denial of the authority of the court to grant a new trial for a part of the sum recovered by the verdict, leaving the judgment in full force as to the residue. From the foregoing principles it follows that, in any view taken of the case, the court did not err in overruling the motion to dismiss the suit, nor in refusing to admit in evidence the record of the judgment and the order granting a new trial.

Admitting that the proof showed a breach of warranty of the character and quality of the lumber on the part of plaintiff sufficient to justify defendants in refusing to pay the contract price, their subsequent use of the lumber rendered them liable for, at least, its market value. The mere fact that they notified plaintiff that the lumber was not of the character contracted for, and would not answer the purpose for which it was ordered, and their offer to pay a lower named price, which was not accepted, did not, under the circumstances, exempt them from liability to this extent. The evidence as to the market value being conflicting, the affirmative charge requested by defendants was properly refused.

Neither is there error in overruling the second motion for a new trial. The record is silent as to the offer of any evidence showing the existence of the facts on which it is based. Such being the case, without deciding the sufficiency of the facts, if established, to authorize a new trial, we must presume, in support of the ruling of the court, either there was no evidence, or that the evidence disproved the ground of the motion. Affirmed.

(95 Ala. 205)

BUFORD *et al.* v. SHANNON *et al.*

(*Supreme Court of Alabama.* Nov. 26, 1891.)

FRAUDULENT CONVEYANCES—EVIDENCE—KNOWLEDGE OF PURCHASER—CONSIDERATION.

1. In ejectment, the fact that defendant knew of his vendor's insolvency does not render his deed inadmissible as against a purchaser at a sale under an attachment levied soon after the deed was executed, but before it was recorded, the attaching creditor knowing of his claim.

2. Though the recited consideration of a deed is money "in hand paid," it may be shown that the real consideration was the satisfaction of prior indebtedness.

3. A motion to strike out all the testimony of a witness, only a part of which is inadmissible, is properly denied.

4. A conveyance of land by an insolvent debtor in part satisfaction of prior indebtedness is not invalidated by a subsequent and independent transaction made on the same day, wherein the debtor sells merchandise to the vendee to settle the rest of the debt, though the vendee then pays the debtor a small sum of money to balance the account.

5. Where an insolvent debtor conveys land to satisfy prior indebtedness to a creditor with knowledge of his insolvency, though the burden of proof is on such creditor to show, by clear and convincing evidence, that the consideration was equal to the value of the land, he need not prove all the separate items aggregating such indebtedness.

Appeal from circuit court, Blount county; JOHN B. TALLY, Judge.

Ejectment by Buford, McLester & Co. against M. L. Shannon and another. Verdict and judgment for defendants. Plaintiffs appeal. Affirmed.

The court refused to give the following written charges requested by plaintiffs: (1) "If the jury believe from the evidence that Shannon owed the plaintiffs a sum of money before the 6th day of February, 1886, then the law casts upon the defendants the burden of proving the consideration of the conveyance from Shannon to Allred by clear and satisfactory proof; and if the jury further find from the evidence that Allred was the son-in-law of Shannon, then the law is that defendants must prove the component amounts aggregating the fair value of the land; and if they fail to prove the different amounts by items which, added together, will show the payment of the value of the property conveyed, then it is the duty of the jury to find for plaintiffs." (2) "The court charges you, gentlemen of the jury, that, if you believe the evidence in this case, you will find that Allred either knew or was in possession of the facts calculated to stimulate inquiry; and if you find the fact so to be, and that on the day the conveyance was made from Shannon to Allred that Allred paid Shannon $25.00 or $30.00 in money, then this would render the transaction fraudulent and void as to plaintiffs, and your verdict should be for plaintiffs." (3) "The law requires the defendants to show an indebtedness from Shannon to Allred equal to the fair valuation of the land conveyed by Shannon to Allred on February 6, 1886; and if defendants have failed to show by clear and satisfactory proof the different items of indebtedness from Shannon which, when added together, will aggregate the reasonable value of the land at the time it was conveyed by Shannon to Allred, then plaintiffs are entitled to a judgment for the land sued for; and, if you believe this evidence, you should so find by your verdict." (4) "The court charges you, gentlemen, that the loans of $150.00, $50.00, $35.00, $25.00, and $50.00 are the only payments by Allred to Shannon established by defendants by that measure of proof the law requires of defendants in this case, and this amount is insufficient to establish the *bona fides* of the deed from Shannon to Allred, and your verdict should therefore be for plaintiffs for the lands sued for." (5) "The defendants must prove the payment of the reasonable value of the lands conveyed by Shannon to Allred; and if the jury believe from the evidence that the payments of $150.00 at one time, $50.00 at another, $35.00 at another, $25.00 at another, and $50.00 at another, were all the payments made by Allred to Shannon, as established by clear proof, then the court charges you, gentlemen, that said deed is fraudulent and void as against the plaintiffs, and your verdict should be for plaintiffs for the lands sued for." (6) "The burden of proof is upon the defendants to show, by clear and satisfactory evidence, that Shannon owed Allred on the 6th day of February, 1886, an amount equal to the reasonable and market value of the land conveyed, and also to show the different amounts due by Shannon to Allred aggregating the value of the land conveyed at that time; and, unless the jury believe the evidence shows this to their satisfaction, the defendants are not entitled to recover, and your verdict should be for the plaintiffs for the lands sued for." (7) "If the jury believe from the evidence that Allred got $60.00 or $100.00 worth of goods from Shannon on February 6, 1886, in addition to the land conveyed by deed of that date, then the duty devolved upon the defendants of showing, by clear and satisfactory evidence, the existence of an indebtedness from Shannon to Allred equal to the value of the goods and land so conveyed; and, unless the jury believe that evidence clearly establishes this amount of indebtedness, the verdict, under the law, should be for plaintiffs." (8) "If the jury believe the evidence of J. P. Green is the only evidence before them of the sale of both the land and goods, and if they further believe that both sales were made at the same time, and that $25.00 or $30.00 were paid, and if there is no other evidence of said sale, and said Green is uncontradicted and unimpeached, then they cannot disregard his testimony capriciously; and if they believe this testimony, in connection with the other evidence, then they should find that the deed from Shannon to Allred is void, and find a verdict for plaintiffs." (9) "If the jury believe from the evidence that Allred bought $60.00 or $100.00 worth of goods from Shannon on February 6, 1886, then the burden of proof is upon the defendants to show that Shannon owed Allred an amount equal to the value of the goods, in addition to the value of the land; and, unless this indebtedness is shown by clear and satisfactory proof, your verdict should be for plaintiffs." (10) "In this case the burden of proof is upon the defendants to show, by clear, satisfactory proof, the value of the consideration passing from Allred to Shannon for the property conveyed by Shannon to Allred, and, in absence of such proof, to the satisfaction of the jury, they should find for the plaintiffs." (11) "The court charges you, gentlemen, that under the law of this case, and the evidence before you, if you believe the evidence, the deed from Shannon to Allred of date of February 6, 1886, is fraudulent and void as against the plaintiffs." (12) "The jury cannot indulge in any presumption of payment by Allred to Shannon, but it devolves upon the defendants to show, by clear and satisfactory proof, the payment by Allred to Shannon of the value of the property conveyed, and, if defendants fail to prove this, then the jury will find a verdict for plaintiffs." (13) "There is no proof before you, gentlemen of the jury, of an indebtedness from Shannon to Allred of $1,400.00, such as the law requires by clear and satisfactory evidence." (14) "There is no proof before the jury of an indebtedness of $1,400.00 from Shannon to Allred, and the jury will not look to any evidence about $1,400.00 being due." (15) "There is no proof before you, gentlemen, of any indebtedness from Shannon to Allred of $1,400.00."

(16) "If the jury believe the evidence in this cause, they should find for the plaintiffs."

John C. Eyster and *Dickinson & Hall*, for appellants.

McCLELLAN, J. This is an action of ejectment prosecuted by Buford, McLester & Co. against John A. Allred and others. Plaintiffs claim under a deed executed to them by the marshal of the United States district court for the southern division of the northern district of Alabama, by whom the land was sold under a judgment and condemnation in attachment prosecuted by said plaintiffs against M. L. Shannon for the collection of a debt existing prior to February 6, 1886. The attachment was levied on the land February 11, 1886. The marshal's deed bears date as of December 1, 1887. Defendants claim under a deed executed February 6, 1886, prior to the levy of the attachment by Shannon, the debtor and defendant in attachment, to John A. Allred, on a recited consideration of $700 "in hand paid." This deed was not recorded until February 25, 1886, subsequent to the levy. Shannon's insolvency at the date of his deed to Allred may be taken as having been conceded on the trial below. For all the purposes of this appeal, it may be further conceded that Allred had knowledge or notice of his grantor's insolvency. From the foregoing facts and concessions it follows that the burden was on Allred to show a conveyance by Shannon to him in satisfaction of an antecedent *bona fide* debt, and substantially equal in amount to the value of the land conveyed. In discharge of this burden, defendants offered the deed which we have described. Its introduction in evidence was objected to *in limine*, on the ground that "it was fraudulent and void on its face as against plaintiffs, creditors of Shannon, in this: Because said deed was executed on the 6th day of February, 1886, and was not filed for record until the 25th day of February, 1886, and plaintiffs' lien on said property was acquired by the levy of the writs of attachments thereon on the 11th day of February, 1886." The court very properly overruled this objection. The delay in putting the deed to record shown in this case did not avoid it as against an intervening attachment levy; and, moreover, it is not controverted but that plaintiffs had actual notice of Allred's claim of title to the land before the levy was made.

2. The assignment of error based on the refusal of the court to exclude testimony going to show that the consideration of the deed was an indebtedness from the grantor to the grantee is untenable. This class of cases does not involve an exception to the rule that, where a particular valuable consideration—as money presently paid—is recited, another and valuable consideration, as the satisfaction of a pre-existing indebtedness, may be shown in support of the deed. Wait, Fraud. & Conv. § 221; Bank v. McDonnell, 89 Ala. 434, 8 South. Rep. 137.

3. It may be that certain declarations of Shannon as to what he was paying Allred for his services deposed to by the witness Green, were not competent to prove the debt relied on by Allred as a consideration for the conveyance to him; but this witness also testified as to the compensation agreed on between Shannon and Allred as the latter's wages. We know of no more direct or approved method of establishing the fact in question than this. The motion of plaintiff in this connection was to exclude, not only Shannon's declarations, but his agreement with Allred. There was no error in overruling it. Kellar v. Taylor, 90 Ala. 289, 7 South. Rep. 907; Badders v. Davis, 88 Ala. 367, 6 South. Rep. 834; Lowe v. State, 88 Ala. 8, 7 South. Rep. 97.

4. The evidence tended to show that the whole amount of Shannon's indebtedness to Allred was $1,400. On the day on which Allred purchased the land involved here from Shannon, in satisfaction in part of this indebtedness, he also purchased from him a stock of goods valued at $20, or $25 more than the balance of his claim, and paid therefor either $20 or $25 in money, and the balance by satisfying that part of his debt not liquidated in the land transaction. In view of Shannon's insolvency and Allred's knowledge of it, this latter transaction, involving, as it did, a present cash consideration in part, would have invalidated the sale and conveyance of the land could the transactions be considered as one, or had there been any connection between the two. But that there was no such connection is put beyond a doubt, for all our purposes, by the following recital in the bill of exceptions: "The evidence further tended to show, and upon this point there was no controversy, that the deed for the property in suit was executed and delivered before any negotiations were had with reference to the goods; that afterwards, and perhaps on the same day, Shannon sold Allred groceries, etc., to pay balance due; that after the goods were selected and invoiced they amounted to some $20 or $25 more than the balance, and Allred paid that difference in money." In view of this recital, it is not conceivable how the purchase of the goods can in any way affect the prior and wholly disconnected transaction with respect to the land. Yet the objection to the charge given for the defendants, and the exceptions to the refusal of the court of charges 2, 7, 8, and 9, proceed on the theory that the first transaction, though in and of itself *bona fide* and valid, was infected with fraud and avoided by what subsequently and wholly independently took place between the parties in reference to the stock of groceries; while charges 10 and 12, asked by plaintiff and refused by the court, manifestly tended to mislead the jury to the same conclusion. The assignments of error addressed to the court's action on these several charges are without merit.

5. While the burden of proving the prior existence and present satisfaction of an indebtedness from Shannon to Allred in amount equal to the value of the land as a consideration for the deed, by clear and convincing evidence, was on the defendants, as declared in many of the charges refused to the plaintiffs, it is quite an er-

ror to suppose, as these charges further declare, that it was essential to prove each separate item aggregating the requisite sum. Cases may well be imagined—and, indeed, this is one of them—where proof of a gross sum found to be due, acknowledged, and agreed to be paid, on a settlement between the parties, might well be entirely satisfactory to a jury, though the witnesses deposing thereto had no knowledge whatever of the dealings between the parties, or the items of debit and credit involved therein, which necessitated and led up to such settlement. Such instructions are especially pernicious in cases like this, where, it appears, both the creditor and debtor, the only persons who ordinarily would be conversant with the itemization of the account, die before the trial is had. Charges 1, 3, 6, 11, 13, 14, 15, and 16, asked by the plaintiffs, either expressly require proof of the items of the alleged indebtedness, or proceed on the theory that such proof is essential, and this, though the jury might reasonably be entirely satisfied of the amount and *bona fides* of the claim from other competent evidence. And charges 4 and 5 were well calculated to mislead the jury to the conclusion that they could not find an indebtedness beyond certain specific sums which one witness testified that Allred loaned to Shannon, because the alleged debt in excess of this amount was not proved, item by item, though there was abundant proof, even by plaintiffs' own witnesses, that these loans did not constitute the whole indebtedness, and other evidence tending to show that, on settlements made between the parties, the balance in Allred's favor was largely more than the sum of these loans. Many, if not all, of these charges were faulty in other particulars, but it is unnecessary to further discuss them. Each of them was properly refused. We find no error in the record, and the judgment of the circuit court is affirmed.

(94 Ala. 149)

POLLAK v. CALDWELL *et al.*

(*Supreme Court of Alabama.* Dec. 2, 1891.)

ABANDONMENT OF HOMESTEAD—LEASE.

Code, § 2539, provides that when a declaration of claim to a homestead exemption has been filed in the office of the judge of probate, leaving the homestead temporarily or leasing it shall not constitute an abandonment. *Held* that, where no declaration was filed, leasing the homestead, although with the intention of reoccupying it at the end of the term, was an abandonment.

Appeal from circuit court, Macon county; JAMES R. DOWDELL, Judge.

Action of ejectment by Ignatius Pollak against W. P. Caldwell and others. Judgment for defendants. Plaintiff appeals. Reversed.

W. F. Foster, for appellant. *Watts & Son*, for appellees.

STONE, C. J. Pollak, the appellant, claims under a purchase at sheriff's sale and sheriff's deed made pursuant thereto. The judgment and execution under which he purchased were against Mrs. A. M. Kelly. The judgment was rendered in 1881, and soon thereafter execution was levied on the house and lot which are the subject of the present suit. Mrs. Kelly interposed a sworn, written claim of homestead exemption. The claim was not contested, and no sale was made under that levy. No other execution was issued on the judgment for some years. All the testimony tends to show that the house and lot were worth not exceeding $1,000, and that she occupied the property as a residence and homestead, at least until she left the premises in 1888. This is the second appeal in this case. Caldwell v. Pollak, 91 Ala. 353, 8 South. Rep. 546. On the first trial it was shown that, commencing a few years after the first levy and claim of exemption in 1881, executions had been regularly issued and kept in the hands of the sheriff of the county, without a lapse of a term, until the sale was made in 1889. Execution was issued in March, 1888, and returned by the sheriff, without action, in September following. Another execution was issued in September, 1888, on which the sheriff, on February 2, 1889, indorsed a levy on the property sued for in this action, and returned the execution, with his indorsement thereon "that he had not sold the same for want of time to make publication." On April 2, 1889, the last execution was issued, under which the sheriff sold the property in May, 1889, and Pollak became the purchaser, receiving the sheriff's deed. The testimony shows without conflict that Mrs. Kelly died in January, 1889, before the sheriff made any levy, after 1881. So, whether the levy made in February, 1889, and sale made in May afterwards, vested any title in the purchaser, depends on the inquiry, had the execution acquired a lien on the house and lot during the life-time of Mrs. Kelly? Unless it had acquired such lien before her death in January preceding, the sale was void, and Pollak was without title. Code 1886, § 2897; Hendon v. White, 52 Ala. 597; Sims v. Eslava, 74 Ala. 594. On the first trial it was testified that Mrs. Kelly had a married daughter living in Columbus, Ga., and that in October or November, 1888, she left the premises, and went to her daughter's home. She never returned, but died at her daughter's, in January, 1889. The facts affecting her previous occupancy of the house, and her leaving it in 1888, were testified to as follows: "Mrs. Amanda M. Kelly, after Mr. Kelly's death, for many years resided on, occupied, and controlled said house and lot before her death, which occurred in January, 1889; that Mrs. Kelly, while so in possession of said house, at different times rented a portion of said house to other persons; that she rented a portion of said house to Mr. ———, in the year 1888." Another witness testified "that Mrs. Kelly occupied and controlled said house and lot for some 4, 5, or 6 years past. * * *" It was also proven by plaintiff that Mrs. Kelly left Tuskegee and went to Georgia in October or November, 1888. The claim of exemption filed in 1881, when the first levy was made, consisted of Mrs. Kelly's affidavit of claim, which was lodged with the sheriff. We have now stated everything which the record on the former appeal showed bearing on the question of Mrs. Kelly's abandonment

of her residence. The record affirmed that it contained all the evidence. It cannot be gainsaid that, according to the facts then shown, the dwelling had for years been Mrs. Kelly's homestead. Renting out some of her rooms, she continuing to reside in the house, was not a change of residence on her part. So, going off on a temporary visit, with the expectation of returning and occupying the house as her home, would not be a forfeiture of her homestead. Boyle v. Shulman, 59 Ala. 566; Lehman v. Bryan, 67 Ala. 558. The trial court had charged the jury, as matter of law, that, if they believed all the evidence, they must find for the plaintiff. This we held was error. We said it should have been left to the jury to determine with what intention Mrs. Kelly left home when she went to Georgia. On the facts then presented, we find nothing to cause us to change our ruling. We still hold that merely going off on a visit, even though it be a long visit, if there be nothing else in the transaction, is no forfeiture of the homestead. On the second trial in this case the testimony was materially different. Mr. Motley testified on the second trial "that Mrs. Kelly had rented the house and lot and a part of the furniture to Rev. Mr. Jones at the beginning of 1888, reserving a room in the house for her board; and that she had remained in the house until about the 1st day of May, 1888, when she left the same, and went to Georgia, where her daughter lived, on a visit to her." If the testimony had stopped at this point, we would hold that our rulings on the former appeal would be applicable to this. It would still remain a question for the jury to inquire whether in going to Georgia Mrs. Kelly's intention was to cease to be a resident of her former dwelling, or simply to visit her daughter. Speaking, however, of the time Mrs. Kelly left home on that occasion, this witness stated "that she [Mrs. Kelly] then rented the house and lot and a part of the furniture to Mr. Jones for ten dollars per month." This testimony is nowhere disputed or qualified by any other testimony, and the bill of exceptions states it contains all the evidence. This testimony, unexplained, if true, brings the case directly within section 2539 of the Code of 1886,[1] and was a forfeiture of the homestead exemption, even though Mrs. Kelly intended to return and reoccupy the residence after the termination of the lease. It was a break or chasm in her continued occupancy, and, unlike a mere visit paid, was a surrender of the exemption, unless a declaration of claim of homestead exemption had been filed in the office of the judge of probate. Code, §§ 2515, 2516, 2539; Stow v. Lillie, 63 Ala. 259; Scaife v. Argall, 74 Ala. 473; Murphy v. Hunt, 75 Ala. 438. It is nowhere shown that Mrs. Kelly had made and filed such declaration of claim in the probate office. On the testimony found in this record the general charge asked by the plaintiff ought to have been given. There is nothing in the other exceptions. Reversed and remanded.

[1]Code, § 2539, provides that "when a declaration of claim to a homestead exemption has been filed in the office of the judge of probate, leaving the homestead temporarily, or a leasing of the same, shall not operate an abandonment thereof, or render it subject to levy and sale," etc.

(99 Ala. 24)

HIGHLAND-AVE. & B. R. CO. v. MATTHEWS *et al.*

(*Supreme Court of Alabama.* Dec. 2, 1891.)

EMINENT DOMAIN—REMEDIES OF ABUTTING OWNERS—DAMAGES.

1. Where a corporation vested with the power of eminent domain, and authorized by its charter to build its railway along a certain street, builds its road without the consent of the owners of property abutting thereon, and without making them compensation, such owners may maintain an action at law for the injuries suffered thereby.

2. In such case, plaintiff may recover prospective damages.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Action by Jonathan Matthews and others against the Highland-Avenue & Belt Railroad Company for damages. Judgment for plaintiffs. Defendant appeals. Affirmed.

In this action plaintiff sought to recover damages for injuries caused by defendant to his lot by the construction of an embankment along the avenue upon which the lot adjoined. To the complaint as amended the defendant demurred, among others, upon the ground that the plaintiff cannot recover damages for permanent injury to the land, in this form of action. This demurrer was overruled. The court, at the request of the plaintiffs, gave the following written charges: (1) "The rule by which the damages are to be estimated in this case is the difference between the market value of the property immediately before the taking or injury and such value immediately after the taking or injury caused by the construction of the railroad; in other words, the diminution in value at the time, produced thereby." (2) "Market value is the price which the property will bring when offered for sale in the market, not at a forced sale on short notice, but after such reasonable time as would be ordinarily taken to make a sale of like property. It is the highest price which at such sale those having the ability and the occasion to buy are willing to pay." (3) "If the jury are reasonably satisfied that the overflow of water on plaintiffs' property is increased by the embankment erected by the defendant for their railroad, then this is a circumstance to be considered by you in estimating any damage to the market value of the plaintiffs' property." (4) "Plaintiffs are entitled to just compensation for all injury done to plaintiffs' property by the construction of defendant's railroad on the embankment in front of the property, and the fact that property along the line of defendant's railroad appreciated in value generally, or was generally benefited by the construction of the railroad, cannot be considered by you to diminish or as a set-off to any special damage that you may find to have been done to plaintiffs' property, resulting in a reduction of its market value by the con-

struction of defendant's railroad." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following written charges: (1) "That the plaintiffs are not entitled to recover as damages the difference between the value of the property before the construction of the railroad and the value thereof after such construction." (2) "That the cost of filling the lot up to the level of the railroad is not the measure of damages in this case, and the jury cannot consider such cost in estimating damages." (3) "That in estimating damages the jury cannot consider the permanent injuries, if any, which the plaintiffs have sustained by reason of the construction of the railroad in Avenue E, in front of the plaintiffs' lot." (4) "That in estimating damages the jury cannot take into consideration the smoke, rumbling, shaking, or noise incident to the operation of the railroad along Avenue E." There was, on the first trial, judgment for the plaintiff in the sum of $750. Upon the court's granting a new trial, from the rulings in which the present appeal is prosecuted, there was judgment for $1,000.

Alex. T. London, for appellant. *Chisholm & Whaley*, for appellees.

WALKER, J. This was an action to recover damages caused to the plaintiffs' lot near the city of Birmingham by the construction of an embankment for the track of the defendant's railroad in the street or highway upon which the lot abutted. It was alleged in the complaint, and there was evidence tending to show, that the defendant is a corporation clothed with the right to call into exercise the power of eminent domain, and authorized by its charter to build its railroad along the street or highway in question, and that, without the consent of the plaintiffs and without making them compensation, it built its railroad upon a fill or embankment made in front of the plaintiffs' lot, and thereby obstructed the ingress and egress to and from such lot, and otherwise injured it. The averments and proof show that a corporation invested with the privilege of taking private property for public use has, in the construction of its works, injured such property without first paying compensation for such injury. This constitutes a violation of the rights secured by section 7 of article 14 of the constitution of Alabama. For the redress of such a wrong an action at law lies. The jurisdiction of a court of equity to prevent the commission of such a wrong is not based upon the absence or inadequacy of legal remedies for the recovery of damages for the wrong when it has been consummated. The recognized equitable remedies may find support upon either of two grounds: (1) Upon the special jurisdiction of courts of equity to confine corporations to the exercise of the powers conferred upon them by law; and (2) upon the inadequacy of legal remedies to protect the constitutional right in its entirety, courts of law being unable to compel the payment of compensation to the property owner before his property is taken, injured, or destroyed. Railway Co. v. Witherow, 82 Ala. 190, 3 South. Rep. 23; East & W. R. Co. v. East T., V. & G. R. Co., 75 Ala. 275. The property owner, however, may fail to avail himself of the preventive equitable remedies, and rely upon his action at law for the redress of the wrong after it has been committed. If his land has been taken without his consent, and without having been duly acquired by condemnation proceedings, he can maintain ejectment for its recovery. Hooper v. Railway Co., 78 Ala. 213; Railroad Co. v. Jones, 68 Ala. 48. If his property has not been so taken, but has been injured by the construction of the defendant's works, he may sue at law to recover damages for such injury. Jones v. Railroad Co., 70 Ala. 227. Such actions have been maintained in this court without question, and we are unable to discover any reasonable ground upon which the right to maintain them can be controverted. Railway Co. v. Coskry, (Ala.) 9 South. Rep. 202; Railway Co. v. Williams, Id. 203; Evans v. Railway Co., 90 Ala. 54, 7 South. Rep. 758; City Council v. Townsend, 80 Ala. 489, 2 South. Rep. 155; City Council v. Maddox, 89 Ala. 181, 7 South. Rep. 433. The property owner may waive formal condemnation proceedings, and yet recover such damages as he may suffer in his property by reason of the building of the railroad upon or near it. Railroad Co. v. McGehee, 41 Ark. 202; U. S. v. Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. Rep. 306; Cohen v. Railroad Co., (Kan.) 8 Pac. Rep. 138. A claim in the complaint of damages which the plaintiffs are not entitled to recover in this action does not impair the right to maintain the suit. A demurrer to a complaint which states a good cause of action is not the proper mode of evoking a decision of the court as to the rule to govern in the admeasurement of damages for the injury alleged. Kennon v. Telegraph Co., (Ala.) 9 South. Rep. 200; Carl v. Railroad Co., 46 Wis. 625, 1 N. W. Rep. 295. There was no error in overruling the demurrers to the complaint.

The principal contention in the case is upon the rulings of the trial court on the question of the measure of damages. The appellant insists that the plaintiffs could not be entitled to recover prospective damages, that they were treating the obstruction complained of as a nuisance, and that in an action for the injury caused thereby their recovery could not go beyond the damages sustained prior to the commencement of the suit. In the Alabama cases against municipal corporations, the measure of damages for injury caused to abutting property by changes in the grades of streets or sidewalks has been stated to be the difference in the market value of the property before and after the act complained of. City Council v. Maddox, 89 Ala. 181, 7 South. Rep. 433; City Council v. Townsend, 80 Ala. 489, 2 South. Rep. 155. The appellant contends that those authorities are not applicable here. It is true that the rule contended for by the appellant is supported by the decisions in several states. In Uline v. Railroad Co.,

101 N. Y. 98, 4 N. E. Rep. 536, the suit was by an abutting owner to recover damages sustained from the construction of a railway in the street fronting his premises, and, after a full consideration of the question of the measure of damages, it was held that the plaintiff could recover only temporary damages; that is, such damages as had been sustained up to the commencement of the action. This ruling has been adhered to in later cases arising in that court, and some other courts have reached similar conclusions. Carl v. Railroad Co., 46 Wis. 625, 1 N. W. Rep. 295; 6 Amer. & Eng. Enc. Law, 595, note 4. There are evidences in the later New York cases that that court has not remained satisfied with the decision in the Uline Case. The inconveniences which have been developed in the attempts to adhere to that ruling have, however, been obviated, in a great measure, by encouraging such shifts as permitting damages for permanent injury to property to be assessed in such cases if the defendant failed to invoke the benefit of the decision against the propriety of this course, thus allowing the rule as to the measure of damages to be determined by the acquiescence of the parties, rather than by the law; or by allowing a judgment for past loss of rentals, and in the same case granting an injunction restraining the further operation and maintenance of the road, unless the defendant paid a certain sum equal to the amount of depreciation in the value of the property, as for a permanent appropriation. Pond v. Railway Co., 112 N. Y. 186, 19 N. E. Rep. 487; 3 Sedg. Dam. (8th Ed.) 465–476, where there is a review and criticism of the New York cases. The principal reasons suggested for limiting the recovery in a case like this one to the damages sustained up to the commencement of the suit are (1) that when the defendant has paid the permanent damages it should have a clear title to the property taken, and such title cannot be acquired as a result of a judgment against it in an action for trespass or for a nuisance; and (2) that the person injured by a nuisance may have it abated, and it would be unjust to allow the plaintiff to recover damages for the permanent injury caused to his property by the nuisance, and still retain the right to bring subsequent actions for damages caused by a continuance of the nuisance, and also the right to have the nuisance itself abated at any time. The first of these reasons can have no weight on this case. The counsel for the plaintiffs expressly waived the right to recover compensation for the property which was taken by the defendant. The claim was for damages for the injury to the lot abutting on the street where the obstruction was made. The plaintiffs' entire claim would be satisfied by the payment of damages. If the defendant had had those damages assessed in condemnation proceedings, it would have acquired no title to the injured property. It is no objection to a judgment for the whole damages in this case that the defendant does not thereby get title to property which it has not taken, and which it does not seek to acquire. When compensation has been made to the plaintiffs for the injury to their property, they can no longer disturb the defendant on that account. The other reason suggested implies that the obstruction complained of must be treated as an abatable nuisance. It was not so treated in this case. There is nothing in the complaint or in the evidence to indicate that the embankment or fill was constructed otherwise than as the defendant would have been authorized to construct it if the damages occasioned thereby to the plaintiffs' property had been first assessed and paid. If the injury was such that final compensation therefor could have been made in condemnation proceedings, its character was not changed by the fact that such proceedings were not resorted to. There is no magic in such proceedings to compel a resort thereto in order to obtain an assessment of damages for an injury, the full damages from which in any other proceeding would be regarded as legally unascertainable or as incapable of recovery. Damages which can be assessed in condemnation proceedings can be assessed just as well in an ordinary action at law. It is not perceived why the payment of the damages awarded on a formal condemnation could be any more effectual to prevent the maintenance of subsequent suits by the property owner than would the payment of a judgment of a court of law for damages for exactly the same injury. The grievance of the plaintiffs is that they have not been paid for the injury caused to their lot. That claim can be fully satisfied by payment of a judgment for damages. There is nothing to indicate that the maintenance in its present condition of the structure erected by the defendant in front of the plaintiffs' lot will furnish them with any legal cause of complaint after they shall have been paid for the injury to their property. The plaintiffs' entire cause of action can be disposed of just as effectually in this suit as in any other form of proceeding. If the structure in question is of a permanent character, its existence and continuance in its present condition constitute but one wrong. Future and past damages on account of it are attributable to but one cause. To allow successive suits for the recovery of such damages in parts would amount to giving several causes of action for a single tort. This would be in violation of the principle that fresh damage, without a fresh injury, does not authorize a second or subsequent action. That cases like the present one come within this principle is the generally accepted view. The New York rule of damages recoverable at law has not prevailed in analogous cases decided in other jurisdictions. New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 Sup. Ct. Rep. 743. In O'Brien v. Railroad Co., 119 Pa. St. 184, 13 Atl. Rep. 74, the action was for damages to property caused by excavations made along the street upon which the property abutted. It was held that the injury was single and indivisible, and that the damages could not be severed. In Fowle v. Railroad Co., 112 Mass. 334, it was held that the plaintiff could recover

for prospective as well as past injury caused by the construction of a road-bed in such a manner as unnecessarily to turn the current of a stream against his land and wash away his soil. In Railroad Co. v. Loeb, 118 Ill. 203, 8 N. E. Rep. 460, it was decided that for taking or injuring land by the permanent structures of a railroad there should be but one response in damages. The reasonable rule on the subject, and the one which is maintained by the preponderance of the authorities, is that, where permanent structures are erected so as to cause a depreciation in value of adjacent or contiguous realty, the injured party may, and therefore must, recover compensation in one action for the entire loss, (1 Sedg. Dam., 8th Ed., § 95; 5 Amer. & Eng. Enc. Law, 20; Railway Co. v. Eberle, 110 Ind. 542, 11 N. E. Rep. 467; City of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. Rep. 821; Troy v. Railroad Co., 23 N. H. 83;) and that the damages in such a case are to be measured by the depreciation in the market value of the property caused by the structure in question, (3 Sedg. Dam. 414.) The result is that the rule as to the measure of damages which has been stated in the Alabama cases against municipal corporations for similar injuries to property is equally applicable here. The charges given by the trial court on the question of the measure of damages are in harmony with the rule above announced. The charges upon that subject which were requested by the defendant, and refused by the court, were to the effect that prospective damages were to be excluded. As the evidence tended to show that the obstruction complained of is of a permanent character, causing permanent injury to plaintiffs' lot, those charges were properly refused. The rulings of the court involving other questions, though assigned as errors, were not insisted upon in the argument for the appellant, and for that reason will not be considered. Affirmed.

(95 Ala. 631)

ELYTON LAND CO. v. SOUTH & NORTH ALA. R. CO.

(*Supreme Court of Alabama.* Nov. 24, 1891.)

RES JUDICATA — RAILROAD COMPANIES — USE OF RIGHT OF WAY — ERECTION OF DEPOTS — EJECTMENT.

1. In ejectment for land held by defendant railroad company as a right of way, which plaintiff claimed to hold as trustee for right of way of other railroads, by reason of the misuser of defendant in erecting thereon a freight depot, etc., it appeared that defendant took possession under a tripartite agreement made by plaintiff land company, defendant, and A. & C. R. Co., by which plaintiff was to hold the land forever as a perpetual right of way for all railroads doing business in B.; that afterwards plaintiff brought suit in equity against defendant and A. & C. R. Co., wherein a final decree was entered reciting that it appeared from "the bill and the admissions of complainant in open court that" defendant has complied with the agreement, and is entitled, under said agreement, "to the lands so designated and set apart to" defendant, "and, as to all other rights acquired for its use * * * under said agreement, the said agreement remains unaffected by this decree;" that following the decree plaintiff executed a deed to defendant, covering the land in question, with other lands, in which it was expressly stipulated that the right of the defendant acquired by said original agreement should remain in full force and effect. *Held*, that plaintiff was estopped from setting up a claim inconsistent with such decree and deed.

2. A railroad company may make any use of the land acquired by it for a right of way for its railroad, which contributes to the safe and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands, and the erection of a freight depot and other structures thereon was not a misuser.

3. If defendant had been guilty of a misuser of its right of way, plaintiff could not recover in ejectment, since, according to its own allegations, defendant and other railroads were entitled to possess and use the land as a right of way.

Appeal from circuit court, Jefferson county; JAMES B. HEAD, Judge.

Ejectment by the Elyton Land Company against the South & North Alabama Railroad Company to recover a strip of land used by defendant as a right of way in the city of Birmingham, with other lands. Trial was had by the court without a jury, and judgment entered for plaintiff, except for the strip in question, which was adjudged to defendant, and plaintiff appeals. Affirmed.

Alex. T. London, for appellant. *Hewitt, Walker & Porter*, for appellee.

WALKER, J. The land involved in this suit is included in the description of the strips of land lying on either side of the right of way of the Alabama & Chattanooga Railroad Company, which, by the terms of the contract of April 21, 1871, between the Elyton Land Company, the Alabama & Chattanooga Railroad Company, and the South & North Alabama Railroad Company, were to be held by the Elyton Land Company forever, as a perpetual right of way for all railroad companies doing business in and through the city of Birmingham. That contract was before this court in the case of the Alabama G. S. R. Co. v. South & N. A. R. Co., 84 Ala. 570, 3 South. Rep. 286, and the extent of the right conferred by its terms upon the South & North Alabama Railroad Company in the right of way of the Alabama & Chattanooga Railroad Company was there determined. In March, 1881, the Elyton Land Company filed its bill in chancery against the South & North Alabama Railroad Company and the Alabama Great Southern Railroad Company, alleging, in substance, the existence of the contract above referred to, the non-compliance by the Alabama Great Southern Railroad Company as the successor of the Alabama & Chattanooga Railroad Company with the conditions of said agreement to be performed by the former of these two companies, and the partial compliance by the South & North Alabama Railroad Company with the conditions to be performed by it under said contract, so as to entitle that company to a portion of the lands which it was to receive under the contract. The complainant in that bill sought thereby to have revoked and declared forfeited the benefits stipulated for by said agreement in favor of the Alabama Great Southern Railroad Company,

and of all other railroad companies, except the South & North Alabama Railroad Company. Decrees *pro confesso* were entered against both the defendants. A final decree was rendered, in which it was recited that "it appears from the allegations of the bill and the admissions of complainant in open court that the South & North Alabama Railroad Company has complied substantially with the terms and conditions of the agreement of April 21, 1871, and has agreed with the complainant on the boundaries of the lots or parcels of land to which the South & North Alabama Railroad Company is entitled under said agreement, being part and parcel of the lands therein described; and as to the lands so designated and set apart to the South & North Alabama Railroad Company, and as to all other rights acquired for its use, by said South & North Alabama Railroad Company under said agreement, the said agreement remains unaffected by this decree." It was decreed that said agreement be revoked, annulled, and declared void and of no effect as to the Alabama & Chattanooga Railroad Company and its successor, the Alabama Great Southern Railroad Company, and as to all other railroad companies and all other persons; but the decree expressly reserved the right of the South & North Alabama Railroad Company for its own use under said agreement. The conclusive effect of this decree upon the rights of the Alabama Great Southern Railroad Company was fully recognized in the case above cited. The result of the decree was to exclude all claim by that company upon any lands of the Elyton Land Company covered by the terms of the contract in question, and to leave the interest of the South & North Alabama Railroad Company in the strip of land involved in this suit undiminished, and, indeed, augmented, certainly to the extent of the exclusion of the Alabama Great Southern Railroad Company from participation in the benefits of the contract. The decree just referred to was followed by a deed, executed in April, 1882, whereby the Elyton Land Company conveyed to the South & North Alabama Railroad Company certain lands, which were accepted by the latter company as the residue of the lands to which it was entitled under the contract of April 21, 1871. It was again recited in this deed that the Elyton Land Company claimed that the Alabama & Chattanooga Railroad Company, and all other railroad companies, except the South & North Alabama Railroad Company, had failed to comply with the terms and conditions of said original contract or agreement, and that said agreement was revoked and annulled as to all other companies or persons, except the South & North Alabama Railroad Company. It was expressly stipulated in that deed that the right of the grantee therein, acquired by said original agreement, to the strip of land 35 feet wide, a portion of which is involved in this suit, should remain in full force and effect, but that the right of way over said strip was abrogated as to all other railroad companies.

It is contended for the appellant that the agreement of April 21, 1871, together with the maps of its property made and published at that time, effected a dedication of the strips of land, a portion of which is involved in this suit, for the purposes stated in the agreement, and that this dedication was irrevocable, and could not be affected by the decree and the deed of 1882, above referred to. It is further contended that the erection of the depot on the strip in controversy is a misuser and a diversion of it from the purposes to which it was devoted by the dedication, which entitle the plaintiff to maintain ejectment for the recovery of the property. The consideration that railroads are devoted to public uses affords the justification for the exercise of the power of eminent domain for the acquisition of private property for railroad purposes. But the land held by a railroad company for the purposes of its enterprise, whether acquired by condemnation proceedings or by purchase from the owners, is, so far as the right of property is concerned, private property. The incidents of private ownership attach to it. The title is in no manner vested in the public or in any part of the public as such. The title of the railroad company is as exclusive as that of any sole grantee in a conveyance of land. It must use the property for the public purposes for which it was acquired under public authority. Though the property must be so used, still the ownership is private, and the public do not share in such ownership. The public are entitled to use the property, but they use it as the property of the company, and the company is entitled to compensation for its use. The law secures to the company the exclusive possession and dominion of the property, and only requires that it be devoted to the purposes of public use and convenience, to subserve which its acquisition was authorized. Land set apart for a railroad right of way, if accepted by the railroad company, is taken as the company's private property, and for its individual profit, though such company, by taking the property, charges itself with a public duty as to the use to which the property is to be devoted. The acceptance by the company is in its own behalf, and cannot properly be said to be in behalf of the public. A dedication is "an appropriation of land to some public use made by the owner of the fee, and accepted for such use by or on behalf of the public." The public is treated as the grantee, and the gift inures immediately to the public. 5 Amer. & Eng. Enc. Law, 395, 399; Steele v. Sullivan, 70 Ala. 589. Dedication is not a mode of conferring a private property right in land. The only cases, not controlled by special statutory provisions on the subject, in which we have found the donation of land for railroad purposes spoken of as a dedication, involved only the assertion of a claim to the property in question by the railroad company itself; and in such cases the claim was either disallowed or was rested, not upon a common-law dedication, but upon an adverse possession by the railroad company, or upon a state of facts raising an estoppel *in pais* against the holder of the legal title, which would

have precluded him from asserting his title against any one who had occupied and improved the land with his knowledge and consent, under similar circumstances. Morgan v. Railroad Co., 96 U. S. 716; Railway Co. v. Sutor, 56 Tex. 496; Daniels v. Railroad Co., 35 Iowa, 130; Forney v. Calhoun Co., 86 Ala. 463, 5 South. Rep. 750. It seems that when the act to be relied upon as the acceptance of a proposed appropriation of property is to be done, not by the public or in behalf of the public, but by an individual or by a private corporation, intending to take the property in its own behalf for use in a business enterprise to be prosecuted for its own profit, and the property is to be acquired as private property and for private gain, so that the public are not to share in the ownership or in the benefits of ownership, but the new private proprietor, by taking the property for the purposes in view, only charges itself with the duty of using the property for public purposes on receiving compensation for such use, then such appropriation of the property, to be binding upon the holder of the legal title, must be effected by his contract, grant, or conveyance, unless he has precluded himself from asserting his title as the result of a state of facts which would have a like effect against him in favor of a purely private party; and that it does not follow that such an appropriation is effected because the act of the proprietor would have amounted to a common-law dedication if the gift had inured immediately to the public, and a private ownership for private profit had not intervened. It seems that a railroad company cannot hold its road, rights of way, depot grounds, or other property against the former proprietor thereof, unless its alleged interest therein has been secured to it in one of the modes provided by law for the vesting of private property rights in private parties. In the cases found by us in which the claim of a railroad company to such property has been rested solely upon a state of facts which would have amounted to a dedication if the appropriation had been for a public use, such claim has not been allowed; and the rejection thereof has been put upon the ground that such an interest in property could not be conferred upon a private party by what is known to the law as a dedication. Watson v. Railroad Co., 48 N. W. Rep. 1129, a decision by the supreme court of Minnesota; Todd v. Railroad Co., 19 Ohio St. 514.

But, even if it be conceded that the contract of April 21, 1871, if standing alone, should be given effect as an irrevocable dedication of the property in question as a perpetual right of way for all railroad companies doing business in and through the city of Birmingham, and that other railroad companies could claim the benefit of that dedication, and would be entitled to prevent the appellee from appropriating the property to a purpose inconsistent with its use as a common right of way, yet the Elyton Land Company is not now in a position to assert such claim against the South & North Alabama Railroad Company. In the first place, it plainly appears that the appellant obtained the decree on the bill in chancery above referred to by representing that the appropriation of lands, including that involved in this suit, which was provided for by the contract of April 21, 1871, was conditional and revocable, and the adjudication that such was the effect of that contract was necessarily involved in the decree then made. Furthermore, the deed of April 28, 1882, was, in effect, a final settlement and adjustment between the parties to this suit of their respective rights under the contract of April 21, 1871. It plainly appears from the recitals contained in that deed that the appellant thereby formally admitted that the claim of all other railroad companies to participate in the use of the strip of land, a portion of which is involved in this suit, had been duly and rightfully abrogated, and that the appellee's right to the exclusive use of that land for the purpose to which it was devoted by the original contract was fully recognized. The recital in that deed of the reservation of the appellee's right in said strip, and of the forfeiture of the claims of all other railroad companies thereto, was a particular recital of material facts which entered into the consideration moving to the appellee for the covenants and releases then made by it. The appellant, having obtained the decree above referred to by representing the instrument upon which it now relies as having an operation wholly different from that now sought to be imputed to it, and having, in its subsequent deed, solemnly admitted as a material fact that the appellee alone is entitled to use the land in dispute as a right of way, is now estopped from setting up a claim inconsistent with such representation and admission. The proceedings in the chancery cause, and the recitals in the deed referred to, show solemn admissions by the appellant that the land in dispute was not irrevocably dedicated, as is now claimed, and the appellant is bound by those admissions, certainly so far as concerns its present claim against the appellee. Pratt v. Nixon, 9 Ala. 192, 8 South. Rep. 751; Jones v. Morris, 61 Ala. 518; Tait v. Frow, 8 Ala. 543; Brown v. Hamil, 76 Ala. 506; Caldwell v. Smith, 77 Ala. 157; Hill v. Huckabee, 76 Ala. 183; Bigelow, Estop. (5th Ed.) 366 et seq.; 7 Amer. & Eng. Enc. Law, 7.

The extent of the interest acquired by the appellee in the land in dispute is to use it as a right of way. The appellant has not deprived itself of the right to confine the appellee to this particular use of the property, though it cannot longer claim that other railroad companies are entitled to share in such use. The claim now made is that the erection of a freight depot and other structures on the strip is a diversion of the property from the purpose to which it was appropriated. In the interpretation of an agreement, regard is to be had to the situation of the contracting parties at the time it was made, the occasion which gave rise to it, and the obvious design intended to be accomplished. Tennessee & C. R. Co. v. East Alabama Ry. Co., 73 Ala. 444. For reasons already stated, the appellant cannot now deny that the appropriation of

the property for the particular use mentioned was conditional, and that the right to participate in the use was forfeitable by any railroad company which should fail within a reasonable time to comply with the conditions imposed. According this meaning to the contract, and it is plain that the contingency of only one railroad company becoming entitled to the benefits offered by the contract was within the purview of its terms. The appellant has admitted by its deed that such contingency has happened; that all railroad companies other than the appellee have forfeited all claims under the contract to the use of the strip in dispute; and that the right to use it for the stipulated purpose is vested in the appellee alone. The parties are to be treated as having contemplated the possibility of the appellee acquiring the exclusive use of the strip as a right of way for its railroad alone.

It is to be observed that another provision of the same contract secured to the appellee the perpetual and free use of the right of way, 100 feet wide, of the Alabama & Chattanooga Railroad Company, (Alabama G. S. R. Co. v. South & N. A. R. Co., 84 Ala. 570, 3 South. Rep. 286;) so that the result of the appellee's compliance with the terms of the contract was to secure to it one right of way to be enjoyed by it in common with one or more other railroad companies, and also an exclusive right of way in another strip. In view of the fact that the use of the right of way of the Alabama & Chattanooga Railroad Company was secured to the appellee, the question to be determined is, did the appellant, in stipulating for an additional right of way, which might become vested in the appellee exclusively, intend, in the event of such right so becoming exclusive, that the strip so appropriated should not be occupied by depots or other buildings adapted to railroad purposes, but should remain open so that tracks could be run over it? Such a meaning cannot be imputed to the contract, unless a railroad right of way is an interest of such limited scope that the land included therein must be devoted by the railroad company exclusively to a track or tracks over which trains may pass. It is a matter of common knowledge that the railroad business involves the use, not only of cars and tracks, but of buildings and structures of various kinds. It was contemplated that the strip of land in dispute in this case should be used as a right of way in a city. The place was expected to be the scene for the transaction of many phases of the business different from, but incident to, the mere act of carrying persons or things. It was to be the place for receiving, delivering, storing, and transshipping freight. In such places it is frequently necessary for the convenient transaction of a railroad business to have platforms, warehouses, lumber-yards, elevators, cattle-pens, engine-houses, car-sheds, depots, repair-shops, and other like facilities contiguous to the tracks. The space which is commonly called the railroad right of way is, in populous localities, generally found dotted with structures, other than the tracks, which are necessary or convenient for the transaction of the business of a common carrier; and we think that the erection of such structures is to be regarded as within the contemplation of the parties to a contract which stipulates for the use of land in such a locality as a railroad right of way, unless the contrary appears from the terms of the contract. Ordinarily, the right of way of a railroad company is its exclusive property, and the company is entitled to its free and unobstructed use. Railroad Co. v. Womack, 84 Ala. 149, 4 South. Rep. 618. The company is entitled to an absolute and exclusive possession, so far as to secure fully every purpose for which the railroad is made and used. Tennessee & C. R. Co. v. East Alabama Ry. Co., 75 Ala. 524. The question is, what are the uses to which the right of way may be devoted? The Western Railroad Corporation was authorized by its charter to lay out its road, not exceeding five rods wide, through the whole length, and to acquire such strip by condemnation proceedings. In reference to the rights of the company within this area, SHAW, C. J., delivering the opinion of the supreme court of Massachusetts, said: "To the extent of five rods, it appears to us, the legislature intended that the franchise of this corporation should extend, for any and all purposes incident to the object of its creation. It was contended in argument that their franchise for public purposes extended only to the use of this strip of land as a way, and that if they had occasion for buildings and store-houses, as incident to their operations as carriers of persons and merchandise, they were to be regarded, in their latter capacity, as carrying on a distinct business, for their own profit, and therefore that such buildings were not to come under the same franchise. But no such limitation is contained in the act of incorporation, and none such results from the nature of its provisions. The establishment of the rail track, and the maintenance of engines and cars, for the transportation of persons and goods, are all combined together, as one public object to be attained, and the privileges incident to the other. No doubt, in practice, the main use of the strip of land of five rods in width, in the greater part of its extent, will be for sustaining the track for the trains to pass over. But such restriction of its use is not found in the act, and therefore, when the corporation have occasion to use any part of such strip of five rods for any of the purposes incident to their creation, it is within their franchise." And, under the law of that state exempting public works from taxation, it was decided in that case "that this railroad corporation is not liable to taxation for the land, of the width of five rods, located for the road, nor for any buildings or structures erected thereon, so that they be reasonably incident to the support of the railroad, or to its proper or convenient use for the carriage of passengers and the transportation of commodities; and that this includes engine and car houses, depots for the accommodation of passen-

gers, and warehouses for the convenient reception, preservation, and delivery of merchandise, and all goods and articles carried on the road." Inhabitants of Worcester v. Western R. Corp., 4 Metc. (Mass.) 564. That court has, in later cases, continued to recognize the right of a railroad company to occupy, with buildings or other structures, the land acquired for its railroad, so long as the mode of occupation is necessary or proper for the convenient exercise of the privileges and the performance of the functions defined by its charter. Proprietors v. Railroad Co., 104 Mass. 1; Boston Gas-Light Co. v. Old Colony & N. Ry. Co., 14 Allen, 444; Brainard v. Clapp, 10 Cush. 6; Peirce v. Railroad Co., 141 Mass. 481, 6 N. E. Rep. 96.

In Railroad Co. v. Wathen, 17 Ill. App. 582, it was held that on land granted for "railroad and depot purposes," the company could permit the erection and use by private parties, without the payment of rent, of elevators, corn-cribs, lumber-yards, and lime-houses which facilitated the business of the company in the receipt, transportation, and discharge of freight. In Telegraph Co. v. Rich, 19 Kan. 517, it was held that a railroad company may, for its own use in operating its road, construct a telegraph line over and along its right of way, and that by such use of the property it did not subject itself to an additional claim of the original land-owner for compensation. The opinion of the court was delivered by Judge BREWER, now an associate justice of the supreme court of the United States. In the course of the opinion it was said: "In short, the railroad company may use its right of way, not merely for its track, but for any other building or erection which reasonably tends to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purposes and extent of the easement, or exposes itself to any claim for additional damages to the original land-owner." The authorities support the conclusion that a railroad company may make any use of the land acquired by it for use as the right of way for its railroad, which, directly or indirectly, contributes to the safe, economical, and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands. Lewis, Em. Dom. §§ 584, 588, and cases there cited; Gudger v. Railroad Co., (N. C.) 11 S. E. Rep. 515; Railroad v. Deal, 90 N. C. 110. The land here in dispute must be treated for the purposes of this case as secured to the appellee alone as an additional right of way in the heart of a city. The depot and other structures erected thereon afford such conveniences and facilities as a railroad company may be expected to provide for the transaction of its business in such locality. The land is used for purposes incidental and auxiliary to the transportation business authorized to be conducted on and over it; and, as the appellant cannot complain of the exclusive character of the occupancy, the uses shown do not, in our opinion, constitute a diversion of the property from the purposes to which it has been devoted. The conclusion is that the evidence does not support the claim that there has been a misuser by the appellee of the right of way in question. The right to maintain the action is based upon the alleged misuser. It is not intended to be admitted that, if such misuser had been shown, the appellant would be entitled to a judgment in the statutory action in the nature of ejectment for land of which it could not hold possession, because, according to is own claim, the appellee and other railroad companies were entitled to possess it and use it as a right of way. Cincinnati v. White, 6 Pet. 431; 3 Brick. Dig. p. 324, § 27.

Affirmed.

(94 Ala. 413)

HIGHLAND-AVE. & B. R. CO. v. DUSENBERRY.

(*Supreme Court of Alabama.* Dec. 1, 1891.)

INJURY TO EMPLOYE—PLEADING.

Plaintiff's intestate, while in defendant's employ, received injuries in a collision of two hand-cars, from which he died. The complaint in one count successively attributed his death (1) to the negligence of the foreman in charge of both hand-cars; (2) to the negligence of some person or persons in charge of the rear hand-car; (3) to the defective and worn condition of one or both hand-cars, arising from, or not having been discovered or remedied owing to, the negligence of defendant, or of some person in its service who was intrusted by it with seeing that the ways, works, and machinery or plant were in proper condition; and (4) to the negligence of some person or persons in the employ of defendant, who had the superintendence of the moving of the rear car, while in the exercise of such superintendence. *Held*, that such count was demurrable, on the ground that it was uncertain and ambiguous in stating several independent causes of action, without disclosing which one was relied on to support plaintiff's claim.

Appeal from city court of Birmingham; H. A. SHAUPE, Judge.

Action by H. F. Dusenberry against the Highland-Avenue & Belt Railroad Company for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Judgment for plaintiff. Defendant appeals. Reversed.

Alex. T. London, for appellant. *Whittaker & Whittaker*, for appellee.

WALKER, J. Demurrers to the three counts contained in the original complaint having been sustained, a fourth court was added by amendment. This count avers, in substance, that on the 16th day of November, 1889, the plaintiff's intestate was an employe of the defendant as a section hand on its railroad, and as such employe was rightfully on one of the defendant's hand-cars; and, while he was riding on the same, and engaged in the line of his employment, another hand-car was being run and moved over and along said line of road, each of said cars being under the superintendence and control of the foreman in charge, and running at a high and reckless rate of speed, and in close and reckless proximity to each other, so that by the carelessness and gross negligence of the foreman in charge in directing or allowing said cars to run at such a high rate of speed, and in such close proximity the one to the other, the same collided,

or the rear car ran into the front car, throwing or knocking plaintiff's intestate between said cars, and thereby inflicting injuries from which he died. The portion of the complaint just summarized states a cause of action based upon the carelessness and gross negligence of the foreman as the person having the superintendence and control of both hand-cars. But the complaint does not stop here. Immediately following the averments already mentioned there are additional allegations to the effect that said injuries were caused by reason of the negligence of some person or persons in the service or employment of the defendant, who, at the time of said injuries, had the charge or control of the running, moving, or operating of the rear hand-car, and that one or both of said hand-cars were in a defective and worn condition; that the brakes or cog-wheels to one or both of said cars were in a bad and defective condition, and that said injuries were caused by reason of the defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer, and said defect arose from or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition; that the defects aforesaid were known to, or could have been known to, the defendant by the exercise of reasonable diligence; and that said injuries were caused by reason of the negligence of some person or persons in the service or employment of the defendant who had the superintendence of the moving of said rear hand-car intrusted to them at the time of said injuries, and while in the exercise of such superintendence. The result of the allegations is that the death of the plaintiff's intestate is in one count successively attributed (1) to the gross negligence of the foreman in charge or control of both hand-cars; (2) to the negligence of some person or persons in charge or control of the running, moving, or operating of the rear hand-car; (3) to the defective and worn condition of one or both of the hand-cars, which defect had arisen from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in its service, who was intrusted by it with the duty of seeing that the ways, works, machinery, or plant were in proper condition; and (4) to the negligence of some person or persons in the service or employment of the defendant who had the superintendence of the moving of the rear car, while in the exercise of such superintendence. We do not construe the complaint to charge that the several acts of negligence were concurrent, co-operating causes, and that all of them together contributed to the alleged injury, so that each specification is to be regarded as an integral feature in the description of the mode in which the injury was inflicted. If that construction could be put upon the complaint, the plaintiff would be in the position of having stated his case with unnecessary particularity, and he would not be entitled to recover unless his proof made out the case with equal particularity of description. Smith v. Causey, 28 Ala. 655; Railroad Co. v. Johnston, 79 Ala. 436; Railroad Co. v. Dickson, 88 Ill. 431; Railroad Co. v. Coulton, 86 Ala. 129, 5 South. Rep. 458; 1 Greenl. Ev. § 57 et seq. Here the several specifications of negligence are stated as disconnected defaults, and each one of them seems to be put forward as a separate ground of liability, independent of the others.

In Railroad Co. v. Coulton, supra, the injury complained of was attributed solely to the defective condition of the brakes on a train, but it was charged that the defendant was negligent in several ways in reference to the condition of said brakes. The averments in this regard were construed to be cumulative charges of several independent acts of negligence; and, no demurrer to the complaint having been interposed, it was held that a judgment on the complaint should be affirmed, though there was an absence of proof to sustain one of the cumulative charges or averments. In that case the court was careful to call attention to the fact that no demurrer to the complaint had been interposed. No judgment can be arrested, annulled, or set aside for any matter not previously objected to, if the complaint contain a substantial cause of action. Code, § 2835. It was plain in that case that a good cause of action was stated, and the cumulative charges of negligence could have been stricken out, and the complaint would have remained amply good. The averment which was not proved was not incorporated as part of the description of the cause of action which was sustained by the evidence. In the present case several distinct breaches of duty, each constituting an independent cause of action, are alleged in one count. Neither of the specifications of negligence could be stricken out or disregarded as surplusage, or as immaterial or impertinent matter, for each of them is an essential part of one of several causes of action, upon either of which, as well as upon another, the plaintiff may rely. Nor can that which is one count in form be treated as several independent counts which could be pleaded to separately, for the averments are linked together in one continuous narrative, the several allegations of negligence are all made in connection with and in reference to a single statement of the fact of injury, the circumstance of the death of the plaintiff's intestate is averred only once, but the defendant's liability therefor is rested upon several independent grounds, stated distributively. A cause of action is shown by coupling the averment of injury with either of the specifications of negligence, yet the allegations as to the several independent breaches of duty are so mingled together that they cannot be singled out and met separately, but issues must be made upon all of them at once by any single plea which would answer the whole of the one count of the complaint. If the plaintiff is entitled to a recovery upon proof of only one of the causes of action, then equally substantive

averments in the same count are ignored, and the practical effect is to treat the several averments of breaches of duty as if they were made in the alternative, so that the plaintiff may select any one of them and abandon the rest, though, as they are all in one count, they must all be met by the same plea or pleas. Alternative averments of matters of substance are destructive of all certainty in the formation of definite issues for trial. The prime object of the successive steps in pleading under our system is to evolve such issues so that they may be presented pointedly and distinctly. If, on the other hand, the proof must sustain all the specifications of negligence, the result is to require proof of several independent causes of action to sustain one recovery. It is quite usual in actions for torts, where a single act or transaction is complained of as the cause of the alleged injury, to insert several counts, stating that act in varying shapes to meet different phases of the proof as it may be developed, and to charge in the successive counts different breaches of duty as separate grounds of recovery. Each count is treated as the statement of a distinct cause of action, and appropriate issues may be pleaded to them severally. Maupay v. Holley, 8 Ala. 103. The separation into counts serves the double purpose of supplying apt averments to meet varying phases of proof, and at the same time presenting material issues singly, and not jumbled together. Under our system, "all pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts or matter to be put in issue in an intelligible form. No objection can be allowed for defect of form, if facts are so presented that a material issue in law or fact can be taken by the adverse party thereon." Code, § 2664. It cannot be said of a complaint that it is perspicuous, or that it presents the facts in an intelligible form, so that a material issue can be taken thereon by the defendant, unless it contains a clear and distinct statement of the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment. 1 Chit. Pl. (16th Amer. Ed.) 256. When the complaint states a good cause of action it is not subject to demurrer because of redundant allegations which could be stricken out as surplusage, or because part of the damages claimed are not recoverable. The pleading is not vitiated by the insertion of merely irrelevant or impertinent matter. Kennon v. Telegraph Co., (Ala.) 9 South. Rep. 201; Railroad Co. v. Hall, 91 Ala. 112, 8 South. Rep. 371; Railroad Co. v. Hanlon, 53 Ala. 70; Manufacturing Co. v. Thomas, 20 Ala. 473; Perry v. Marsh, 25 Ala. 659. But when the plaintiff, in a single count, shifts his right of action from one ground to another, and states several breaches of duty in the alternative or disjunctively, so that it is impossible to say upon which of several equally substantive averments he relies for the maintenance of his action, then there is such confusion and obscurity as to the ground upon which a recovery is claimed that the defendant is not clearly informed of the matter to be put in issue; and a count so substantially variant and contradictory in its allegations is demurrable. Andrews v. Flack, 88 Ala. 294, 6 South. Rep. 907; Munter v. Rogers, 50 Ala. 283. In the present case, a plea of contributory negligence on the part of the plaintiff's intestate, though it would present a good defense to several of the causes of action stated, yet would perhaps be insufficient as an answer to the whole count because one of the separable grounds of recovery is the alleged gross negligence and recklessness of the foreman in charge of the two hand-cars. Likewise, a plea setting up a state of facts which would relieve the defendant of liability for the alleged injury if it was caused by reason of a defect in machinery would not be a good answer to the count because it would not meet other issues wholly foreign to this one. In short, if several independent causes of action may be so joined in one count that they may be regarded either as stated in the alternative, or as putting upon the plaintiff the burden of proving averments which are not joined together as parts of the description of a single transaction, then the defendant is put to the answer of a multiplicity of equally material issues at once, and no steps in pleading can reduce the contention of the parties to a single material issue. Inextricable confusion of issues would result from the blending in one count of a number of distinct breaches of duty as independent grounds of recovery, to be chosen from and relied on at the election of the plaintiff. Perspicuity and certainty in his pleading are not exacted of the plaintiff if he is permitted to put forward in one count several independent causes of action, stated in such ambiguous terms as to leave the defendant wholly in doubt as to what alleged breach of duty is really made the ground of the charge of liability. The defendant is entitled to be clearly and distinctly informed of the facts relied upon as the basis of recovery against him. The count which was added by amendment in this case is uncertain and ambiguous in stating several independent causes of action without disclosing which one was relied upon to support the plaintiff's claim, and the demurrer pointing out the defects in the complaint should have been sustained. Reversed and remanded.

(94 Ala. 277)

WARDEN v. LOUISVILLE & N. R. Co.

(*Supreme Court of Alabama.* Nov. 25, 1891.)

CONTRIBUTORY NEGLIGENCE — RIDING ON COW-CATCHER—CUSTOM—OPINION EVIDENCE.

1. Plaintiff was the head brakeman on a freight train running between two stations 17 miles apart, between which were four other stations from one to seven miles apart. His duty, when the train was proceeding along the line, was to attend to the brakes on the front cars, which could be performed only on the tops of the cars. When the train approached a station at which cars were to be left or taken on, it was his duty to open switches, which could only be done on the ground, in front of the engine. While the train was proceeding from one station to another, plaintiff, who was at the time sitting on the

cross-beam in front of the engine, with his legs hanging over the cow-catcher, was injured by the collision of the pilot with a rail of a bisecting road. But for his position on the pilot he would not have been injured. *Held*, that he was guilty of contributory negligence.

2. There was no error in rejecting evidence that it was the custom of plaintiff and other head brakemen on that train to ride between stations on the pilot.

3. In such case, opinion evidence that it is not more dangerous to ride on the front of the engine than on top of the cars is not admissible.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Action by Henry Warden against the Louisville & Nashville Railroad Company for injuries received while in defendant's employ. Judgment was entered on a verdict directed for defendant, and plaintiff appeals. Affirmed.

Taliaferro & Houghton, for appellant. *Hewitt, Walker & Porter*, for appellee.

MCCLELLAN, J. Appellant was plaintiff below. He received personal injuries while in the service of the appellee as head or front brakeman on a freight train, and brought this action to recover damages therefor. The trial was had upon the general issue, and several special pleas, each averring plaintiff's contributory negligence. No evidence was adduced except on the part of the plaintiff, and upon this the court gave the general affirmative charge in favor of the defendant on the theory that his own evidence was free from conflict and all contrary inferences to the proof of negligence on plaintiff's part which proximately contributed to the injury sustained by him. This evidence showed that the train on which plaintiff was employed was a regular cross-country freight train of the defendant company. Its run was over the line between Bessemer and Boyles station, a distance of 17 miles, between which points were four other stations from one to seven miles apart. The business of this train was to receive and deliver at these intermediate and terminal stations cars laden with ore, pig-iron, and the like, and also general freight; and in doing the work assigned to it, it was necessary to do more or less switching, and setting in upon and taking out from side tracks loaded cars, at each one of these stations. It was plaintiff's duty, when the train was proceeding along the line, to attend to the brakes on the two or three cars next to the engine,—a duty which could be performed only on the tops of the cars; and, on approaching a station at which cars were to be left or taken on, his duty was to open switches leading into and out of sidings,—a duty which could only be performed on the ground, in front of the engine. It does not appear that he had any duties to perform, or that any of his duties could be performed, on the pilot, cross-beam, or cow-catcher of the engine, or that it was in any sense necessary for him to be on the cross-beam in front of the engine at any time, and certainly at no time while the train was passing from one to another of the stations served by it. Yet it is uncontroverted in this case that he received the injuries of which he now complains while sitting on this cross-beam in front of the engine,—the beam to which the pilot or cow-catcher is attached,—with his legs hanging over in front of the pilot, and this while the train was out on the main line, proceeding from one station to another, and when the only duty he could possibly have had to perform was upon the top of the train. Not only so, but it is equally clear from the testimony that the casualty was directly the result of the pilot's colliding with a rail of a bisecting road; that no other part of the train or engine was injured; that no other of the several persons on the train was hurt; and that he would not have been hurt but for his having taken this position on the pilot. There being thus no doubt that plaintiff's presence on the pilot contributed proximately to the injuries he sustained, the main question in the case is whether his being there at the time of the accident was negligence *in se* on his part, and to be so declared by the court as a matter of law. The authorities are believed to be uniform to the support of the affirmative of this inquiry. The investigations of the court and counsel have failed to disclose a single adjudged case to the contrary, while many courts are upon the record as holding, either by analogy or directly, that to ride upon the pilot or cross-beam in front of an engine while proceeding on its way along the line of its track, without justifying necessity therefor, involves *per se* such negligence as will defeat an action counting upon injuries received while so riding, and which would not have been received but for the plaintiff's being there. Even the assumption of less dangerous, but, at the same time, improper, positions on moving trains, voluntarily and unnecessarily, has been many times held to be contributory negligence as a matter of law, neutralizing the negligence of the defendant, and destroying an otherwise good cause of action, as is illustrated in the following cases: Martin v. Railroad Co., 41 Fed. Rep. 125; Judkins v. Railroad Co., (Me.) 14 Atl. Rep. 735; Hickey v. Railroad Co., 14 Allen, 429; Railroad Co. v. Langdon, 1 Amer. & Eng. R. Cas. 87; Railroad Co. v. Thomas, Id. 79; Railroad Co. v. Greiner, (Pa. Sup.) 6 Atl. Rep. 246; Railroad Co. v. Ray, 70 Ga. 674; Martensen v. Railroad Co., (Iowa,) 15 N. W. Rep. 569. And it is laid down as a general proposition that the act of riding, without a necessity so to do, on an engine is contributory negligence *per se*, which will defeat recovery for injuries resulting in consequence from collisions, and the like. Abend v. Railway Co., 17 Amer. & Eng. R. Cas. 614; Doggett v. Railroad Co., 34 Iowa, 284; Robertson v. Railroad Co., 22 Barb. 91. As an engine is justly considered the most dangerous place to be on a train moving forward, so, for the same reasons, the pilot is manifestly and obviously the most perilous place on a forward moving engine. Its very name is a proclamation of danger. The sole end it is intended to conserve—the removal of obstructions from the track—is alone sufficient to impress upon it, to the apprehension of every man in

his right mind, the character of being the most perilous place capable of occupation on a train while proceeding from station to station on its way. And so, we repeat, the authorities present unanimity to the proposition that to take position there under such circumstances is a fact not only authorizing the inference of negligence to be drawn by the jury, but to which the law itself imputes negligence.

A leading case on the point is that of Railroad Co. v. Jones, 95 U. S. 439. There the plaintiff was one of a party of men employed by a railroad company in constructing and repairing its road-way. They were usually conveyed to and from their place of labor by the company, and a box-car drawn by an engine was used for this purpose. The plaintiff, although forbidden on several occasions to do so, and warned of the danger, on returning from work one evening rode on the pilot or bumper of the locomotive, and was injured from a collision with some cars standing on the track in a tunnel. There was room for him in the box-car, as there was room for the plaintiff here on the train; and none of those in the box-car were hurt, as here all who remained on the cars escaped injury. It was held that, as the plaintiff would not have been injured had he used ordinary care, he was not entitled to recover, Mr. Justice SWAYNE observing: "His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit." In the case of Kresanowski v. Railroad Co., 18 Fed. Rep. 229, the facts were that the plaintiff, an employe of the defendant railroad company, while being transported to the place where his services were required, along with other employes, on an engine provided by the company, sat, with one or two others, on the front of the engine, with his feet hanging over the pilot, and was injured by a collision with another engine. It was held, on a motion to instruct the jury to find a verdict for the defendant, (1) that the plaintiff himself so far contributed to his injury by his own negligence in placing himself in such a dangerous position that he could not recover; and (2) there being evidence that there was no room for the plaintiff on the tender, and that he had in effect been authorized or invited by the company to ride over the pilot, that, the plaintiff being of age, and able to see and know the risks of the position, even the fact of such invitation and authorization would not justify him in placing himself in a position of obviously great risk and danger. But the strongest support of this doctrine is found in the circumstances of a Michigan case, and the several decisions which were made in different actions which grew out of it. The facts were that a switchman in the employ of a railway company was killed. The engine upon which he was employed, and which was at the time engaged in switching cars about the yard of the company, ran into a truck owned by the defendant, an individual having no connection with the railway company, and driven by his teamster. The result of the collision was the death of the switchman, injury to defendant's teamster, and destruction of the truck and team. The switchman, at the time of the collision, was sitting on the cross-beam of the pilot, with his feet hanging down over the "cow-catcher." He had no duties to perform while on the engine. His duty was to attend to the switching of tracks in front of the engine, getting off and on the cars for that purpose. It is to be noted that, while this case is strikingly like the one at bar in most of its features, it is yet different from it in that the party injured there was a switchman having no duties to perform on the cars, and the engine was being run in the railroad yard, and only for the purposes of switching, while here plaintiff's duties while the train was in motion were all on top of the cars, and at the time of the accident the train was running across country, and not engaged in switching at all, and was in fact engaged in switching at no time except as an incident of its carrying business from station to station; so that in every particular in which there is a difference between the two cases the Michigan case is a much stronger one in favor of the injured party than the present one. Several actions grew out of the transaction. The teamster sued the railroad company, counting on the personal injuries he sustained. The company was found negligent, and judgment went against it, which was paid. The railroad company also paid the owner for the loss of his truck and team. The personal representative of the dead switchman sued the railroad company in the circuit court of the United States, claiming that the death of his intestate resulted from the negligence of the railroad company in not ringing the bell or blowing the whistle for the crossing, over which the truck was passing when the collision occurred, in not having a flagman there to keep the way clear, in obstructing the switchman's view of the crossing, etc. Judge BROWN, now of the supreme court of the United States, before whom that case was tried, directed a verdict for the defendant, upon the ground that the switchman was guilty of contributory negligence in being at the time on the cross-beam of the pilot. The administrator of the switchman then sued the owner of the team and truck, and this last case went to the supreme court of Michigan, and was there determined against the plaintiff, who had recovered in the *nisi prius* court, on the ground that the trial judge had left it to the jury to say whether the switchman was guilty of contributory negligence, when the court itself should have determined that he was guilty of negligence which contributed to his death as a matter of law, and thus withdrawn that issue from the jury altogether. GRANT, J., rendering the opinion of the court, said: "Several questions are raised by the record, but the plaintiff's right to recover is barred by his decedent's contributory negligence, rendering a determination of the other questions unnecessary. There is no dispute about the facts. The judge found as a fact, and so charged the jury, that there was no testimony in the case that the deceased was

obliged to ride upon the cow-catcher, and left it to the jury to determine whether or not this constituted negligence on his part. In the absence of proof, we cannot believe that any railroad company requires its switchmen, or any of its employes, to ride in so dangerous a place. There was a safer place for him to ride. He was neither required nor directed to ride in a position which every person of ordinary intelligence and observation knows was the most dangerous he could have chosen. The fact that upon switch-engines switchmen rode standing upon the platform provided for them in front of the engine had no tendency to prove that the deceased was justified in riding in a sitting posture upon the cow-catcher of a road-engine; nor would the fact that switchmen were in the habit of riding upon the cow-catcher excuse the deceased, as between him and defendant. Yet the judge substantially left the jury to determine the question of contributory negligence by the determination of the question as to whether the deceased was riding in the usual and ordinary place upon the engine. If switchmen always rode there, still that fact would not take them without the rule of contributory negligence. When a safer place is provided, and employes choose a more dangerous one, they do it at their own risk. The difference in danger between standing on a platform of a regular switch-engine and sitting on a cow-catcher, with one's legs hanging over it, is apparent. In the one case the switchman is ready to jump upon the approach of danger; in the other, considerable time must elapse before he could recover his standing position upon the pilot-beam, and put himself in readiness to avoid danger. In the present case deceased was the only one upon the engine who was injured. He chose the only place in which he could have been injured, and chose a sitting posture, instead of a standing posture. Railroad Co. v. Jones, 95 U. S. 439; Doggett v. Railroad Co., 34 Iowa, 284; Kresanowski v. Railroad Co., 18 Fed. Rep. 229. We quote with approval from the language of the court in Railroad Co. v. Jones, as applicable in this case: 'This [contributory negligence] is shown with as near approach to demonstration as anything short of mathematics will permit.' There was no fact in this case for the determination of the jury. The question was therefore one purely of law. It was therefore the clear duty of the court to instruct the jury to find for the defendant. It was as clearly its duty as it would be to determine the legal effect of a contract the terms of which are undisputed." Glover v. Scotten, (Mich.) 46 N. W. Rep. 936. The exigencies of the case at bar do not require that we should go to the full length of the opinion in Glover v. Scotten, and hold that for a switchman to sit upon the pilot or cross-beam of a road-engine being moved about in the yards of a railroad while performing the functions of a regular switch-engine would be negligence *per se*. It may be that the true doctrine in such case is that declared by the supreme court of Kansas in Railway Co. v. McCally, 21 Pac. Rep. 574, where it is held, the company having failed to provide a switch-engine, and having always required switching to be done with an ordinary freight-engine, there being some evidence of a necessity for switchmen to stand on the cross-beam while the engine was being moved about the yard, and to the effect that it was the usual custom of all brakemen in that yard to so ride, that the question as to whether that position was one of danger and voluntarily chosen by the deceased was a question of fact to be determined by the jury under all the circumstances. The position of the Kansas court may be conceded for all the purposes of the case we are considering without affecting the result we have foreshadowed. Here the engine was not a switch-engine, nor being used at the time of the accident as a switch-engine. It was an ordinary road-engine, proceeding on its way along the line of the road between two stations, engaged in its regular business of drawing a freight train. The case is thus wholly unlike McCally's Case, and upon all-fours with Jones' and Kresanowski's Cases. The person injured was not standing on the steps of the pilot, and thus in a position to escape a collision with facility by jumping, as in the Kansas case, but sitting down on the beam, with his legs hanging over the cow-catcher, as in the Cases of Jones, Kresanowski, and Glover, though we are not prepared to say that the particular attitude assumed on the pilot by the person injured could ordinarily be a material consideration. McCally's Case is strenuously pressed upon our attention in connection with the facts that the line over which the train on which plaintiff was injured was running was a short one; that the stations on it were not far apart; that this train had to stop at each one of them, and at each do more or less switching. We do not conceive that these facts can exert any influence on the question. Certain trains on all roads stop at all stations. Usually such trains have switching to do at all stations. The right of the front brakeman on such trains to leave his post of duty—which is on the top of the cars—and take a position of obvious danger on the pilot cannot be made to depend upon the frequent recurrence of stations and a consequent necessity for him to open switches in front of the engine. However frequent the stations are, and whatever the duties of the head brakeman may be at the stations, it is certain that, while the train is passing from one station to another, there are no duties for him to perform on, or even near, the pilot, and no possible necessity for his presence there. We feel entirely safe in the conclusion that plaintiff's conduct in unnecessarily and voluntarily leaving his post of duty, and assuming a position of obviously greater danger, but for which he would not have been injured, involved such negligence on his part as justified the trial court in giving the general affirmative charge against his right to recover.

It is insisted, however, that the case should be reversed because of the exclusion of certain testimony offered by the plaintiff, going to show a custom on the part of himself and other head brakemen on

that train to ride between stations on the pilot. The city court did not, in our opinion, err in the exclusion of this testimony. The fact that one is in the habit of doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is negligence *per se* for persons to walk upon the track of railroads. Doubtless many persons are in the habit of using the track in this way. Yet it has never been supposed, and it cannot be the law, that such custom would convert the track, which the law declares to be *per se* a dangerous place, into a safe place. So a person may be in the habit of crossing railway tracks without stopping and looking and listening for approaching trains; yet we have never heard it suggested such person, when he finally reaps the penalty of his lack of care, is, because of such habit, not guilty of contributory negligence as a matter of law. Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent. Glover v. Scotten, (Mich.) 46 N. W. Rep. 936; Hickey v. Railroad Co., 14 Allen, 429; Judkins v. Railroad Co., (Me.) 14 Atl. Rep. 735; Railroad Co. v. Clark, 15 Amer. & Eng. R. Cas. 261; Railway Co. v. Robbins, (Kan.) 23 Pac. Rep. 113; Humphreys v. News, etc., Co., (W. Va.) 10 S. E. Rep. 39; Hibler v. McCartney, 31 Ala. 501; Bryant v. Railroad Co., 56 Vt. 710.

Nor do we conceive that the court committed error in refusing to receive opinion evidence to the effect that it was not more dangerous to ride on the front of the engine than on the top of the cars. The general rule is well established that such evidence is not competent where all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury. All the facts upon which the opinion which was offered here proceeded were before the court, either through the ordinary vehicles of evidence or as matter of judicial knowledge; and they presented such a state of case as that it became the court's right and duty to declare, in effect, as a matter of law, that the cross-beam in front of the engine was an obviously more dangerous position on a moving train than the top of the train; and the authorities are uniform in support of the proposition that the mere opinions of witnesses to the contrary can exert no influence upon the conclusion which the court itself is esteemed more competent to reach and declare. Chicago v. McGiven, 78 Ill. 347; Bridge Co. v. Pearl, 80 Ill. 251; People v. Morrigan, 29 Mich. 5; Muldowney v. Railway Co., 36 Iowa, 462; Hamilton v. Railroad Co., Id. 31; Railway Co. v. Peavy, 11 Amer. & Eng. R. Cas. 260. We discover no error in the record, and the judgment of the city court is affirmed.

(94 Ala. 636)

EAST TENNESSEE, V. & G. RY. CO. v. THOMPSON.

(*Supreme Court of Alabama.* Nov. 26, 1891.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—RESIDENCE—EVIDENCE—BEST AND SECONDARY—HEARSAY—INSTRUCTIONS.

1. A pipe projecting from a water-tank, whereby a brakeman is knocked off a railroad train and killed, is a part of the "ways, works, machinery, or plant" of a railroad company, within the meaning of Code, § 2590, which renders a master liable to a servant for injuries caused by any defect of the "ways, works, machinery, or plant connected with or used in the business of the master."

2. Where, in an action against the railroad company by the personal representative of such servant, one of the issues was whether the pipe hung so low that a brakeman on top of a car could not safely pass under it, evidence of the height of ordinary freight-cars on the road was relevant, especially in connection with testimony as to the distance of the pipe from the level of the track.

3. In determining the residence of a decedent, and the consequent jurisdiction of the probate court to grant letters of administration, evidence of general reputation and of statements of various persons is hearsay.

4. A question put to the conductor whether he did not, on the night of the accident, or the next day, telegraph the superintendent that deceased lived in another state, and to send his body there, was properly excluded, since, if the purpose was to prove the residence of deceased, it was hearsay, and, if the purpose was impeachment, the telegram, being in writing, should have been produced or accounted for.

5. Although the fact that the pipe, without injury to any one, had been for several years in the same relative position in which it was at the time of the death of deceased is properly considered by the jury in determining the negligence of defendant and the contributory negligence of deceased, yet charges that the jury may infer certain conclusions from such fact are properly refused, as being arguments, and as giving undue prominence to certain phases of the evidence.

Appeal from circuit court, Shelby county; LE ROY F. BOX, Judge.

Action by Mary Thompson, administratrix, against the East Tennessee, Virginia & Georgia Railway Company to recover damages for the alleged negligent killing of plaintiff's husband. The witness Robinson, mentioned in the opinion, was the conductor of the train on which deceased was at work when the accident occurred. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

The court, at plaintiff's request, gave the following charge: "If a person standing on a moving freight-car should be struck by a supply-pipe and knocked from the car, while the tendency would be for the man to fall near the pipe, yet you are to consider other natural laws, such as the forward motion of the body of the man on the train if the train was in motion, and all other natural laws that may

enter in and control the motion of the man's body after he was so struck." The following written charges, requested by defendant, were refused: "If the jury believe from the evidence that the pipe to the tank had stood as it was for a number of years, this is a circumstance at which the jury may look in determining whether or not that pipe was safe, if they believe, further, that trains had passed by each day, and no one had been theretofore injured by said pipe." "(9) If the jury believe the evidence, they ought not to find a verdict for the plaintiff." "(13) If the jury believe the evidence, they must find for the defendant. (14) The supply-pipe of a water-tank is not a part of the ways, works, machinery, or plant of a railroad company." "(*k*) If the jury believe from the evidence that the supply-pipe to the water-tank had been in the same position for a number of years, and trains had passed there each day during all the time, and no one had been injured at that point, this is a circumstance tending to show that the construction of said pipe was not dangerous." "(*z*) The fact, if it be a fact, that the supply-pipe to the water-tank at Montevallo, in the same relative position to the defendant's railroad track in which it was at the time said Anderson Thompson was killed, has been safely used for a number of years, is a circumstance at which the jury may look in determining whether or not the negligence of Anderson Thompson contributed proximately to the death of the said Anderson Thompson." "(*p*) If the jury believe from the evidence that the supply-pipe to the tank had been in the same relative position as it was at the time Anderson Thompson was killed for a number of years, and freight trains had passed said pipe each day and night during all the said time, and no brakeman or other person had been injured before said time by said pipe, this is a circumstance at which the jury may look in determining whether or not the leaving of said pipe in said condition was negligence on the part of the defendant."

Pettus & Pettus, for appellant. *Linton A. Dean*, for appellee.

CLOPTON, J. This action is brought by appellee, as administratrix of Anderson Thompson, under section 2591[1] of the Code. The complaint, which is framed under the first subdivision of section 2590,[2] avers that plaintiff's intestate was, at the time he was killed, in the employment of defendant as brakeman, and that while in the discharge of his duties on the top of a car, attached to a running train, he was struck by a pipe projecting from a water-tank, knocked off, and caused to fall under the train, resulting in his death. The defect which caused his injury is alleged as follows: "That said pipe was projecting from said tank and overhanging defendant's road-bed in such a careless and dangerous position that a brakeman, standing on the top of a moving train, could not pass thereby without being knocked off." There can be no question that the supply-pipe of a water-tank is, in the meaning of the statute, a part of the ways, works, machinery, or plant connected with or used in the business of a railroad company; and if an employe is injured, without contributory negligence on his part, by reason of a defect therein, which arose from or was not discovered and remedied owing to the negligence of defendant or of some person intrusted with the duty of seeing that such ways, works, machinery, or plant were in proper condition, the company is answerable in damages. Railway Co. v. Brooks, 84 Ala. 138, 4 South. Rep. 289.

Among other pleas, the defendant filed two special pleas negativing the existence of the statutory facts which confer authority on courts of probate within their respective counties to grant letters of administration, and averring that the letters granted to plaintiff are void. Whether the validity of the letter can be collaterally assailed it is unnecessary to decide. Plaintiff having joined issue on the pleas, any competent evidence tending to support their truth is admissible. Residence is a fact to which a witness may testify, or he may testify to the acts of the party or the circumstances from which it may be inferred. But it cannot be proved by what the people at the alleged place of residence or the relatives of the deceased said, or the general reputation among the people with whom he associated, as to where he lived. This is mere hearsay.

One of the main issues being whether the pipe projected so far and extended so low that a brakeman on the top of a car could not safely pass under it, evidence of the height of the ordinary freight-cars in use on defendant's road was relevant, especially in connection with testimony as to the distance of the pipe from the level of the track. Such evidence throws light on a material inquiry. Railroad Co. v. Smith, 90 Ala. 25, 8 South. Rep. 43.

Neither was there error in refusing to allow defendant to ask the witness Robinson if he did not, on the night of the accident, or the next day, telegraph the superintendent of defendant's road that deceased lived in Rome, Ga., and to send his body to that place. If the purpose was to prove the residence of deceased, the question is obnoxious to the objection that residence cannot be proved by declarations of a third person, and especially when such third person is the agent of defendant. If the purpose was impeachment, the telegram, being in writing, should have been produced and shown, or read to the witness, that he might have opportunity to inspect and explain, or its

[1] Section 2591 provides that, "if such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor," etc.

[2] Code, § 2590, provides that "when a personal injury is received by a servant or employe in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employe, as if he were a stranger, and not engaged in such service or employment, in the cases following: (1) When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer," etc.

non-production accounted for. Floyd v. State, 82 Ala. 16, 2 South. Rep. 683.

If the supply-pipe to the tank had been for a number of years in the same relative position in which it was at the time plaintiff's intestate was killed, and freight trains had passed the pipe each day and night during that period, and no brakeman or other person had been previously injured, these are facts proper to be considered by the jury on the inquiry of negligence on the part of defendant, or of contributory negligence on the part of defendant. Railroad Co. v. Hall, 87 Ala. 708, 6 South. Rep. 277; Railroad Co. v. Arnold, 84 Ala. 159, 4 South. Rep. 359. It is the duty of the jury to consider the evidence tending to show such facts, as it is their duty to consider all evidence admitted before them. But the charges asked by defendant, based on the hypothesis of these facts, are objectionable for the reason that they select and direct special attention to the evidence tending to show that phase of the defense, and give it undue prominence. We have heretofore observed, more than once, that "charges of this character —assuming that the jury may look to this fact, or may consider that fact, or are authorized to infer certain formulated conclusions from the evidence, and especially from specific parts of it—have often been condemned by us as objectionable, and should never be given, although the giving or the refusal of such instructions may not be a reversible error. They are legitimate arguments to the jury, not announcements of legal principles, proper to be in the form of instructions by the court." Snider v. Burkes, 84 Ala. 53, 4 South. Rep. 225. Such charges are regarded as mere arguments, and on this account properly refused. Salm v. State, 89 Ala. 56, 8 South. Rep. 66; Hawes v. State, 88 Ala. 37, 7 South. Rep. 302; Riley v. State, 88 Ala. 188, 7 South. Rep. 104. The charge given at the instance of plaintiff is subject to the same objection. It is a mere argument, announcing no legal proposition, but, having been given, will not reverse the judgment. It is manifest on the evidence that the court would not have been justified in giving the affirmative charge in favor of defendant, or the charge that the jury could not find for plaintiff. We have examined the other rulings assigned for error, and discover no error in them.

Affirmed.

(94 Ala. 286)

KANSAS CITY, M. & B. R. Co. v. HIGDON.

(*Supreme Court of Alabama.* Nov. 27, 1891.)

CARRIERS OF PASSENGERS — LIABILITY FOR DOGS LOST BY CARRIER—RULES OF COMPANY—HARMLESS ERROR.

1. Plaintiff was a passenger for E. in a second-class car, with his dog. The conductor told him, under the company's rules, dogs must go in the baggage-car. Plaintiff delivered the dog to the baggage-master, and told him to put it off at E., and that he would not pay him any money for the dog. On arriving at E., the baggage-master refused to deliver the dog without the payment of 25 cents, which plaintiff refused to give, and the dog was carried further on, and lost by the negligence of the baggage-master. Plaintiff afterwards, and before learning of the loss of the dog, offered to pay what was due on it. *Held*, that plaintiff could recover for the dog from the company, though it had a rule providing only for the payment of a fee to the baggage-master, and relieving itself of all liability; plaintiff not being informed of the rule, and having no knowledge of it.

2. Defendant having had the benefit under certain pleas of matters set out in others, demurrers to which were sustained, any error in sustaining the demurrer was harmless.

Appeal from circuit court, Jefferson county; JAMES B. HEAD, Judge.

Action by E. L. Higdon against the Kansas City, Memphis & Birmingham Railroad Company to recover damages for the loss of a dog. From a judgment on a verdict directed for plaintiff, defendant appeals. Affirmed.

Defendant's pleas numbered 1 and 2 were the general issue, and the special pleas interposed by defendant set up a rule of defendant regulating the carriage of dogs, and disclaimed responsibility for dogs so carried; averred that the defendant was not, and did not hold itself out to be, a carrier of dogs on its passenger trains; that the only compensation provided for their carriage would be the personal perquisites to the baggage-master for their carriage.

Hewitt, Walker & Porter, for appellant.
Cabaniss & Weakley, for appellee.

WALKER, J. The defendant had the benefit under pleas numbered 1 and 2 of the matters set up by the three special pleas, the demurrers to which were sustained. Such being the case, if there was error in sustaining the demurrers, it was error without injury to the defendant, and does not afford ground for a reversal of the judgment. Railroad Co. v. Davis, 91 Ala. 487, 8 South. Rep. 552.

The appellee was a passenger on the appellant's train from Birmingham to Elliott, a station on the appellant's line of road. When he boarded the train he went into a second-class car, carrying his dog along with him. When the conductor passed through the train collecting tickets he saw the dog, and then told the appellee that it was against the rules of the company to carry dogs on its passenger-coaches, and that he would have to put the dog in the baggage-car. Thereupon the appellee and a brakeman took the dog into the baggage-car, and delivered it to the baggage-master. The appellee testified, without contradiction, that he told the baggage-master to put the dog off at Elliott, and also that he told him that he would not pay him any money for the dog. When the train arrived at Elliott, the baggage-master refused to deliver the dog, unless the appellee would pay him a fee of 25 cents. The appellee declining to make this payment, the dog was carried to Memphis, and was lost. The appellee afterwards offered to pay what was due on the dog, but did not renew such offer after he was informed that the dog was lost. There is no evidence to show that when the appellee delivered the dog to the baggage-master he had knowledge or notice of the rule under which the appellant seeks to relieve itself of responsibility. The conductor was acting within the apparent scope of his authority when he gave directions as to the

disposition to be made of the dog. When the baggage-master received the dog, there was nothing to indicate that he was acting in his own behalf, rather than as an employe of the appellant and for it. It does not appear that the appellee was in any way made to understand that in reference to the carriage and custody of the dog he was to look to the baggage-master individually, and not to the railroad company. He was not informed that the company was unwilling to transport the dog or to become responsible for it. He was simply told to leave the dog in another part of the train, and with the person in charge of the baggage. He was not presumed to know the rules of the company as to the kinds of property it would receive for transportation. It does not even appear in this case that the rule relied on was posted in the depot, or in any other public place, at the station where the appellee was received as a passenger. The rule itself shows that it was the duty of the defendant's employes to give notice to the owners of dogs of the conditions upon which they would be carried by the railroad company, and, if the owners were unwilling to accept such conditions, to refer them to the express company. In the present case the conductor permitted the dog to remain on the train, and had it put in the baggage-car, and neither he nor the baggage-master intimated to the appellee that the company was unwilling to carry the dog or to become responsible therefor. It affirmatively appears that the appellee did not know of the rule in question. He was entitled to rely upon and to follow the instructions given by the conductor. Railroad Co. v. Huffman, 76 Ala. 492; Jones v. Railroad Co., 89 Ala. 376, 8 South. Rep. 61; Railroad Co. v. Rosenzweig, (Pa. Sup.) 6 Atl. Rep. 545. A rule of which the passenger has no notice cannot have effect to relieve the railroad company of responsibility for an article accepted for carriage by an employe who is intrusted with the duty of receiving and taking charge of goods delivered for transportation, and who accepts the article in question apparently in the course of his employment and on behalf of the principal. The conductor and the baggage-master could be treated by a person having dealings with the defendant as having all the ordinary powers incident to their respective positions except so far as restrictions are imposed upon their authority which are known, or ought to be known, to the person dealing with them. In transacting the business intrusted to them, within the usual and ordinary scope of such business, they act within the extent of their authority; and the principal is bound, provided the party dealing with them acts in good faith, and without notice of any restrictions or limitations upon their authority, (Wheeler v. McGuire, 86 Ala. 398, 5 South. Rep. 190; Coffin Co. v. Stokes, 78 Ala. 372;) and the principal is responsible for the act of the agent when done within the apparent scope of his authority, though in violation of a rule or instruction of the principal, which was unknown to the person dealing with the agent, (Gilliam v. Railroad Co., 70 Ala. 268.) In the present case, the baggage-master, when he received the dog, was engaged in the particular business with which he was intrusted by the defendant. The plaintiff was entitled to suppose that he was dealing with the defendant through its regularly accredited agent in that department of its business. If the defendant was unwilling to receive or to become responsible for the dog, the plaintiff should have been informed to this effect by the agent. No such information having been given, and the rule now set up being unknown to the plaintiff when his dog was received without objection, he was entitled to look to the defendant for its carriage and proper delivery; and as the dog was lost, and was not accounted for, the defendant was liable on the undisputed facts shown by the evidence. The plain conclusion from the evidence is that the dog was lost in consequence of the negligence of the baggage-master; and, in the circumstances developed by the proof, the defendant could not shift the liability from itself to the baggage-master individually. Cantling v. Railroad Co., 54 Mo. 385; Minter v. Railroad Co., 41 Mo. 503; Bish. Non-Cont. Law, § 1157. The affirmative charge in favor of the plaintiff was properly given. Affirmed.

(94 Ala. 545)

MEMPHIS & C. R. CO. v. GRAHAM.

(*Supreme Court of Alabama.* Nov. 27, 1891.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—RULES—PLEADING—EVIDENCE—CUSTOM—INSTRUCTIONS.

1. In an action against a railroad company for the negligent killing of a conductor while uncoupling cars, a plea that deceased was negligent in violating a rule of the company forbidding employes from going between cars in motion to couple or uncouple them, where not demurred to because it does not aver that deceased knew of the rule, raises a valid issue for the jury.

2. A rule of a railroad company forbidding employes from going between cars in motion to uncouple them is reasonable and "wholesome."

3. Since this rule is clear and explicit, evidence that for many years it had been the custom of brakemen to go between cars in motion to make uncouplings was inadmissible to show that the rule, not having been insisted on, was not binding on deceased.

4. Where it was contended that a rule of the company requiring freight-car conductors to "assist" in shifting and making up trains meant that they should only superintend and give orders, evidence that for many years it had been their custom to couple and uncouple cars was admissible, since "assist" is ambiguous.

5. A conductor who voluntarily, even though with the acquiescence of the railroad company, undertakes to uncouple cars, subjects himself to all reasonable rules prescribed for those whose duty it is to do such work.

6. Where the evidence tended to show both that the conductor could have uncoupled the cars in no other way, and also that he might have uncoupled them from the platform with perfect safety, it was error to refuse to charge that, if the car could have been uncoupled with safety after it had stopped, or with safety from the platform, and if deceased knew of the rule which required all employes to exercise great care in coupling and uncoupling cars, then his failure to wait till the car stopped, or to uncouple the car from the platform, would preclude his recovery.

7. Although a conductor is not a person intrusted with the duty of seeing that the "ways,

works, machinery, or plant" of a railroad company are in proper condition, within Code, § 2590, subd. 1, which declares a master liable to a servant for injuries caused by any defect therein, yet a rule requiring railroad employes to examine the soundness of cars, engines, machinery, etc., as far as reasonable, before using them, is proper.

8. A charge predicated on a fact not in evidence is properly refused.

9. It is not negligence for a servant to go between cars, contrary to rules of the railroad company, when the duty required cannot otherwise be performed.

Appeal from circuit court, Madison county; H. C. SPEAKE, Judge.

Action by Ella P. Graham, as administratrix, against the Memphis & Charleston Railroad Company, for the alleged negligent killing of plaintiff's husband. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

The printed rules of the company required the coupling to be done by the brakemen with sticks made for that purpose. Rule No. 139, introduced in evidence, required that "every employe must exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching of cars and the movement of trains, which work each employe must look after, and be responsible for his own safety. Jumping on or off trains or engines in motion, getting between cars in motion to couple or uncouple them, and all similar imprudences, are dangerous and in violation of duty." Defendant excepted to the following portions of the general charge given by the court: "Again, if you find that there was such defect, and the same was known to the person in the employment who was intrusted with the duty of seeing that the draw-head of defendant's car was in proper condition, and that such defect had existed for such a length of time as, with proper diligence, it could have been discovered or remedied by defendant, then, in that event, you would be authorized under the law to say that the defendant was negligent. (2) And if you further believe that the death of deceased was caused by the negligence of defendant as above described, then the law would authorize you to find a verdict for the plaintiff. (3) You must also look to all the evidence, including custom referred to by the witnesses, to determine the reasonableness of said rules, and whether or not they had been modified by the custom of employes in coupling and uncoupling cars, and whether or not such custom or usage was known to defendants." The court refused to give the following written charges, requested by defendant: "(1) If the jury believe the evidence they must find for the defendant. (2) I charge you that rule 139, in the rules attached to the time-table, and which has been introduced in evidence, is such a rule as defendant had a right to establish; and, if John L. Graham came to his death in consequence of his trying to get between cars while in motion to uncouple them, he was acting in violation of such rule, and your verdict should be for defendant. (3) It is not shown in this case that it was the duty of the defendant, while the car with the broken draw-head was at Huntsville for several days prior to October, 1887, to examine or inspect the same, or to notify said Graham, as conductor, of its condition. (4) If the jury find from the evidence that a rule of the defendant made it a violation of duty for an employe to get between cars in motion to couple or uncouple them, and that John Graham came to his death in trying to get between cars in motion to uncouple them, then the verdict of the jury must be for the defendant. (5) If the jury believe from the evidence that John L. Graham came to his death while violating a rule of defendant in trying to get between cars in motion to uncouple the same, the verdict must be for the defendant. (6) I charge you that rule 138, in the rules attached to the time-table, and which has been introduced in evidence, is a reasonable rule, which the defendant had the right to establish. (7) If it was safer for Graham to go on the platform of the coach, and from there couple or uncouple, and it was more dangerous to go between the cars to couple or uncouple, and these facts are shown by the evidence, and Graham adopted the more dangerous method of coupling or uncoupling, then Graham was guilty of contributory negligence, and the verdict of the jury should be for the defendant. (8) No failure of duty on the part of defendant in allowing the draw-head or coupling apparatus to become or remain defective or broken would excuse John L. Graham from examining the condition of such draw-head or coupling apparatus before using the same, or exposing himself between the cars; and, if the jury believe from the evidence that if John L. Graham had examined the condition of the draw-head or coupling apparatus he would have discovered that it was defective or broken, so as to be dangerous to use,—then the verdict must be for the defendant. (9) Although the railroad company may have been negligent in having a defective car, yet if the jury believe from the evidence that Graham violated a rule of the company in going between a car in motion to uncouple it, and thereby was killed, and that at the time he violated such rule he had knowledge of the said rule, then the plaintiff cannot recover in this case. (10) If the jury believe from the evidence that it was a rule of the company that no employe should enter between cars in motion to couple or uncouple them, and that Graham had knowledge of such rule, and in violation of such rule he did go between said cars while in motion, and if you believe from the evidence that his violation of said rule approximately contributed to his death, then the plaintiff cannot recover in this case. (11) If the jury believe from the evidence that said car could have been uncoupled with safety after said car had stopped, or with safety from the platform of said car, and the rule of the company required that all employes should exercise great care and caution in coupling and uncoupling cars, and that Graham had knowledge of such rule, then he was bound to uncouple said car from the platform, or wait till said car had stopped before he attempted to uncouple it; and

if you believe that his failure to do so proximately contributed to his death, then the plaintiff cannot recover."

Humes & Sheffey, for appellant. *Wm. Richardson* and *E. L. Palley*, for appellee.

COLEMAN, J. The evidence shows that the plaintiff's intestate, John L. Graham, whose regular employment was that of freight-car conductor, went between the cars while in motion to uncouple a freight-car from a passenger-car, and on account of a defective or broken draw-head or coupling appliance was crushed and killed. There was a platform to the passenger-car next to the freight-car where the uncoupling was to be done. The defense was contributory negligence, and that plaintiff's intestate came to his death in violation of a rule of defendant, which prohibited employes from going between the cars while in motion to uncouple them. The plea does not set out the rule, or aver that plaintiff's intestate knew of the existence of such rule. In the case of Railroad Co. v. Hawkins, 92 Ala. —, 9 South. Rep. 271, it was distinctly declared as the settled doctrine in this state that the adoption and promulgation by an employer of a rule for the guidance of an employe does not charge the latter with knowledge thereof, so as to impute negligence to him for its violation, but that to such end it is essential that knowledge of its existence be brought home to the employe. It was further held that a plea setting up a violation of such rule as establishing contributory negligence was open to demurrer which failed to aver knowledge of such rule. It is also well settled that where issue is joined upon an insufficient plea it becomes one of the issues to be tried by the jury, and that the defendant is entitled to the advantage of such plea, in the introduction of evidence in support of it, and in the instructions to be given by the court to the jury. Farrow v. Andrews, 69 Ala. 97. A conductor who voluntarily, even though by the permission or acquiescence of the employer, undertakes to perform the duties of coupling or uncoupling cars, subjects himself to all reasonable rules and regulations prescribed by the employer for the government of those whose duty it is to perform this work. Rule 139, offered in evidence, prescribes that "getting between cars in motion to couple or uncouple them is dangerous, and in violation of duty. All employes are warned that, if they commit these imprudences, it will be at their own risk and peril." This rule, or one similar to it, has been declared by repeated decisions of this court to be reasonable and "wholesome," and that railroad companies were justifiable in adopting and enforcing it for their own protection and that of employes. Railway Co. v. Propst, 90 Ala. 3, 7 South. Rep. 685, 83 Ala. 518, 3 South. Rep. 764; Pryor v. Railroad Co., 90 Ala. 35, 8 South. Rep. 55; Railroad Co. v. Watson, 90 Ala. 69, 8 South. Rep. 249. When the authorities declare that the rule is "reasonable" and "wholesome," it is with the qualification or understanding that the duties required may be performed consistently with the observance of the rule; and if the sticks furnished by the employer —as the evidence in this case tends to show—are so short that a coupling cannot be made by their use without going between the cars, the rule which forbids employes from going between cars to effect a coupling while in motion would afford no protection to the master if the duty imposed necessitated its non-observance. The rule which requires the use of sticks to make couplings is "reasonable" and "wholesome," and an employe who, having knowledge of the rule, and provided with a stick by which this duty can be performed without going between the cars, and in violation of the rule, without urgent and excusable necessity, goes between the cars, and is thereby injured, is guilty of contributory negligence of an aggravated character, and his remedy is gone. Beach, Contrib. Neg. § 141; Pryor v. Railroad Co., supra; Railway Co. v. Propst, 83 Ala., 3 South. Rep., supra. There is no evidence to show that cars can be uncoupled by the use of a stick, and we presume sticks, as now prepared, cannot be used for that purpose. In referring to the use of sticks, the rule prescribes that they must be used for making couplings, not uncouplings.

In considering this case, we have kept in view the fact that the injured person was the conductor himself, authoritatively exercising control over the engineer and brakemen and the movement of the cars. Is there any evidence to show that the work of uncoupling the cars could have been performed in an apparently safe way, which deceased did not adopt, or that the condition of the cars was such that they could not be uncoupled with reasonable safety except by going between them, or that the company had waived its right to insist upon an observance of the rule? As a legal proposition, independent of any rules provided by the master, if an employe selects a dangerous way to perform a duty, knowing it to be attended with danger, when there is a safe way apparent to him, and he undertakes to perform the duty in the dangerous way, and in consequence thereof is injured, he is guilty of such contributory negligence as to cut off all legal remedy for the injury. Railroad Co. v. Orr, 91 Ala. 548, 8 South. Rep. 364; Railroad Co. v. Holborn, 84 Ala. 137, 4 South. Rep. 146; Highland Ave. v. Walters, 91 Ala. 435, 8 South. Rep. 360. The act of uncoupling cars while in motion by going between them does not necessarily constitute contributory negligence, under all circumstances. Goodrich v. Railroad Co., (N. Y. App.) 22 N. E. Rep. 397. It is, however, necessarily an act attended with more or less danger. There was evidence introduced on the trial which tended to show that the cars, on account of their condition, could not have been uncoupled from the platform of the passenger-car; but there was evidence tending to show that the uncoupling could have been effected in this way with perfect safety, and that that was the proper way, under the circumstances existing in this case. Applying the principle of law declared in the Orr Case and Holborn Case, supra, in regard to the duty of an employe when there is a

dangerous way and a safe way to perform an act, the court was in error in refusing to give charge No. 11, requested by appellant. It is contended by appellee that this charge and other charges were properly refused, under the authority of Railroad Co. v. Perry, 87 Ala. 394, 6 South. Rep. 40, because the charges failed to hypothesize the question of knowledge or notice of the existence of the rule. The plea in the present case failed to aver knowledge or notice, and issue was joined upon it in this insufficient condition. The fact of knowledge or notice was not an issue before the jury, and the charges requested were not objectionable for ignoring an outside issue. Railroad Co. v. Watson, 90 Ala. 68, 8 South. Rep. 249; 87 Ala. 394, 6 South. Rep. 40, supra. It may be that ordinarily freight or box cars, which have no platform, cannot be uncoupled without going between the cars; but this would not excuse an employe who failed to use the platform, if there was one, and the use of the platform was obviously the safer way.

A disputed question in the case arises upon the proper construction of rule 201, which requires freight-car conductors "to assist in the shifting and making up of trains." In behalf of plaintiff, evidence was introduced tending to show that under the rule it was the custom, and had been for many years, for conductors to couple or uncouple cars, and that at times all the conductors on the road performed this duty, and it was generally understood that the word "assist" included this duty. One witness testified that he had seen every conductor on the road assist in this way in coupling or uncoupling cars. For appellant it was contended that coupling and uncoupling was the duty of brakemen only, and the word "assist" meant that conductors should superintend and "give the proper signals." We think the evidence of custom on this question was properly received. Rules for the government of employes should be written with precision, and be free from ambiguity. The principle of law is "that parol evidence of a usage is admissible to explain terms ambiguous or doubtful in significance, or from which to infer the intention, understanding, and agreement of the parties, and to incorporate a stipulation or element wherein the contract is silent." Railroad Co. v. Johnston, 75 Ala. 604; Barlow v. Lambert, 28 Ala. 704. The court properly received evidence which tended to show the meaning of the word "assist" as used in rule 201, and, the evidence on this point being in conflict, the determination of the disputed fact was a question for the jury.

Evidence of usage and custom for many years, on the part of brakemen, to go between the cars while in motion to make an uncoupling, was introduced to show that rule 139, which prohibits this mode of coupling and uncoupling, was not insisted upon by the railroad company, was not binding upon the employes. The rule is clear and explicit in terms, free from ambiguity or equivocation. It does not "pander in a double sense." Mr. Greenleaf (2 Ev. § 251) says: "The true office of a usage or custom is to interpret the otherwise indeterminate intention of parties to fix the meaning of words and expressions of doubtful or various senses." In the case of Railroad Co. v. Johnston, 75 Ala. 604, this court declared that evidence of usage or custom will not be received when it varies or contradicts the express terms of a contract. Barlow v. Lambert, 28 Ala., supra. "When persons enter into express stipulations, it is a reasonable rule, subject only to a few exceptions, that neither custom nor usage will be allowed to dispense with such express stipulations." Railroad Co. v. Kolb, 73 Ala. 401. The rule has been declared to be "reasonable" and "wholesome." It was adopted for the protection of the company and for the safety of its employes. Evidence of usage and custom of its violation by those it was intended to protect, either to exempt them from its obligations or to subject the company to damage because of its repeated violation, does not come within the exception, and such evidence is inadmissible. The case of Hissong v. Railroad Co., 91 Ala. 518, 8 South. Rep. 776, does not in any manner conflict with the rule here declared.

So far as rule 140, or any other rule, militates against the liability imposed upon the employer or master under section 2590, or contravenes the principle of law which requires the employer or master to furnish and maintain suitable material and appliances for the safe prosecution of its business, and the right of the employe to presume that this has been done, it will be regarded as wholly inoperative, and afford no protection to the employer or master; but, so far as rule 140 imposes the duty upon employes to examine for their own safety the condition of the car, engines, and machinery, etc., before using them, or exposing themselves on or with the same, so as to ascertain, as far as reasonably can be done, their condition and soundness, it is reasonable and proper. It cannot be expected of car conductors or brakemen to make the same careful examination, and to be able to discover defects to the same extent, as that expected and required of the employer or master, or person intrusted generally with this duty for the public safety or safety of employes; but the character of the general duties to be performed by conductors and brakemen are such that they necessarily become more or less familiar with the appliances and machinery constantly in their use and under their supervision, and to know to some extent when they are not in proper condition for safe use. To the extent of their information and the opportunities afforded to make such examination, consistently with their other duties and the circumstances attending, they should observe and obey the rule. Whether the deceased was negligent in not making such examination, or whether the defect was of that character that it could not have been discovered upon such examination as it was his duty to make, and whether he did conform to the rule, and failed to discover the defect, is a question of fact for the jury. We do not think a conductor or brakeman is "a person in the service

of the master or employer intrusted with the duty of seeing that the ways, works, machinery, or plant were in proper condition," within the meaning of subdivision 1 of section 2590[1] of the Code, and our understanding of the rule of the company is that the duty imposed upon conductors and brakemen to examine the machinery and appliances devolves upon those conductors and brakemen who are using the machinery, ways, works, etc., in question. The fact that a brakeman or conductor of some other train at a former period may have noticed the defect, and neglected to report such, did not exempt the conductor, whose duty it was to use the defective appliance or machinery, from making the examination for his own safety as required by the rule.

The employe's act does not and never was intended to take from the master the defense of contributory negligence. Railway Co. v. Bradford, 86 Ala. 579, 6 South. Rep. 90; Railroad Co. v. Holborn, 84 Ala. 133, 4 South. Rep. 146. The principles of law declared in Railroad Co. v. Orr, and Railroad Co. v. Holborn, as to what constitutes contributory negligence on the part of an employe, may be applicable to two phases of the tendencies of the testimony in this case,—that which defines when an employe must select the safer way to perform a duty, and also when an employe assumes at his own peril that proper appliances have been provided by the master. The jury is the sole judge whether the facts bring the case within their application. The general charge of the court, considered as a whole, with but few exceptions, is a clear and correct exposition of the law as applicable to the many questions raised by the evidence. The court, however, should not have left it to the jury to say whether the rule was reasonable which requires that employes shall use a stick in coupling cars, or which prohibits them from going between cars while in motion to couple or uncouple. As a matter of law the rule is reasonable. When the proof shows that the company refused to furnish sticks, or that the duty required, on account of the appliance or other proper causes, could not be performed without a violation of the rule, the master cannot invoke the rule for its protection. In such cases the court might and should hypothesize the enforcement of the rule upon the finding of the jury as to these facts.

We have attempted to limit and define the proper boundaries of usage and custom as applicable to the facts in this case. Charge No. 1, requested by defendant, was properly refused. Charge No. 3 is abstract, as there is no evidence tending to show the car was in Huntsville prior to October. Charges 2, 4, 5, 7, 9, and 10 were faulty, in ignoring the evidence which tended to show that on account of the condition of the appliances the duty could not be performed except by going between the cars. Charge 8 assumes that John L. Graham did not examine the draw-head and coupling apparatus. This was a fact to be determined by the jury. Charge 11 states the law very clearly, as we understand it, and ought to have been given. Charge 6 also ought to have been given. If desired, and the evidence justified it, an explanatory charge should have been requested by appellee. Reversed and remanded.

WALKER, J., not sitting.

[1] Code, § 2590, provides that a master shall be liable to his servant for any personal injury "caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master."

(94 Ala. 152)

GRADY v. IBACH *et al.*

(Supreme Court of Alabama. Dec. 1, 1891.)

USE AND OCCUPATION — RIGHTS OF CESTUI QUE TRUST.

1. Under Code, § 2715, which provides that a reasonable satisfaction may be recovered for the use and occupation of land demised by deed, the action is one for the recovery of rent, and the relation of landlord and tenant must have existed; and where executors, holding land in trust to manage for the testator's daughter until her majority, leased the same, she cannot, on reaching her majority, recover of the lessee for use and occupation during her minority, she not having had actual possession of the land.

2. Where the trust devolved on the executors was also for the purpose of paying to the testator's wife during her life one-third of the net income of other property, taking possession of the property by the daughter on becoming of age would not operate to substitute her in place of the executors so as to vest in her the right of action.

3. As the trust would not fail for want of a trustee, it mattered not that all of the executors had resigned or died during the daughter's minority.

Appeal from circuit court, Mobile county; W. E. CLARK, Judge.

Action by Carrie J. Grady against M. Ibach and others for the use and occupation of certain premises. Judgment for defendants. Plaintiff appeals. Affirmed.

Frederick G. Bromberg, for appellant. *W. E. Richardson*, for appellees.

CLOPTON, J. The appellant brings the action to recover for the use and occupation of two stores under and a part of the Gulf City Hotel, in Mobile, from November, 1883, to February, 1890. The hotel was leased to James Flanagan by the executors of D. O. Grady, who was the father of the plaintiff, for the term of one year, commencing November, 1879. In November, 1882, Flanagan sublet the stores to defendants, who occupied them until February, 1890, renting in the mean time from, and paying the rent to, Flanagan, who held over after the expiration of his lease, and continued to occupy the hotel during the entire period of defendant's occupation of the stores. By the fifth clause of the will of D. O. Grady, under which plaintiff derives title to the premises, the testator devised and bequeathed all his real and personal property, not otherwise disposed of, to his executors, named in a prior clause, in trust to take possession and hold the real estate, rent the same from time to time, receive the rents, pay the taxes, keep the property insured at

their discretion, and pay to the wife of the testator during her life one-third of the net proceeds arising therefrom in lieu of dower; also to hold, manage, and control the balance of his estate, except the portion of the personal property bequeathed to his wife and certain contingent legacies, until plaintiff should reach 21 years of age, when they were to deliver the same, real and personal, together with what remained of the contingent fund provided in the will, to plaintiff. The executors were required to appropriate money of the estate at their discretion, for the support, maintenance, and education of plaintiff. The contingent fund alluded to consisted of the annual revenue remaining after paying the several sums directed, which the executors were required to keep as a fund to be applied to the payment of any debts incurred by the estate which the current net revenue was insufficient to discharge, and to be appropriated to the support of his wife, if one-third of the rents should be insufficient for that purpose. Two of the four executors resigned in February, 1881; another died in March, 1883; and the fourth in July or August, 1886. Plaintiff became of age March 31, 1890, since which time defendants have paid her the rent for the stores.

The question arising on these facts, which are undisputed, is, can plaintiff maintain the action against defendants for use and occupation of the premises during her minority? Such action is regulated by statute, which provides a reasonable satisfaction may be recovered for the use and occupation of land, where there has been a demise by deed or by parol, and no specific sum agreed on as rent; or when the tenant has been let into possession upon a supposed sale of the land, which, from his act, has not been consummated; or when the tenant remains on the land by the sufferance of the owner. Code, § 2715. The action is limited to the enumerated cases. It is essentially an action to recover rent, and rests on an agreement, express or raised by the law on the facts, to pay the value of the use of the land. As a general rule, to support the action the conventional relation of landlord and tenant must have existed. A contract, express or implied, either creating the technical relation, or bringing the parties into a relation from which like rights and duties result, is an indispensable element. These principles have been uniformly recognized by this court. Powell v. Security Co., 89 Ala. 490, 8 South. Rep. 136; Stringfellow v. Curry, 76 Ala. 394; Weaver v. Jones, 24 Ala. 420. There are insurmountable obstacles to the maintenance of the action by plaintiff. In the absence of an express agreement, or of actual possession, only the owner of the legal estate can maintain an action for use and occupation. 12 Amer. & Eng. Enc. Law, § 757. In such case, the law will not imply a promise to pay rent to other than the owner of the legal estate. It is manifest that, by the devise, the legal estate was vested in the executors. They alone were authorized to take possession and hold the real estate, and rent it, and receive the rents during the minority of plaintiff. They alone could have dispossessed the tenants. The executors let the premises to Flanagan; the relation of landlord and tenant existed only between them. The plaintiff was not entitled to receive or recover the rents during her minority; she could not have maintained ejectment or an action on the lease to Flanagan. The express contract would have supported an action against him for use and occupation after the expiration of his lease by the executors, in their individual names, though they were accountable for the proceeds recovered. It is self-evident that a several right of action on the same agreement cannot exist at the same time in two persons, there being no several covenants. A *cestui que trust* cannot maintain an action for use and occupation, where the letting was by the trustee. Tayl. Landl. & Ten. § 639. Plaintiff not having had actual possession, and there being no express contract between her and Flanagan for the rental year commencing November, 1879, or with the defendants when they first entered into possession, the law will not imply a promise from defendants to her in the absence of title. Couch v. McKellar, 33 Ala. 473. If it be said that the delivery of the property to her, on attaining her majority, operated, the trust having been executed, to vest the title in her, the general rule is that, as defendants did not enter under or by her permission, she can recover for use and occupation only from the time she had the legal estate, though she may have had the equitable estate. Balls v. Westwood, 2 Camp. 13, note; Harris v. Booker, 12 Moore, 283.

Neither did the delivery of the property operate to substitute her in the place of the executors so as to vest in her the right of action. Whatever might have been the effect had the trust been solely for the benefit of plaintiff, and there had been a settlement discharging the executors from liability to further account, mere taking possession of the property on attaining majority cannot have such effect, when the trust devolved on the executors is for other uses and parties; for this would be a substitution, by her own act, in the place of the executors as to the trust.

It matters not that all the executors had resigned or died; a trust does not fail for the want of a trustee. We do not wish to be understood as holding or intimating that plaintiff is without remedy, at least for the period of occupation after the authority of the executors ceased by resignation and death. It may be that she could maintain an action against Flanagan for money had and received, (Vincent v. Rogers, 33 Ala. 224,) or hold the tenants accountable as trustees *in invitum*. As to this we express no opinion. All we decide is that plaintiff cannot, under the circumstances, maintain the action for use and occupation prior to the acquisition of the legal title, not having had actual possession. Affirmed.

(94 Ala. 131)

MOBILE & O. R. CO. v. DISMUKES.

(*Supreme Court of Alabama.* Nov. 27, 1891.)

CARRIERS OF GOODS — INTERSTATE COMMERCE — VALIDITY OF FREIGHT CONTRACT — KNOWLEDGE OF SHIPPER—SCHEDULE RATES.

1. The interstate commerce law makes it unlawful for a carrier to issue bills of lading at rates different from those established and filed with the commission, or to demand or receive freight charges variant from such established rates. The act makes it penal for any person to knowingly obtain transportation at less than the regular rates in force at the time. Defendant agreed to carry goods from C., Ill., and deliver them to plaintiff at a point in Alabama on the line of the M. & B. R. R., with which road defendant had a joint tariff. The bill of lading called for $5.44 freight charges, but the M. & B. road refused to deliver the goods except on payment of $29.30, the schedule rate. *Held*, that plaintiff could recover the value of the goods, since it did not appear that he or the consignor knew of the schedule rate.

2. It is not in the contemplation of the interstate commerce law that persons dealing with common carriers should be held to know their published schedules of rates.

3. Code, § 1159, providing that carriers exacting exorbitant charges for freight are guilty of extortion, and liable for double the damages sustained, does not apply to shipments over lines without the state.

Appeal from circuit court, Mobile county; W. E. CLARK, Judge.

Action by H. C. Dismukes against the Mobile & Ohio Railroad Company for failure to deliver goods. Judgment for plaintiff. Defendant appeals. Affirmed.

E. L. Russell, for appellant. *Sheton Sims*, for appellee.

MCCLELLAN, J. A statute of this state (Code, § 1159) provides that "any person or corporation engaged in the business of transporting passengers or freights over any railroad in this state who shall exact and receive more than just compensation therefor, or demands more than the rates specified in any bill of lading issued for such freights, * * * is guilty of extortion, and is liable to the party injured in double the damages sustained," etc. The act of congress, known as the "Interstate Commerce Law," of February 4, 1887, as amended by acts approved March 2, 1889, makes it unlawful for any common carrier to issue bills of lading at rates, or to demand or receive freight charges variant from the rates, established and published as therein prescribed, and filed with the interstate commerce commission; and this, whether the carriage in a given instance is by one common carrier, or by more than one, having traffic arrangements and a joint tariff of charges. Not only so, but it is also made unlawful for any person or corporation, by what means soever, and whether with the consent and connivance of the carrier or otherwise, to knowingly obtain transportation at less than the regular rates at the time in force on the line of transportation; and the infraction of the statute in the particulars referred to, as well by consignors and consignees as by carriers, is made a highly penal offense. In the case at bar the Mobile & Ohio Railroad Company received at Cairo, Ill., certain goods of the value of about $40 for transportation to Sunny South, Ala., a station on the Mobile & Birmingham Railway, with which the initial line connected at Mobile, Ala.; and delivered to the shipper a bill of lading whereby it was undertaken to transport the goods over the two roads in question to Sunny South, and there deliver them to H. C. Dismukes, for a compensation of $5.44. There was at the time a joint tariff of rates in force between the Mobile & Ohio and the Mobile & Birmingham Railway Companies between the initial and terminal points of this shipment, which had been duly filed with the interstate commerce commission, approved, promulgated, and published in consonance with the act of congress; and, according to the rates fixed in this schedule, the freight charges on this consignment were, or should have been, $29.30. On arrival of the goods at Sunny South, the consignee tendered to the agent of the Mobile & Birmingham Railway Company $5.44, the amount of charges stipulated in the bill of lading, and demanded the property. This demand was refused, the insistence being that, the bill of lading to the contrary notwithstanding, the consignee was liable for the schedule rate of $29.30; and thereupon the consignee instituted this action for the value of the goods as upon a failure to deliver the same to him, before a justice of the peace, whence, on judgment for plaintiff, an appeal was taken to the circuit court, where a trial *de novo* was had before the judge without jury on agreed facts. Judgment was again entered for plaintiff in the circuit court, and from that judgment this appeal is prosecuted, presenting for review the conclusion of the trial judge on the facts.

The statute of Alabama which we have quoted is relied on in support of the judgment. We do not think any aid can be derived from that source. The shipment—the transportation being from a point in Illinois, through the states of Kentucky, Tennessee, and Mississippi, into Alabama—was an act of interstate commerce, and clearly within the laws of the United States regulating that commerce. It, of course, cannot be doubted that Alabama is without power to declare what rates of charge in respect of such commerce shall amount to extortion on the part of the carrier, or to declare that the demand for an amount of freight charges which the carrier is authorized under the act of congress to impose is rendered extortionate by reason of the fact that a less amount is stipulated to be paid and received between the parties to the bill of lading. To hold otherwise would be to give paramount efficacy to state regulation of a subject which is not only within exclusive national control, but with respect to which national legislation has already provided all regulations deemed necessary or expedient. Our statute may, no doubt, be looked to as determining what is extortion in freight charges for transportation within the state, and also, it may be, as affording a remedy and measure of redress for extortion in interstate shipments, but not as declaratory of what shall consti-

tute extortion in transactions of the class last named.

But, leaving the Alabama statute out of consideration, there is an element of contract in this case which, in our opinion, upon the agreed facts, will support the judgment below. The Mobile & Ohio Company agreed and bound itself to carry this consignment to Sunny South, Ala., and there deliver it to Dismukes, for a certain compensation. That company had no right, under the law and its tariff of rates adopted, approved, and promulgated as by the law provided, to enter into any such contract; and so far as the company is beneficially concerned in it, so far as the contract might otherwise be relied on by the carrier against the consignee, it is void, as being in the teeth of the law of congress, as the same has been put into practical operation, upon the carrying business of the company. But it by no means follows that the consignee has no rights under it, or, indeed, any less or other right than would have been his had the rate set down in the bill of lading been the approved rate for the transportation. It nowhere appears that either the consignor or consignee knew that the stipulated rate was different from the approved rate. It is not in the contemplation of the interstate commerce law that persons dealing with common carriers should be held to a knowledge of what their published schedules of rates contain. These schedules are no part of the law which all men are held to know, but are resultants *in pais*, so to speak, of the acts of the carrier, and of the interstate commerce commission, done under and in execution of the law. There is nothing in the law which forbids shippers to contract for transportation at other rates than those specified in these schedules. It is only when the shipper knowingly contracts for a rate differing from that therein prescribed that his act is denounced as unlawful and punished as a crime. The motive of this legislation, moreover, is the protection of persons dealing with common carriers. Its primary purpose is to prevent a resort on the part of carriers to the undue advantages which accrue to them from the circumstances of their relations to persons having need for their services. The provisions of the law should not be so strained or contorted as to defeat its purposes, and convert the shield it was intended to afford the unwary shipper, who has no choice but to patronize the carrier, into a sword with which to work his destruction more certainly and completely than would have been possible had not the arm of the government been put forth in his behalf. To allow the carrier to draw the shipper, entirely ignorant of the schedule of rates approved by the commission, into a contract of affreightment, upon which the goods are delivered and carried, at a stipulated rate which the shipper can afford to pay,—as in this instance, about 12½ per cent. of the value of the property,—and then to refuse to deliver the shipment to the consignee, except upon payment of a rate which he cannot afford to pay,—in this instance, 75 per cent. of the value,—and upon which the property would not have been shipped at all, would be to put a construction on the law of congress which its terms do not require or justify, and which would defeat the purposes which actuated its enactment. True it is that the contract here is one which the Mobile & Ohio Company had no right to make. True it is that its execution on their part involved a crime. But the act of the shipper in entering into it is not, in the absence of knowledge on his part of the schedule rate, tainted with criminality, or violative of any provision of the interstate commerce acts. He is not *in pari delicto* with the contracting carrier; and he is entitled to the protection of that principle of law which enforces such a contract in behalf of the innocent party to it,—a principle which we conceive to be logically sound, and thoroughly settled upon authority. See Tracy v. Talmage, 14 N. Y. 162, and numerous later cases, which are cited and discussed in a note to that case as reported in 67 Amer. Dec. 153. Affirmed.

(95 Ala. 614)

O'CONNER MIN. & MANUF'G CO. v. COOSA FURNACE CO. *et al.*

(*Supreme Court of Alabama.* Dec. 1, 1891.)

CREDITORS' BILL — SETTING ASIDE CONVEYANCE — FRAUD.

1. Where property has been mortgaged, and a part of it conveyed absolutely by one corporation to two other corporations, the boards of directors of the three companies being composed of the same persons, a creditor of the first corporation cannot, regardless of their fairness or unfairness, set aside the mortgage and conveyance merely because the corporation itself or its stockholders could have done so, but the creditor to set them aside must show that the transactions were fraudulent.

2. Where the evidence shows that the mortgage was given to secure debts justly due, and that the deed was executed in *bona fide* and absolute payment of a portion of such debts in property which was not worth more than the true amount of the debts paid thereby, the transactions cannot be considered fraudulent, even if the witnesses whose testimony is relied on were persons in control of the several corporations engaged in the dealings in question.

3. Under Code, § 3544, authorizing a creditor without a lien to file a bill in chancery to subject to the payment of his debt any property which has been, or has been attempted to be, fraudulently transferred by his debtor, such creditor must, to be entitled to relief, show that the transfer was fraudulent.

Appeal from chancery court, Etowah county; S. K. MCSPADDEN, Chancellor.

Action by the O'Conner Mining & Manufacturing Company against the Coosa Furnace Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Dunlap & Dortch, for appellant. *Aiken & Martin* and *Watts & Son*, for appellees.

WALKER, J. The bill was filed by the O'Conner Mining & Manufacturing Company as a simple contract creditor of the Coosa Furnace Company, and its principal purpose was to reach and subject to the payment of the debt claimed certain property alleged to have been fraudulently conveyed by the Coosa Furnace Com-

pany,—first, by a mortgage executed on the 7th day of April, 1884; and, again, as to a part of the property, by a deed of absolute conveyance executed on the 18th day of July, 1885. The specified ground of attack upon the conveyances in question is that they were executed for the purpose and with the intent to hinder, delay, or defraud the complainant, and to prevent it from enforcing collection of its just demands; and that the debts the mortgage was given to secure, and also the considerations recited in the deed, were simulated, and not real. The execution of the two instruments is alleged in the bill, and is admitted in the answer. The instruments must stand, unless the particular infirmities charged against them are shown by the evidence. There are no allegations to support a contention that their formal execution by the corporation was insufficient in any particular. The charge that the considerations recited in the two instruments, respectively, were simulated, and not real, is not sustained by the proof. The defendants proved, without contradiction, that the debts secured by the mortgage were due from the mortgagor, and represented full value received by it; and also that the consideration mentioned in the deed was paid in the discharge of debts which were secured by the mortgage, and that the property conveyed was not at that time worth as much as the amount of the debts in payment of which it was received. We would have to ignore the uncontroverted evidence in the case to arrive at any other conclusion on the subject than that the debts correctly represented money actually advanced to the Coosa Furnace Company and bills contracted by it.

Much stress is laid in the bill and in the argument of counsel for the appellant upon the relations existing between the several defendants during the time covered by the transactions which are sought to be impeached. The dealings in question were between the Coosa Furnace Company, on the one side, and the Wabash Iron Company, the Vigo Iron Company, A. L. Crawford, and his two sons, J. P. Crawford and A. J. Crawford, on the other side. It is true that each of the three corporations mentioned were controlled and dominated by the Crawfords. The great bulk of the stock in each of them was owned and held by members of the Crawford family. The board of directors in each of the corporations was composed of the Crawfords and their adherents. It thus plainly appears that the transactions were between the Coosa Furnace Company and some of its own stockholders and directors, and also two other corporations, having boards of directors composed of the same persons who managed and controlled the first-named company. The directors of a business corporation are its agents. Though they may not be trustees in the technical sense, yet they exercise functions of a fiduciary character. Their position implies that confidence is reposed in them. The duties which a director assumes to the corporation, and to the stockholders thereof, disqualifies him from binding the corporation in a transaction in which he is adversely interested. He cannot at the same time act for himself and for his principal without the full knowledge and free consent of the principal. In Morawetz on Private Corporations (section 528) it is said: "A person who is agent for two parties cannot, in the absence of express authority from each, represent them both in a transaction in which they have contrary interests. This rule is based upon the same reason as the rule which prohibits an agent from representing his principal when his personal interests are opposed to his duty. The principal stipulates for the judgment and skill of his agent, and the latter has no authority to act, when he is not in a position to give the principal the benefit of his best endeavors. It follows, therefore, that the directors, or other agents of a corporation, have no implied authority to bind the company by making a contract with another corporation which they also represent." If the same persons, as directors of two different companies, represent both companies in a transaction in which their interests are opposed, such transaction may be avoided by either company, or, at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair and open it may be shown to be. Railroad Co. v. Woods, 88 Ala. 630, 641, 7 South. Rep. 108. But the duty which disqualifies the directors from binding the corporation by a transaction in which they have an adverse interest is one owing to the corporation which they represent and to the stockholders thereof. A principal may consent to be bound by a contract made for him by an agent who, at the same time, represented an interest adverse to that of the principal. A *cestui que trust* may elect to confirm a transaction which he could have repudiated, on the ground that the trustee had an interest in the matter not consistent with his trust relation. In like manner, dealings between corporations, represented by the same persons as directors, may be accepted as binding by each corporation, and the stockholders thereof. The general rule is that such dealings are not absolutely void, but are voidable, at the election of the respective corporations or of the stockholders thereof. They become binding if acquiesced in by the corporations and their stockholders. Kelley v. Railroad, 141 Mass. 496, 6 N. E. Rep. 745; Ashburst's Appeal, 60 Pa. St. 290-314; Buell v. Buckingham, 16 Iowa, 284; Manufacturers' Sav. Bank v. Big Muddy Iron Co., 97 Mo. 38, 10 S. W. Rep. 865; Alexander v. Williams, 14 Mo. App. 13; Oil Co. v. Marbury, 91 U. S. 587; Booth v. Robinson, 55 Md. 419; United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450; Tayl. Corp. (2d Ed.) § 630; 1 Beach, Priv. Corp. § 247. The directors of a corporation, in the transaction of its business and the disposition of its property, do not stand in any such relation to the general creditors of the corporation as they occupy to the corporation itself and to its stockholders. They

are not the agents of such creditors, nor can they usually be regarded as trustees acting in their behalf. The creditors are not entitled to disaffirm a transfer of the property of the corporation, made by its directors or other agents, merely because the corporation itself or its stockholders could have done so. When a disposition of the property of a corporation is assailed by its creditors they are not clothed with the right of the corporation or of its stockholders to set aside the transaction, regardless of its fairness or unfairness, on the ground that it was entered into by representatives of the corporation who had put themselves in a relation antagonistic to the interests of their principal. The right of the creditor to impeach the transaction depends upon its fraudulent character. The question in such case is, was the transaction which is complained of entered into with the intent to hinder, delay, or defraud creditors,—was the property fraudulently transferred or conveyed or attempted to be fraudulently transferred or conveyed? The mere fact that the corporation, in disposing of its property, dealt with persons who at the same time were charged with the duty of representing its interests does not by itself render the transaction fraudulent. Corrugating Co. v. Thacher, 87 Ala. 458, 6 South. Rep. 366. Where the property of a corporation is transferred to another corporation represented by the same directors, the fact of such relationship is a circumstance well calculated to arouse suspicion, and calls for a rigid and severe scrutiny in the examination of such transaction when it is assailed by a creditor. When such a relationship is shown to exist between the contracting parties, clearer and fuller proof must be given of a valuable and adequate consideration, and of the good faith of the parties, than would be required if the transferee or grantee had been a stranger. When, however, such examination is made and such proof is forthcoming, and the result is that no fraud or unfair dealing is shown, and it appears that the transaction was not vitiated by any infirmity of which a creditor has the right to complain, then the transaction must stand, and it is as valid, as against the creditor, as if the corporation had dealt with a stranger, who was not involved in any way with the corporate representatives.

In the present case, the proof offered by the defendants shows fully and in great detail the circumstances connected with the dealings between the defendants, corporations and individuals. The several witnesses were subjected to rigid cross-examinations. The considerations to support the several debts which figured in the transactions are clearly and distinctly proved. That the mortgage was given to secure debts justly due, and that the deed was executed in *bona fide* and absolute payment of a portion of such debts, in property which was not worth more than the true amount of the debts paid therewith, are facts clearly shown by testimony which is not contradicted in any way. We do not feel at liberty to discredit and reject the full and consistent versions of the matters in controversy given by several of the witnesses, merely because these witnesses were the persons in control of the several corporations which were engaged in the dealings in question. There is no prohibition against a corporation dealing with its own stockholders or directors in reference to matters in which such stockholders or directors have interests adverse to those of the corporation, or against several corporations, which are controlled by the same persons, dealing with each other. Nor is there anything wrong in a corporation conveying its property as security for, or in absolute satisfaction of, obligations honestly assumed in such dealings, if such transfer involves no fraud upon the rights of other creditors. The evidence in this case fails to show that the conveyances which are assailed were fraudulent as charged. It is alleged in the amendment to the bill that the Coosa Furnace Company was insolvent at the date of the execution of the mortgage, and has been insolvent ever since that time. Even if it could be conceded that the fact of insolvency, if proved, would create such a change in the relations between the directors and the creditors of the corporation as to take from the directors the right to allow one or more creditors to acquire an advantage over the other in the application of the corporate assets to the payment of debts, yet such concession could have no effect upon the result in this case, because the evidence wholly fails to show that the company was insolvent when the mortgage was made. It plainly appears that the company was insolvent 15 months after the date of the mortgage. Its property was then worth very much less than it cost. What it was worth at the time the mortgage was executed is not shown. It appears from the evidence that the value of furnace property is very fluctuating. The value of the company's assets at the date of the mortgage is not proved, nor is it shown that they were then worth less than the amount of the company's liabilities at that time. The inference that the company was insolvent at the date of the mortgage does not follow from the proof of insolvency more than a year afterwards. The insolvency of the company at the date of the deed does not affect the validity of that instrument, for the operation of the deed was merely to transfer, in absolute payment of a debt, property which had been conveyed as security therefor at a date when the corporation is not shown to have been insolvent.

The leasehold interest of the Coosa Furnace Company and the income from the leased property are assets of that insolvent corporation. It is shown that the Gadsden Iron Company has been receiving the output from the mines. It is not alleged or proved that the latter company has paid less for the ore than it was worth, and it is not shown that it is chargeable with fraud in the purchase thereof. The complainant, as a simple contract creditor without a lien, is seeking to reach the output from the mines, and to subject it to the payment of its de-

mands. Its claim in this regard is a legal demand, which may be enforced by proceedings at law. There is no obstacle to hinder the complainant from reaching this property by legal process. The bill cannot be regarded as a creditors' bill, supported by the equitable demand for a settlement of the affairs of an insolvent corporation, as it is filed in behalf of the complainant alone, and not in behalf of itself and of other creditors, and for an administration of the assets and a ratable distribution among the creditors entitled to share therein. The bill is framed under the statute authorizing a creditor without a lien to file a bill in chancery to subject property fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed. Code, § 3544. As, in our opinion, the proof fails to sustain the charge that the transactions which are assailed were fraudulent, the conclusion is that the complainant is not entitled to relief. The decree to that effect must be affirmed.

(99 Ala. 90)

ROOT v. JOHNSON.

(*Supreme Court of Alabama.* Dec. 1, 1891.)

CONSTRUCTION OF CONTRACT—FORFEITURE—TENDER.

1. Where a land contract provides that the vendee shall pay "$15 cash, and balance, with interest from date, in quarterly installments of $10," the quarterly payments are $10 net, to continue until the entire amount with interest is paid.

2. Where a party to whom money is due on a contract declares that he will not receive it if tendered, actual tender is dispensed with, and tender in the bill for specific performance is sufficient.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

Bill in equity by J. W. Johnson against Isaiah Root for the specific performance of a land contract. Plaintiff had decree, and defendant appeals. Affirmed.

The appellant, Isaiah E. Root, agreed to sell a lot to the appellee, J. W. Johnson, to be paid for in installments. The agreement was in writing, was attached to the bill of complaint, and is as follows: "Received, April 19/86, of J. W. Johnson, fifteen dollars on a/c of a half-acre lot in Neil tract, next south of Elsie Tarver, and extending to west line of tract, or at right angle to the same, which I agree to sell to him for 100 dollars, payable fifteen dollars cash, and balance, with interest from date, in quarterly installments of 10 dollars each, with the condition that, if any payment agreed to be made is not made in a year from date agreed to be paid, all payments previous shall be forfeited to me for use of land, and I shall have the right to re-enter and take possession of the land, and this obligation shall be null and void. [Signed] ISAIAH E. ROOT."

A. A. Wiley and *W. S. Thorington*, for appellant. *J. F. Holtzclaw*, for appellee.

STONE, C. J. The bill in this case was filed July 19, 1888. Its object is to enforce specific performance of an executory agreement, whereby Johnson purchased from Root a half-acre lot of ground lying near the city of Montgomery. The written agreement evidencing the sale, as set out in the reporter's statement of facts, bears date April 19, 1886, and was signed by Root, the seller. The price agreed on was $100,—$15 agreed to be paid and actually paid at the date of the contract; and the balance to be paid in quarterly installments of $10, until the whole purchase money, with interest, should be paid. It is contended for appellant that the $10 installments of the purchase money, agreed to be paid quarterly, were to be supplemented at each payment with the then accrued interest on the entire unpaid balance of the purchase money. This would increase the first payment—July 19, 1886—by three months' interest on $85, and require the addition of that interest—$1.70—to the $10 then demandable; and it is claimed this was and is the proper rule until the entire purchase money should be paid. This is not our interpretation of the contract. Its language is: "Fifteen dollars cash, and balance, with interest from date, in quarterly installments of 10 dollars." The "interest from date" refers to and qualifies the "balance" of the purchase money, and not the "10 dollars" installments. We hold that the quarterly payments required under the contract were $10 net, and to continue until the purchase money, with interest, should be paid in full. Under this interpretation, $10 were due at the end of every three months; the first to mature being July 19, 1886. The written agreement of sale contains "the condition that, if any payment agreed to be made is not made in a year from date agreed to be paid, all payments previous shall be forfeited to me for use of land, and I shall have the right to re-enter and take possession of the land." Forfeitures are not favorites in equity, and, unless the penalty is fairly proportionate to the damage suffered by the breach, relief will be granted when the court can give by way of compensation all that could be reasonably expected. 8 Amer. & Eng. Enc. Law, 449. Johnson, the purchaser, paid $20 in December, 1886. This is admitted by Root. This paid the installments maturing in July and October of 1886, although not on the days they were demandable. It is also admitted that he paid $10 in August, 1887. This was in less than a year after the maturity of the installment of January 19, 1887. The next installment to mature would be April 19, 1887, and if a year after that was permitted to elapse without payment or tender of that installment, then, according to the letter of the contract, Johnson forfeited his purchase. Johnson testified that he tendered to Root $10, January 1, 1888, and that Root refused to receive it, claiming that the contract was forfeited. Meriwether testified that he heard Root admit such tender was made. Root denied that any tender was made, but his testimony and that of other witnesses tend to show he claimed a forfeiture long before the letter of the contract, under our interpretation, authorized such claim. The witnesses McDonald and Loveless tend to strengthen Johnson's version, and to weaken that given by Root. The judge of the city

court, chancellor in this cause, reached the conclusion that the $10 were tendered to Root January 1, 1888, and the testimony does not convince us that he erred. This tender, as we have shown, was in time to prevent a forfeiture, under the most technical enforcement of the contract. The law does not exact the observance of a vain ceremony. The purpose of tender, in a case like the present, is to leave the seller without excuse for a non-compliance with his contract, and to cast on him the fault of its breach. When, before tender made, the party to whom money is due declares he will not receive it, or makes any declaration or demand which is equivalent to a refusal to accept the money if tendered, then actual tender is dispensed with. 7 Wait, Act. & Def. 593. It was sufficient in this case to tender payment in the bill. This renders it unnecessary that we should pass on the weight or credibility of the conflicting testimony bearing on the question of the alleged tender made by Johnson of the whole amount due before instituting this suit. Affirmed.

(43 La. Ann. 1169)

STATE *ex rel.* VIGNES v. JUDGE CIVIL DISTRICT COURT. (No. 10,933.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 43 La. Ann.)

AMENDMENT OF JUDGMENT.

A judgment which has been signed cannot be altered, amended, or revised by the judge who rendered the same, except in the manner provided by law. He cannot, on his own motion, change a judgment which has been so signed, notwithstanding it was signed in error, and was not the judgment orally given.

(*Syllabus by the Court.*)

Application by Samuel Vignes for a writ of *certiorari* and prohibition to the judge of the civil district court to arrest a writ of *fieri facias*. Application granted.

Ker & Duvigneaud, for relator. *J. N. Wolfson*, for respondent.

MCENERY, J. The relator applies for a writ of *certiorari* and prohibition to arrest the execution of a writ of *fi. fa.* issued under a judgment which he alleges was never rendered by the court, in the suit of Legendre v. Vignes, on the docket of the civil district court for the parish of Orleans. In said case the district judge, on the final trial thereof, orally gave judgment for the plaintiff. The minutes showed this fact. The judgment which was signed by the judge in said case is as follows: "The court considering the law and the evidence to be in favor of defendant, and for the reasons orally assigned, it is ordered, adjudged, and decreed that there be judgment in favor of the defendant and against plaintiff, with costs." This judgment is not in accordance with the minutes, and is not the judgment orally given. The judge, several days after signing the decree, on his own motion, canceled the same, and signed another judgment or decree in accordance with the minutes of the court. Article 546 of the Code Practice requires the judge to sign all final decrees or judgments. This is absolutely essential to constitute a judgment. The minutes of the court, even if signed by the judge, are not sufficient to make the entries therein of decrees final and definitive. Hartwell v. Jumel, 30 La. Ann. 421. Article 547, Code of Practice, allows the court to make certain amendments, which are enumerated, before the judgment is signed. The judge can *ex officio* order a new trial to revise the judgment. Article 548 provides that "a judgment, when once rendered, becomes the property of him in whose favor it has been given; and the judge cannot alter same, except in the mode provided by law." The judge *a qua* was therefore without power to cancel the judgment, *ex proprio motu*, first signed by him in favor of defendant, and substitute another thereafter in favor of the plaintiff. Balio v. Wilson, 12 Mart. (La.) 360; Flint v. Cuny, 6 La. 69; Whipple v. Hartzberger, 11 La. Ann. 475; Factors' & Traders' Ins. Co. v. New Harbor Protection Co., 39 La. Ann. 583, 2 South. Rep. 407; State v. Banking Co., 7 Rob. (La.) 447. It is therefore ordered, adjudged, and decreed that the relief prayed for by relator be granted, and the rule herein be made absolute.

(43 La. Ann. 1170)

VON HOVEN v. VON HOVEN *et al.* (No. 10,861.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 43 La. Ann.)

APPEAL—FILING RECORD—DISMISSAL.

When the return-day for filing the record has been extended, and the transcript is filed after the expiration of the extension, the appeal will be dismissed, as the appellant is not entitled to three days' grace which follow the return-day thus extended.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Action by Elizabeth Von Hoven and husband against Jacob Von Hoven. Judgment for plaintiffs. Defendant appeals. Appeal dismissed.

Henry P. Dart, for appellant. *Benjamin R. Forman*, for appellees.

MCENERY, J. This appeal was made returnable on the first Monday of May, 1891. On the 6th day of May a motion was made for an extension of time to file the transcript. Fifteen days were granted. The transcript was not filed until the 23d May. The record not having been filed within the time allowed by the law, nor within the further time granted by the court, the appeal must be considered as having been abandoned. The appellant is not entitled to the three days of grace following the return-day which has been extended. Code Prac. art. 590; Bienvenu v. Insurance Co., 28 La. Ann. 901; Insurance Co. v. Bynum, 32 La. Ann. 28; Lacroix v. Bonin, 33 La. Ann. 119; Pierce v. Cushing, Id. 401; Succession of Gast, 42 La. Ann. 91, 7 South. Rep. 68. The appeal is dismissed.

(43 La. Ann. 1171)

BERTRON *et al.* v. STEWART *et al.* (No. 10,866.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 43 La. Ann.)

FOREIGN EXECUTORS—RIGHT TO SUE—WAIVER OF OBJECTIONS—CURATOR AD HOC.

1. While it is true that, in the absence of any statute authorizing it, the authorities deny any efficacy to an appointment of an executor outside of the territorial jurisdiction within which it was granted; and that, if such executor desires to prosecute a suit in another state, he must first obtain a grant of administration therein in accordance with its laws,—yet exception must be therein taken to such executor's want of capacity, otherwise the court will be presumed to have acted on proper evidence of his capacity, and its judgment will not be annulled for want of jurisdiction of the court to render it.

2. In case the judgment debtor resides in a state different from that in which the decree was rendered, and it becomes necessary to institute proceedings for its revival, it is competent for the court of this state, in which the suit for revival is brought, to appoint a curator *ad hoc*, upon whom service can be made, and contradictorily with whom a judgment can be rendered. Such a suit is not an action *in personam*, but one *quasi in rem*, and the judgment therein pronounced will be binding upon the absentees.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Carroll & Carroll, for appellant W. R. Stewart. *H. H. Bryan*, curator *ad hoc*, for appellants. *Morse & Titche*, for appellees.

WATKINS, J. The object of this suit is to revive and continue the life of an antecedent judgment in which Ottilie Bertron, widow of Samuel R. Bertron, deceased, and William Hughes and Clara Purnell, widow, appear as the co-executors of the last will of the deceased as plaintiffs therein. The judgment sought to be revived is alleged to be one that was rendered in the late sixth district court of the parish of Orleans, and styled and entitled "Samuel R. Bertron v. Wm. R. Stewart and J. R. Powell," numbered 2,605 on the docket thereof. It is averred in the petition that said judgment was therein rendered in plaintiff's favor and against the two defendants *in solido* for the capital sum of $7,892.07, with 8 per cent. per annum interest thereon from the 7th of March, 1871, said judgment having been signed on the 22d of November, 1871; and that same, in principal and interest, remained unpaid. It is further averred that said suit was transferred to the docket of the civil district court of the parish of Orleans, and it was therein given the number 3,810, and therein said original judgment was duly and legally revived by a decree of revival duly signed on the 27th of March, 1882. It is further averred that plaintiffs are desirous of again having said original judgment revived, and its life prolonged; and, alleging that the two defendants and judgment debtors are citizens, at this time, of the state of Mississippi, they pray for due citation and the appointment of a curator *ad hoc* to represent said absentees, and for a decree of revival against them. This suit was filed on the 3d of February, 1890, and, on the day following, the defendant William R. Stewart was personally cited and served in the city of New Orleans; and on the 5th of same month an order was obtained appointing a curator *ad hoc* to represent both of the defendants. One citation was served on the curator *ad hoc* on the 6th of March, 1890, and another on the 17th of that month. On the last-named date a judgment by default was entered up against the defendant William R. Stewart. On the 28th of same month the curator *ad hoc*, representing both defendants, appeared, and filed an answer, in which he pleaded a general denial, and the prescription of 10 years, against the original judgment. On the 16th of April, 1890, the court *a qua* rendered a judgment decreeing the revival of the judgment originally rendered on the 17th of November, 1871, and signed on the 22d of November, 1871; and also the judgment reviving same, rendered on the 14th of March, 1882, and signed on the 27th of March, 1882. This judgment was duly signed on the 22d of April, 1890. Matters remained *in statu quo* until the 16th of August, 1890, when the plaintiffs sued out a garnishment proceeding against the New Orleans National Bank, accompanied by a *fi. fa.*, whereunder they realised the sum of $485.12 as the property of William R. Stewart. On the 20th of April, 1891,—just within one year after the rendition of said final judgment,—the curator *ad hoc* applied for and obtained an order of appeal therefrom, and filed a bond of appeal. On the next day the defendant William R. Stewart—who had been personally cited and served, as stated, and against whom a judgment by default had been rendered—appeared by counsel, and moved to set aside said default, and for leave to file an answer; and he was permitted to do so. The averments of the answer of course are impertinent to the issues that are presented on the appeal, and so are those of the reconventional demand which is therein incorporated. In this court, same counsel for Stewart, joined by the curator *ad hoc*,—who, in the court below, represented both of the defendants, and from the judgment rendered appealed for both of them,—filed an assignment of errors, upon which they jointly demand the reversal of the said judgment of revival as to Stewart. The errors assigned are the following, viz.: *First.* Because, as to Powell, the plea of prescription should have been maintained. *Second.* Because, as to Stewart, the said judgment is null and void, same having been rendered contradictorily with a curator *ad hoc*, notwithstanding he had been theretofore personally served, and a tacit issue had been joined with him on a judgment by default. *Third.* Because the appointment of a curator *ad hoc*, service on Stewart through such curator *ad hoc*, a trial had contradictorily with such curator *ad hoc*, subsequently to said personal service on Stewart, rendered same, and also the judgment of revival thereon based, absolutely null and void. Thus, as to Powell, the case stands on the plea of 10 years' prescription, which is urged by the curator *ad hoc*, and in respect to Stewart it stands on the assignment of errors enumerated above.

1. As the plea of prescription turns up-

on the efficacy of the former judgment of revival, which was rendered and signed on 27th of March, 1882, it will be necessary to examine it first. The record shows that the original judgment was signed on the 22d of November, 1871. The suit for its revival was filed on the 2d of July, 1881, and on the same date an order was granted appointing a curator *ad hoc* to represent the two defendants, who were alleged to be, at that time, absentees, residing in the state of Mississippi; and service was regularly made upon the curator *ad hoc* on the 5th of same month and year. On the 14th of December, 1881, the curator *ad hoc* appeared, and filed an answer, pleading the general issue. All these proceedings appear regular and legal on their face. The suit for revival was filed, and the service regularly made, on the 5th of July, 1881, within the period of 10 years after the signing of the original judgment on the 22d of November, 1871, and thereby the prescription of the statute was interrupted *quoad hoc*. The present suit having been filed and service thereof made on the 4 h of February, 1890, —within 10 years after the signing of the former judgment of revival on the 27th of March, 1882,—the life of the original judgment was preserved and prolonged for an additional period of 10 years from the 22d of April, 1890. On the face of the papers the curator's plea of prescription was correctly overruled. We quote below article 3547, Civil Code, providing for revival of judgments: "All judgments for money, whether rendered within or without the state, shall be prescribed by the lapse of ten years from the rendition of such judgment: provided, however, that any party interested in any judgment may have the same revived at any time before it is prescribed, by having a citation issued according to law to the defendant or his representative, etc.; and, if such defendant be absent, and not represented, the court may appoint a curator *ad hoc* to represent him in the proceedings, upon which curator *ad hoc* the citation shall be served." The suits for revival appear to have been brought in strict conformity with the provisions of that article, and thereby the prescription thereof was interrupted.

2. In the printed argument several different causes of nullity in the two judgments of revival are assigned, which are not embraced in the answer of the curator *ad hoc*, nor in the assignment of errors. They are as follows, viz.:

First. The absolute nullity of the former judgment of revival, which was signed on the 21st of March, 1882.

(*a*) The want of capacity of the plaintiff to institute and prosecute that suit, and stand in judgment. The point made in argument under this head is that Ottilie Bertron alone instituted and prosecuted that suit to final judgment, in her capacity of testamentary executrix of the last will of her deceased husband, the judgment creditor of the defendants; that there are two other joint and co-executors of that deceased person; and all three of them had been thus appointed under the will of the deceased, which was duly admitted to probate in the proper court of the state of Mississippi, where the testator resided at date of his death; hence, being a foreign executrix, she was without right or authority to appear in the courts of the state of Louisiana for any purpose, under the authority of Noonan v. Bradley, 9 Wall. 399. Conceding the force and correctness of the views entertained by the supreme court in that case, and which were to the effect that, "in the absence of any statute, * * * all the authorities deny any efficacy to the appointment of an executor outside of the territorial jurisdiction of the state within which it was granted; and, * * * if he desires to prosecute suit in another state, he must first obtain a grant of administration therein, in accordance with its laws,"—and yet we cannot perceive how this doctrine is to avail the defendants at this time. In the court which had jurisdiction in that case, *ratione materiæ et personæ*, no objection to the plaintiff's capacity was taken then, and objection cannot be entertained now. Had such exception been formally tendered to the court on the hearing of the cause, the plaintiff could, in all likelihood, have exhibited her authority. From all that appears on the face of the record she was authorized, and there is nothing to induce us to doubt the judge's authority to render judgment on the averments of her petition.

(*b*) The fact that the defendants were not in the case personally served with citation; the court being without jurisdiction to try the cause and render judgment thereon contradictorily with a curator *ad hoc*, alone. The point made on the argument is that, for the purpose of such suit and judgment, substituted service was not due process of law, and unavailing, in so far as defendants were concerned. The judge, in appointing a curator *ad hoc* to represent the absentees in that case, acted on the express authority of article 3547 of the Civil Code, above quoted, which declares that, "if such defendant be absent, and not represented, the court may appoint a curator *ad hoc* to represent him in the proceedings, upon which curator *ad hoc* the citation shall be served." Reliance is placed on Pennoyer v. Neff, 95 U. S. 714, and Laughlin v. Ice Co., 35 La. Ann. 1184. In our opinion this contention is erroneous. In Hammett v. Sprowl, 31 La. Ann. 327, our predecessors held that it was exclusively within the power of the court rendering the judgment "to enforce and to revive it;" and they further held that "a proceeding to revive a judgment [is] not a new suit, but simply a proceeding in the same suit to continue and keep alive a judgment rendered therein, and to furnish proof that it has not been satisfied or extinguished." To the same effect is their opinion in Succession of Patrick, 30 La. Ann. 1071, in which a suit to revive is denominated "the peculiar statutory action" provided for the continuation of judgments beyond their term of 10 years. *Vide* Lalane v. Payne, 42 La. Ann. 154, 7 South. Rep. 481. We had occasion recently to examine the question here presented, and decided it adversely to the contention of

the defendants' counsel. *Vide* Young v. Upshur, 42 La. Ann. 362, 7 South. Rep. 557. In that case the controversy was in reference to the ownership of an undivided interest or share in a certain judgment rendered by this court on appeal from the parish of Tensas, in this state, the plaintiffs therein being citizens of the District of Columbia, and the case at the time being still pending and undecided in the supreme court on writ of error, and the suit in which the claim of an interest was made having been brought in the parish of Tensas, wherein the plaintiffs in the original suit were cited throug' a curator *ad hoc*. To that suit the exception was that such service as was made on the curator *ad hoc* was not due process of law, and failed to confer on the court jurisdiction thereof; but we held that the jurisdiction of this court was complete, and the judgment binding on the absentees, on the ground that the proceeding was not one *in personam* but one *quasi in rem*, "its object being to obtain judicial recognition and enforcement of a specific interest in tangible property in the parish of Tensas in this state," etc. In several similar cases we have recently maintained the jurisdiction of district courts as grounded on like service. Notably in Duruty v. Musacchia, 42 La. Ann. 357, 7 South. Rep. 555; McKenzie v. Bacon, 38 La. Ann. 765; and Robbins v. Martin, 43 La. Ann. 488, 9 South. Rep. 108. And one remark that was made in our opinion in the last-cited case—that "if, indeed, a non-resident cannot be brought into a court of this state in such a case, such a cause of complaint as that propounded by the plaintiff, though well grounded in our law, would be practically remediless,"—is strictly applicable to the exception taken in the case at bar. The grounds of nullity assigned are not well taken.

Second. The nullity of the judgment of revival from which the present appeal is prosecuted.

(*a*) Because of the variance between the party plaintiff in the former suit for revival and the parties plaintiff in the instant suit, and the incapacity of the present plaintiffs to recover judgment. Certainly, if Ottilie Bertron, executrix, was capacitated to institute suit, and stand in judgment in the former revival suit, the three joint co-executors are likewise capacitated so to do. The variance that is suggested is of no consequence whatever. It cannot fatally affect the judgment. What was said of the want of capacity in a foreign executor to bring suits in the courts of this state, in the preceding part of this paragraph, as appertaining to the former revival suit, is strictly applicable to the instant case. Neither objection is good.

(*b*) Because the judgment by default that was entered up against the defendant Stewart was never subsequently confirmed. That there was a judgment regularly rendered and signed there is no doubt. That the defendant Stewart was personally cited, and that there was also appointed a curator *ad hoc* to represent him as an absentee on whom service was made, cannot be denied. It is true that the judgment does not formally state that by reason of said default having been made final it was rendered and signed. But it is impossible for us to conceive the ground of defendants' complaint on that account, or to appreciate his objection of absolute nullity of the judgment; for if the judgment by default was, in effect, made final, he is without cause of complaint; and if it was not made final it was evidently abandoned, and judgment was rendered on the issue joined between plaintiff and the curator *ad hoc* on his answer. This, to our thinking, is the true state of the case. In either event the judgment is, to all appearances, valid.

3. It is not correct to say that the instant suit is one to revive the former judgment of revival. A suit to revive, as said in Hammett v. Sprowl, 31 La. Ann. 325, is not a new suit, but a new proceeding in the original suit. Its sole object is to legally and judicially interrupt prescription. Once the revival suit is brought to a termination by a judgment, its object is accomplished, and a 10-years lease of life is given to the original judgment. At the expiration of this lease a new revival suit must be brought in order to interrupt prescription, and give to the original judgment another 10-years lease of life. These two revival proceedings are separate and independent of each other, though having same object in view. Hence it was matter of no consequence that the former suit was brought in the name of one executrix, and the latter was brought in the name of three joint co-executors. The Code says expressly "that any party interested in any judgment may have the same revived at any time before it is prescribed." Rev. Civil Code, art. 3547. Under the authority of this article this court held in Martinez v. Succession of Vives, 32 La. Ann. 305, that any attorney at law entitled to only a contingent interest in a judgment for the payment of his fees had sufficient interest in it to authorize him to bring suit for its revival, and to revive the whole judgment, and not merely a restricted and limited interest in it. Our conclusion is that it was of no consequence to the defendants that one revival suit was brought by one executor, and the other by three co-executors. After a thorough study of this case, and a full examination of all its details, we are satisfied that the original judgment has been legally and properly revived and kept alive; that the defenses pleaded of prescription and nullity are not well grounded in law; and that the judgment appealed from is correct, and it is therefore affirmed.

(28 Fla. 209)

HANOVER FIRE INS. CO. v. LEWIS *et al.*

(*Supreme Court of Florida.* Dec. 7, 1891.)

INSURANCE — ACTION ON POLICY — PLEADING — CHANGE OF INTEREST—PROOFS—WAIVER.

1. Where a plea to an action brought upon a policy of fire insurance is interposed alleging that no preliminary proofs of loss have been furnished by the assured according to the provisions of the policy requiring such proofs as a condition precedent to the right to sue thereon, a replication to such plea is bad that simply alleges

"that proofs of loss were furnished on blank forms furnished to plaintiffs by defendant for that purpose," without alleging that the proofs so furnished were in accordance with the requirements of the policy; and a demurrer to such replication should be sustained.

2. G. and E. were partners in a general banking business, and as such partners were the sole owners of a house and the land upon which it was situated, which house they insured against loss by fire, the policy issued to them containing the following provision: "If the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, it should render the policy void." After the issuance to them of the policy, but prior to the destruction of the property by fire, G. and E. admitted W. into their firm as a partner, upon a verbal agreement that he was to have no interest in the properties of the former firm, but a fixed interest only in the profits of the firm's business generally. *Held*, that this did not give to W. any interest in the insured property, nor work such change in the title, ownership, or possession of the property as would avoid the policy under the above-quoted provision therein.

3. Where the insurers, after receipt of proofs of loss, in a correspondence by letter repeatedly call upon the assured for further or more particular information as to the interest or ownership that a party named in the proofs has in the insured property, and in such correspondence and otherwise are silent as to any other defect in the form or substance of such proofs, and fail to call the attention of the assured to any other defect that may exist in the proofs furnished, such silence and failure of the insurers to call the attention of the assured thereto *held* to be a waiver on their part of any defect in such proofs not discovered by them to the assured; and *held* that, where the particular matter or information asked for in such correspondence is not requested to be furnished in verified form, such failure to request verification thereof is a waiver of that formality. *Held, further*, that the information asked for by letter, when supplied by letter, will be treated as supplementary to such proofs upon the particular subject to which they relate. *Held, further*, that such proofs of loss and letter correspondence supplementary thereto are admissible in evidence at the trial to establish the fact that the requirements of the policy as to the furnishing of preliminary proofs of loss have been complied with before institution of suit.

4. Where the assured inadvertently make an incorrect statement or mistake in the preliminary proofs of loss furnished to the insurers after loss, such statement or mistake may be afterwards corrected and explained by parol testimony at the trial of a suit upon the policy, where the same explanation or correction has been asked for by letter and given in substance by letter prior to the institution of the suit.

5. In the trial of a suit upon a policy of fire insurance an unverified estimate of the cost of replacing the destroyed property made by a party while in life, but at the time of the introduction of such estimate deceased, is inadmissible in evidence for any purpose; and the fact that the party who made such estimate is dead at the time the same is offered in evidence does not render such estimate admissible.

6. Where a policy of fire insurance contains the following provision: "In case differences shall arise touching any loss or damage after the proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies, respectively, under this policy,"—*held* to be a valid and binding covenant, and that when the parties under its provisions have submitted the finding of the amount of such loss to such arbitration, they are mutually bound as to the "amount" of the loss by the award of the arbitrators, unless such award, under proper pleadings, is avoided for fraud or other matter legally recognizable as vitiative thereof, and that, unless so avoided, the assured are limited in their right of recovery to the amount so awarded.

7. The arbitration provided for under such provision in a policy of insurance does not undertake to oust the courts of their jurisdiction, and is not obnoxious to law. Neither is it necessary that such arbitration should be conducted in accordance with the statute. McClel. Dig. p. 105 et seq. Neither is it necessary, to make such award available, that the same should be accepted or acted upon in any way by the parties. Neither is it necessary, to render such award available as a defense in limitation of the amount of recovery, that the amount of such award should be paid or tendered. Such an award, when specially pleaded in limitation of the recovery sought for, is admissible in evidence upon the trial of a suit upon the policy.

8. It is error for the trial court in a charge to the jury to supply any fact from other facts adduced in evidence, but should leave every fact, and its establishment or non-establishment, to the determination of the jury alone.

9. Where a policy of insurance provides that the amount of the loss insured shall be due and payable 60 days after the furnishing by the assured of proofs of loss as provided by the policy, the assured are entitled to interest upon the amount of their recovery from a date 60 days after the furnishing by them of such proofs of loss.

(*Syllabus by the Court.*)

Error to circuit court, Leon county.

Action by George Lewis, Edward Lewis, and William C. Lewis against the Hanover Fire Insurance Company to recover on a policy of insurance. Verdict and judgment for plaintiffs. Motion for a new trial denied. Defendant brings error. Reversed, and new trial directed.

W. A. Blount and *Fred T. Myers*, for plaintiff in error. *R. W. Williams*, for defendants in error.

TAYLOR, J. On the 15th of August, 1885, George Lewis, Edward Lewis, and William C. Lewis, styling themselves as partners under the firm name of B. C. Lewis & Sons, instituted their action in *assumpsit* in the circuit court of Leon county against the Hanover Fire Insurance Company, a corporation of the state of New York, having an agency at Tallahassee, in Leon county, for the recovery of one-half of the amount of a policy of insurance for $5,000, issued to them on April 18, 1882, by the Germania Fire Insurance Company and the Hanover Fire Insurance Company, as underwriters, wherein each of said companies, severally, each for itself, and not one for the other, became the insurers, for one-half the amount of said policy, for a term of three years; the said policy containing a covenant that in the event the assured had to resort to judicial proceedings to enforce their claims under said policy, it should not be necessary to proceed against each of the insurers, but that such action might be brought against either of said companies, and that the other should be bound and concluded by the result of such action in the same manner and to the same effect as if it had been prosecuted against each of them separately with the like result.

To the declaration in the cause the defendant company interposed five pleas, as follows: (1) *Non assumpsit;* (2) *nil debet;* (3) that the plaintiffs did not, before the institution of their suit, make and furnish to defendant proofs of their alleged loss in accordance with the requirements of the policy of insurance sued upon; (4) that subsequent to the issuance of the said policy of insurance, and before the occurrence of the said fire, there took place a change in the title and possession of the said property described in the said policy of insurance, in that the plaintiff William C. Lewis, who had no interest therein when the said policy was issued, became in part an owner thereof with the plaintiffs George Lewis and Edward Lewis, and entered into possession thereof with them before the said fire; (5) that if the plaintiffs are entitled to recover from the defendant, they are entitled to recover only the sum of $2,086.37½, with interest thereon, because the said plaintiffs and defendant, on the 10th day of April, A. D. 1885, submitted to an arbitration consisting of B. F. Langley and T. J. Rawls, together with a third person to be chosen by the said arbitrators, if necessary, the appraisal and estimate, at the then cash value, of the damage by the said fire to said property, which appraisal and estimate by them, or any two of them, in writing was to be binding on both parties as to the actual cash value of or damage to the said property, but without reference to any other question or matters of difference within the terms and conditions of the insurance, a copy of which said submission to arbitrators is hereto annexed marked "A," and made a part of this plea. And thereupon, to-wit, on the 11th day of April, A. D. 1885, the said Langley and J. M. Wilson, the third party chosen by the said arbitrators to determine with them the said question, did make, write, and deliver to the said plaintiffs and the defendant their award and appraisal in the premises, and by such award and appraisal did appraise and arbitrate the damage done by the said fire at the sum of $4,172.75.

To the first and second of these pleas the plaintiffs joined issue. To the third and fifth pleas the plaintiff demurred, which demurrer, upon subsequent argument, was overruled.

To the defendant's fourth plea the plaintiffs interposed a replication in avoidance of the defense of a change of title in the property insured anterior to the fire that is set up in the defendant's fourth plea. After the overruling of their demurrer to the third and fifth pleas of the defendant, the plaintiffs replied to the said pleas, as follows: "The plaintiffs, as to the third plea, say that they did make and furnish to defendant proofs of their loss on blank forms furnished to plaintiffs by defendant for that purpose, and were not, therefore, required to furnish other. The plaintiffs, as to the fifth plea, say that the so-called 'arbitration' was not in accordance with the statutes of this state in such cases made and provided, nor in accordance with the terms of the policy of assurance between plaintiffs and defendant, nor with the 'special agreement' for submission to two builders; that said two builders, nor either one of same, with a properly constituted umpire, have made 'no' award in accordance with said agreements; that the so-called 'award' has not been accepted, nor acted upon by either party, but was promptly repudiated by plaintiffs, and defendants so advised; that said agreement of submission was in no sense legal, just, or equitable, and had no binding force, in that its effect was to bind one party only to the prospective award; that one arbitrator was committed in favor of one party, and the umpire relied wholly upon the statements of the arbitrator or arbitrators, without personal knowledge and without testimony."

To this replication to the third plea the defendant demurred, and at the same time moved to strike out the replication to the fifth plea. Upon subsequent argument the demurrer to the replication to the third plea was overruled; but the motion to strike out the replication was granted.

At this stage of the proceeding, by leave of the court, the plaintiffs amended their declaration by striking out the name of William C. Lewis, as a party plaintiff, and by styling their suit "George Lewis and Edward Lewis, formerly partners under the firm name of B. C. Lewis & Sons," as plaintiffs. Upon this amendment of the declaration the defendant withdrew its first plea of *non assumpsit*, and pleaded the others over to the declaration as amended. The plaintiffs then filed a replication to the defendant's third plea, substantially the same that they before interposed to same, which replication was demurred to again by the defendant, and the demurrer again overruled, which ruling was erroneous. The demurrer of the defendant to the replication to defendant's third plea should have been sustained, for the obvious reason that the replication demurred to does not allege that proper proofs of loss were made by the plaintiffs and furnished to the defendant, or that proofs were thus made and furnished in compliance with the provisions for such proofs in the policy contained as one of the covenants therein, but simply alleges that "proofs of their loss were furnished to defendant by plaintiffs of blank form furnished to plaintiffs by defendant for that purpose," when the pith of the third plea, to which it was intended as a reply, was that no proofs "in accordance with the requirements of the policy sued upon" had been furnished. The replication does not dispute or take issue upon this assertion in the plea, but undertakes to side track the defense tendered by the plea, by substituting proofs made on a blank form for the proofs called for by the provisions of the policy. The proofs furnished as alleged in this replication, though filling up the blanks in a dozen set forms, may still have fallen far short of filling the requirements of the policy sued upon.

Upon defendant's fourth plea the plaintiffs joined issue. To the fifth plea the plaintiffs interposed a replication containing 26 numbered grounds of objection. Upon the filing of this replication the defendant moved the court to require the plaintiffs to elect the ground therein upon

which they would rely, and to strike out the others. This motion seems, from the record, to have been "granted," and then by a subsequent order of the court it was specifically ordered that the ground of the replication "contending for a tender of the amount of the award set up in the fifth plea" should be stricken out. Afterwards the plaintiffs seemed to have abandoned their replication to the fifth plea, and filed a general joinder of issue thereon. This disposes of the pleadings in the case.

On the 20th of January, 1888, the cause was tried before a jury, and resulted in a verdict for the plaintiffs in the sum of $3,000. Motion for new trial was made and denied, and judgment for $3,000 entered against the defendant company, and from this judgment the case is brought here upon writ of error.

The errors assigned are as follows: (1) The overruling of defendant's demurrer to plaintiffs' replication to third plea; (2) the admission in evidence of the papers denied to be proofs of loss; (3) the admission of the testimony of Edward Lewis as to William C. Lewis' interest in the property insured; (4) the admission in evidence of the letters between plaintiffs and defendant; (5) the admission of the testimony of Edward Lewis as to whereabouts of T. J. Rawls; (6) the refusing to admit in evidence the arbitration and award between plaintiffs and defendant; (7) the giving of each and every of the special charges asked by the plaintiffs; (8) the refusing of each and every of the special charges asked by the defendant; (9) the refusing of defendant's motion for a new trial. These assignments will be considered in the order in which they come.

The first assignment has already been disposed of, and held to be error.

The 2d, 3d, and 4th assignments will be discussed together, as they raise the same or closely kindred questions. It seems that when the policy of insurance sued upon was issued, George Lewis and Edward Lewis alone composed the firm of B. C. Lewis & Sons, to whom the policy was issued, and that they alone, as such partners, at the time of the issuance of the policy, owned and held the legal title to the property covered by the policy. As testified to by Edward Lewis, subsequent to the issuance of the policy, but prior to the loss by fire, William C. Lewis was taken into the firm as a member thereof to share in the profits alone to a certain limited extent. It is contended for the plaintiff in error that this worked a change in the title, possession, interest, and ownership in the assured property, giving to the new partner, William C. Lewis, an interest therein to such an extent as to avoid the policy under the following covenant therein: "If the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," it should render the policy void. In that clause of the policy providing for the furnishing of proofs in case of loss it is further stipulated, as follows: "If the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth with their respective interests therein certified to by them." In the proofs of loss that were furnished to the defendant company after the fire, and that were subsequently, at the trial of the cause, admitted in evidence over the defendant's objection, we find the following statement sworn to by Edward Lewis and William C. Lewis: "The property insured belonged, at the time of the fire, to B. C. Lewis & Sons, a firm composed of George, Edward, and William C. Lewis, and at the time of effecting the insurance it belonged to B. C. Lewis & Sons, a firm composed of George and Edward Lewis." After the receipt of this proof of loss by the defendant company a correspondence, by letter, of considerable length was had between the insurers and assured, which letters were subsequently admitted in evidence over the defendant's objection. In the first of these letters, dated May 22, 1885, from the defendant to the plaintiffs, in which the receipt of the proofs of loss is acknowledged, no objection is raised to the form or sufficiency of the proofs furnished except that the plaintiffs are asked therein for information as to the "nature and extent of William C. Lewis' interest in the present firm of B. C. Lewis & Sons." To this the plaintiffs replied, under date of May 26, 1885: "W. C. Lewis, as stated in proof of loss, is a partner in our firm, having been admitted January 1, 1883, with a fixed share of profits." This did not seem to satisfy the defendant company, as they again wrote on May 29, 1885, to the plaintiffs, asking them to "state what share of the 'Glenwood' property was owned by William C. Lewis, as a member of the firm, at the time of the fire." To this the plaintiffs replied on June 2d: "W. C. Lewis had no interest in the Glenwood property, except as stated in our letter of 26th May." In none of this correspondence is the objection urged that the explanation of W. C. Lewis' connection with the property should be under oath; and in none of this correspondence is there any other objection or question raised with reference to the proofs of loss, either as to their form or substance. The plaintiffs, in reply to the inquiries of the defendant in relation to this matter, state distinctly that W. C. Lewis had no interest in the property, but was limited to a fixed interest in the profits of the firm's business. What further information could have been reasonably desired or given on the subject it is difficult for us to see. To have demanded more presents the appearance on the part of the defendant of a desire to quibble at straws. It was an error very natural to be made by men not expert in the nice distinctions growing out of the ownership of partnership properties to state, as was done in these proofs of loss, that the incoming partner, William C. Lewis, owned an interest in the insured property; but when the matter is drawn pointedly to their attention the true explanation is at once made, showing that he in reality has no interest in the property of the firm as originally composed, but only a fixed interest in the profits of the business generally. In the light of the explanation given by Edward Lewis in his testimony,

as to the terms upon which William C. Lewis was admitted into the firm, we are of the opinion that he did not acquire any such interest in the property as would avoid the obligation of the defendant to pay the loss. In this case, according to the evidence of Edward Lewis, (and it is nowhere contradicted,) no written contract of partnership was gone into when William C. Lewis entered the firm. Nothing was done except to admit him to membership by a verbal agreement that he was to have a fixed interest only in the profits of the general business. With this testimony we are of the opinion that he did not acquire any such interest in this property as would defeat the right of George and Edward Lewis to recover upon this policy. In Lindley on Partnership (volume 1, p. 329) it is said that "the only true method of determining, as between the partners themselves, what belongs to the firm and what not, is to ascertain what agreement has been come to upon the subject. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with." To the same effect is Pars. Partn. § 366. Applying this test by getting from Edward Lewis, on the stand, the agreement between the partners here, the result is that William C. Lewis, on entering the firm, acquired no interest in its properties, but a prospective interest only in the profits of the business generally. Stumph v. Bauer, 76 Ind. 157. We do not think there was any error in admitting in evidence the proofs of loss furnished to the defendant, nor in admitting the correspondence that passed in reference thereto between the defendant and the plaintiffs, nor in permitting Edward Lewis, on the stand, to testify fully as to the *status* of William C. Lewis in the firm. The correspondence was directly pertinent to and explanatory of the only point in the proofs of loss to which the defendant excepted, and, not being demanded under oath, we think the requisite of being verified by oath must be held to have been waived. Marthinson v. Insurance Co., 64 Mich. 372, 31 N. W. Rep. 291; Insurance Co. v. Kelly, 32 Md. 421; West v. Insurance Co., 27 Ohio St. 1; Ayres v. Insurance Co., 17 Iowa, 176. The part of Edward Lewis' evidence objected to was directly pertinent to the same point, and we think was clearly admissible. It amplified and explained fully William C. Lewis' *status* towards the insured property, the only apparent subject of contention between the parties as to the sufficiency of the proofs of loss; which explanation and correction of the proofs of loss, we think, was proper at the trial, and in accordance with law. Insurance Co. v. Huckberger, 52 Ill. 464; Insurance Co. v. Stevens, 48 Ill. 31; McMaster v. President, etc., 55 N. Y. 222; Hubbard v. Insurance Co., 33 Iowa, 325; Insurance Co. v. Schwenk, 94 U. S. 593; Maher v. Insurance Co., 67 N. Y. 283; Mosley v. Insurance Co., 55 Vt. 142; Willis v. Insurance Cos., 79 N. C. 285; May, Ins. § 465; 2 Pars. Cont. p. 461. The cases cited by the defendant's counsel in support of their contention all involved personal property, where the incoming partner was admitted to full partnership in the assets of the former firm, where those assets consisted entirely of personalty, and have no applicability to the question here.

The fifth assignment of error, we think, is well taken. The whereabouts of T. J. Rawls, or the question as to whether he was alive or dead, could not have any relevancy to any issue in this case; and we are at a loss to understand the object of the inquiry as to his whereabouts, unless it be, as is contended by defendant's counsel, an effort to make admissible as evidence at the trial an estimate of the items and cost of replacing the destroyed property, purporting to have been made by T. J. Rawls, deceased. Even for this purpose we do not think the inquiry as to his whereabouts was pertinent or proper, as the fact of his decease did not render any estimate on the subject made by him admissible evidence. Had he been alive, his estimate, to be proper evidence, would have to be verified by his oath; and the fact of his decease did not render his unverified estimate, made while in life, any more competent as evidence than if the same had been offered during his life-time.

The sixth assignment of error is well taken, and is fatal to the verdict and judgment in this cause. Incorporated in the policy sued upon, as one of the covenants therein, is the following provision: "In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators, indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies, respectively, under this policy." In pursuance of this provision, the insurers and insured, after the loss, entered into the following agreement in writing for submission of the sole question of "amount" of loss to two builders or arbitrators:

"New York Underwriters' Agency, composed of the Germania and Hanover Fire Insurance Companies, of New York. Special agreement for submission to two builders. It is hereby agreed by B. C. Lewis & Sons, of the first part, and the Germania and Hanover Fire Insurance Companies, of the city of New York, of the second part, (each acting for itself,) that B. F. Langley and T. J. Rawls, together with a third party to be chosen by them, if necessary, shall appraise and estimate at the true cash value the damage by fire on the 2d day of January, 1885, to the property belonging to B. C. Lewis & Sons, as specified below, which appraisement and estimate by them, or any two of them, in writing, as to the amount of such loss or damage, shall be binding on both parties; it being understood that this appointment is without reference to any other question or matters of difference within the terms and conditions of the insurance, and is of binding effect only so far as regards the actual cash value of or damage to such property covered by policy No. 20,195 of said companies, issued

at the Tallahassee, Fla., agency. The property on which damage is to be estimated and appraised is the 2½-story frame building, with shingle roof, situate about seven miles north-east from Tallahassee, known as the 'Glenwood Property.' And it is expressly understood and agreed that said builders are to take into consideration the age, condition, and location of said premises previous to the fire, and also the value of the walls, material, or any portion of said building, saved; and after making an estimate of the cost of replacing said building a proper deduction shall be made by them for the difference (if any) between the value of a new or replaced building and the one insured. Said builders are hereby directed to exclude from the amount of damage any sum for previous depreciation from age, location, ordinary use, or any cause whatever, and simply to arrive at the damage actually caused by said fire. Witness our hands at Tallahassee, Fla., this 10th day of April, 1885.

[Signed] "B. C. LEWIS & SONS.
["] "GERMANIA & HANOVER FIRE INS. COS.,
"Per CHAS. C. FLEMING, Spl. Agt."

Then follows the oath of the said two builders, as follows:

"Declaration of Builders. State of Florida, county of Leon—ss.: We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisement and estimate of the actual damage to the property of B. C. Lewis & Sons, insured by the Germania & Hanover Fire Insurance Companies, of New York, agreeable to the foregoing appointment, and that we will return to said company a true, just, and conscientious appraisement and estimate of damage on the same, according to the best of our knowledge, skill, and judgment. Witness our hands this 10th day of April, A. D. 1885.

[Signed] "B. F. LANGLEY,
["] "T. J. RAWLS.

"Subscribed and sworn before me this 11th day of April, A. D. 1885.

[Signed] "W. C. LEWIS,
"Notary Public."

Then follow the findings or award, signed by one of said builders and an umpire alleged to have been selected by them, to-wit:

"Award of Builders. To the Germania and Hanover Fire Insurance Companies, of New York: Having carefully estimated and appraised the damage by fire to the property of B. C. Lewis & Sons, agreeably to the foregoing appointment, we hereby report that, after having taken into consideration the age, condition, and location of the premises previous to the fire, and making proper deductions for the walls, materials, and portions of building saved, we have appraised and determined the damage to be four thousand one hundred and seventy-two 75-100 dollars, ($4,172.75.) Witness our hands this 11th day of April, 1885.

[Signed] "B. F. LANGLEY.
["] "J. M. WILSON."

This submission to arbitration and the award that followed were specifically set up as a special defense by the fifth plea of the defendant. This plea was demurred to by the plaintiffs, and the demurrer was overruled by the court, and the plea sustained as a valid defense; yet, afterwards, on the trial, when the defendant sought to substantiate its plea by introducing the agreement of submission and the award in evidence, its admission was refused by the court, unless it should also offer to introduce evidence that the amount awarded had been paid or tendered by the defendant to the plaintiffs, and this, too, after a replication to this plea had been held by the court to be bad, that contended for payment or tender of the amount awarded before the award could be available as a defense.

Ever since the decision in 1853 in the house of lords, by COLERIDGE, J., of Avery v. Scott, 8 Exch. 499, it has been uniformly held in England and in this country that provisions like this in a policy of insurance for the ascertainment and settlement of the amount of loss or damage by submission to arbitrators are proper, legal, and binding on the parties, and do not fall within that class of arbitraments that undertake to oust the courts of their jurisdiction, and that are therefore obnoxious to the law. Wolf v. Insurance Co., 50 N. J. Law, 453, 14 Atl. Rep. 561; Gauche v. Insurance Co., 4 Woods, 102, 10 Fed. Rep. 347; Adams v. Insurance Co., 70 Cal. 198, 11 Pac. Rep. 627; Trott v. Insurance Co., 1 Cliff. 439; Zallee v. Insurance Co., 44 Mo. 530,—in which it is held that such a submission is not, in the accepted legal sense of the term, a submission to arbitration, but merely an appraisal, and that it was not necessary to have the appraisers sworn. Elliott v. Assurance Co., L. R. 2 Exch. 237; Howard v. Railroad Co., 24 Fla. 560, 5 South. Rep. 356. The parties in this case, in pursuance of this valid and binding provision in the policy here sued on, entered into a solemn written compact submitting the matter of the "amount" of the loss or damage to two arbitrators or appraisers of their own choosing, with power in them to choose a third as umpire in case of their failure to agree. The appraisers thus chosen have awarded or fixed the amount of the loss at $4,172.75. Why the assured are not bound by their agreement of submission and this award that followed we cannot comprehend from anything exhibited in the record. It is true that promptly after the rendition of the award they notified the insurers of their determination not to abide the same; but parties cannot thus arbitrarily rid themselves of the binding force and effect of their solemn contracts. By this award they were bound, and to the amount awarded were they limited in their right to recover, unless they could have shown under proper pleading such fraud or other matter as would in law have avoided the same. Burchell v. Marsh, 17 How. 344. In the record here there is not one *scintilla* of evidence even tending or attempting to show either irregularity, unfairness, or fraud in the procurement of this submission or in its conduct or result, and we must, consequently, hold that, in the absence of any such circumstances to avoid it, it is bind

ing as to the extent of the loss on the assured as well as upon the insurers. Such submission does not come within the catalogue of arbitraments provided for in our statute, (McCle. Dig. p. 105 et seq.,) and need not have been conducted in accordance with the statute. Neither was it necessary that the award of the appraisers, touching such special question submitted to them, should have been accepted or acted upon in any way by the respective parties; neither was the agreement to submit such special question to arbitration a unilateral undertaking binding only on one of the parties thereto; because, upon the face of that covenant, in the policy sued upon that makes provisions for the appraisement of the amount of the loss, and also in the subsequent agreement submitting said special question to two builders, it is expressly stipulated that the findings of such arbitrators as to the amount of the damage should be binding on both parties. Hence, if, after such ascertainment of the amount of the loss, it should be found that the insurers were legally liable for such loss, they at once became bound for the "amount" ascertained and awarded by such arbitrators. The fact that the amount thus fixed by the arbitrators was not paid or tendered has nothing to do with the question whatever. Both in the policy and in the subsequent submission to the appraisers the liability of the insurers was expressly excepted and reserved from the consideration of said arbitrators. The naked question submitted to them was: What is the amount of the damage here? Whether the insurers were legally liable, or obligated to pay that loss, was not submitted to them, and did not enter into their sphere of inquiry, nor into their award, and depended upon the settlement of divers other independent circumstances and conditions growing out of the contract between the parties. As before stated, the refusal of the court below to admit in evidence this agreement for submission to arbitration and the resultant award, under the objection apparently urged, was fatally erroneous. By that award, until avoided in some legally recognized way, each one of the underwriting companies, in the event of their legal liability for the loss, was obligated for one-half part of the amount thereof, $4,172.75. But one of the companies is sued here, and the verdict against it is for $3,000, which we find to be considerably in excess of one-half part of the amount of the award, by which the parties were bound, and to which they were limited in a recovery.

The seventh assignment of error is the giving of each and every of the instructions given by the court to the jury of the court's own motion, and those requested by the plaintiffs, but in the briefs of counsel this assignment seems to have been abandoned, except as to the instruction lettered "E," which is as follows: "The letter of the defendant acknowledges receipt of proofs of loss as of May 20, 1885. The interest, then, in the event of your finding for the plaintiffs, begins to run from July 20, 1885." This instruction, we think, was erroneous. It dealt too strongly with the facts, and supplied in reality a fact itself; that is, the exact date from which interest began to accumulate in the event of a recovery by the plaintiffs. The jury are the sole judges of facts, and they alone determine the establishment or non-establishment of every material fact in a cause. Had this instruction directed them that the plaintiffs were entitled to interest, in the event of their recovering, upon the amount of the recovery from a date 60 days after the furnishing of proofs of loss, and left it to the jury to determine whether proofs of loss had been furnished or not, and when, it would have been a proper charge. But, in view of the absence of any conflict of evidence as to the time when the defendant received the proofs of loss, we do not think the giving of this charge could be held to be reversible error. The other instructions given and excepted to counsel have ignored in their briefs, and consequently we will treat them as abandoned.

The eighth assignment of error is the refusal of the court to give nine instructions requested by the defendant. After what has been said upon the various questions arising in this case we do not deem it necessary to discuss this assignment further than to say that the court below, upon another trial, can conform its rulings upon the questions raised by said refused instructions to the views and opinions herein expressed.

The ninth assignment of error, the refusal to grant a new trial, it follows from what has been said, must be sustained. A new trial should have been granted.

The judgment of the court below is reversed, with instructions that a new trial be awarded.

(43 La. Ann. 1118)

REYNOLDS v. REYNOLDS *et al.* (No. 10,863.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

PARTITION—RIGHT TO DEMAND—APPEAL—WAIVER.

1. The right of co-owners of property to demand a partition thereof is absolute, and, where the co-ownership is admitted, appeal does not lie from a simple decree of partition.

2. When, besides admitting co-ownership, the parties have consented to the method and terms of partition fixed in the decree, they had nothing left subject to appeal.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Suit by Mary Reynolds against William Reynolds and others for partition. Decree for plaintiff. Defendants appeal. Dismissed.

A. L. Tissot and *E. J. Meral*, for appellants. *Joseph Brewer*, *Gilbert L. Hall*, and *Farrar, Jones & Kruttschnitt*, for appellee.

ON MOTION TO DISMISS.

FENNER, J. The motion is based on two grounds, viz.: (1) That the judgments are interlocutory, and not in their nature appealable; (2) that they were rendered by consent of appellants. The record discloses a simple suit for partition, by one owner against her co-owners, of certain designated property held in common be-

tween them. The answers of defendants admit the fact of co-ownership, and, two of them being minors, their tutor prayed that, in case of a decree for partition by licitation or sale, the right be reserved to a family meeting on behalf of his wards to advise as to terms and conditions of sale. A decree of partition by licitation was rendered, reserving the fixing of the terms and conditions until after the convocation of a family meeting in behalf of the minors. After the rendition of this decree the minors were duly emancipated, and thereupon a rule was taken on defendants to show cause why the terms of sale should not be fixed by the court. On this rule judgment was rendered, which recites that it was made "upon the consent of all parties given *ore tenus* in open court," and which orders that the sale "be made for cash to the highest bidder, and the judgment on this rule do stand as supplementary to the said judgment and decree of March 19, 1891. From the two judgments the defendants appeal. What standing have they in this court? Plaintiff's co-ownership being admitted, her right to demand a partition was absolute. Civil Code, art. 1289. It was long since held that appeal did not lie from a simple decree of partition between co-owners. Stokes v. Stokes, 6 Mart. (N. S.) 350. If the case involved a controversy as to the fact of co-ownership, or as to the mode of partition, possibly, under some circumstances, appeal might lie. But where, as in this case, the co-ownership is admitted, and when the method and terms are settled by consent of all, it seems very clear there can be no room for appeal. The appellants have favored us with no defense of their position, and we see none. Appeal dismissed.

(43 La. Ann. 1071)

Succession of ALLEN. (No. 10,822.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

RIGHT TO APPEAL—REMAND.

In appeals by third persons, not parties to the judgment in the court below, when the facts on which the right of appeal is based have not been established, and are denied by appellee, the case will be remanded to the lower court to try that issue.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Special Judge.

Kernan & Laycock and *Fergus Kernan*, for appellants. *Henry C. Miller*, for appellee Mrs. Nora K. Allen.

FENNER, J. The appellants claim to be heirs of the decedent, Allen, and appeal, as third persons, from a judgment rendered in the court *a qua* recognizing his widow as sole heir, and putting her in possession of the estate, to which judgment the appellants were not parties. Their interest in the proceeding and their right to appeal are based on their allegation of heirship, which is based on no proof save the *ex parte* affidavit of one of them attached to the petition of appeal in the lower court, and verifying the facts therein alleged. The appellee has filed a formal answer to the appeal in this court, in which she denies that appellants are relations or heirs of the deceased, or have any interest whatever to maintain an appeal. The jurisprudence of this court settles, beyond dispute, the course to be pursued in such a case. If a third person appeal, and the facts on which his right of appeal is based be denied, the case will be remanded to try that issue. Hermann v. Smith, 6 Mart. (N. S.) 161; Oakley v. Philips, Id. 306; Taylor v. Jeffries, 10 La. 438; Désormes v. Désormes, 15 La. 15; Succession of Henderson, 2 Rob. (La.) 391; Succession of Lauve, 6 La. Ann. 529; Succession of Bailey, 24 La. Ann. 486. These authorities are not controverted or overruled by those cited by appellant, viz.: Payne v. Ferguson, 23 La. Ann. 581, and Cooley v. Cooley, 38 La. Ann. 197. In the first, the allegation that appellant was a creditor was sustained by an authentic copy of his judgment annexed to his petition. In Cooley's Case there was no denial that appellant was a creditor, but merely a denial of his right of appeal as a legal consequence of his being a creditor. We find some difficulty in understanding the object of this appeal, or how the judgment appealed from practically aggrieves appellants, since they were not parties thereto, and it cannot operate as *res judicata* against them. Sue v. Viola, 2 La. Ann. 996; Williams v. Trepagnier, 4 Mart. (N. S.) 343; Young v. Cenas, 1 Mart. (N. S.) 308. If, however, they are heirs, and desire to annul this judgment by appeal, we cannot controvert their right to appeal. But they must first establish their right and interest. It is therefore adjudged and decreed that this cause be remanded to the lower court, with direction to the judge to hear testimony as to the heirship of appellants and their right to appeal.

(94 Ala. 346)

GIBSON v. J. SNOW HARDWARE CO.

(*Supreme Court of Alabama.* Dec. 1, 1891.)

EVIDENCE OF AGENCY — SALE TO PRINCIPAL—ACTION FOR PRICE—EVIDENCE—INSTRUCTIONS—ESTOPPEL.

1. In an action for materials furnished defendant for her building, plaintiff company adduced evidence that for some time it had sold goods to defendant's son, and that defendant had paid for the same; that the son prepared the specifications for the building, and superintended its erection; that the son directed plaintiff to let the contractor have whatever was needed, stating that defendant would pay therefor; that the goods were charged to the defendant; that a statement of a part of the account was presented to defendant, and paid by her; that afterwards plaintiff presented two accounts against defendant,—one for the building, and one individual of $20,—and defendant paid $100, with direction to satisfy the individual debt, and apply the balance to the building account; that during its construction defendant was much about the building, and knew that plaintiff was supplying the material. *Held*, that the evidence was admissible to establish the son's agency.

2. There being evidence before the jury that the son was defendant's agent, it was competent to prove all his acts in the transaction, including his declaration that he was defendant's general agent.

3. As the question before the jury was whether the son was acting as defendant's agent, it was competent for plaintiff to show that it acted

in strict compliance with the son's orders, since, if the jury found no agency, such evidence would impose no obligation on defendant.

4. The fact that some of the material was delivered to a workman under the contractor is no defense, since, if the agency was established, and pursuant to his instructions the contractor selected the material, the delivery to the workman to be carried to the building had no different effect on the account than a delivery to the contractor.

5. It was immaterial that defendant had paid the contractor for the material, since, if the son was authorized to bind defendant for the same, her payment to another could not affect plaintiff.

6. One who by his conduct had justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, is estopped from denying such authority.

7. Where the evidence was conflicting on every material point, it was proper to refuse to instruct the jury: "If the jury believe the evidence, you must find for defendant."

8. A request to charge which singles out the evidence of a certain witness, and demands a verdict if the jury believe such witness, was properly refused. Evans v. Railway Co.; 78 Ala. 341, followed.

9. In an action for the price of a bill of hardware sold defendant for use in a certain building, it was error to admit evidence of the amount of such material necessary for the construction of such building.

Appeal from circuit court, Tuscaloosa county; J. C. SPRATT, Judge.

Action by the J. Snow Hardware Company against F. L. B. Gibson for the price of a bill of hardware. Plaintiff had judgment, and defendant appeals.

All the facts, as well as the rulings of the court upon the evidence, to which exception was taken and assigned as error in this court, are sufficiently stated in the opinion. The plaintiff requested the court to give the following written charges: (1) "It is not true that one who deals with a general agent is bound to know the extent of his authority; but if the plaintiffs show that John Brady was Mrs. Gibson's general agent in building the opera-house, they would have a right to deal with him in regard to matters connected with the opera-house, without inquiring the exact extent of his authority." (2) "When one without objection suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound thereby, although no previous authority exists. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, he is estopped from denying it." The court gave each of these charges, and the defendant separately excepted thereto. The defendant then requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence, they must find for the defendant." (2) "The court charges the jury that the evidence in this case is not sufficient to establish the general agency of John G. Brady for the defendant." (3) "The court charges the jury that there is no evidence in this case that John G. Brady was the general agent of Mrs. Gibson." (4) "The court charges the jury that, if they believe the evidence, Mrs. Gibson, the defendant, cannot be made to pay for the goods ordered by G. W. Allen from the J. Snow Hardware Co." There was judgment for the plaintiff, and the defendant brings this appeal, and assigns the various rulings of the court as error.

Tipton Bradford and *Foster & Oliver*, for appellant. *Foster & Jones*, for appellee.

MCCLELLAN, J. This action is prosecuted by the J. Snow Hardware Company against Mrs. Gibson for the price or value of materials alleged to have been supplied to her to be used, and which were used, in the construction of an opera-house in the city of Tuscaloosa. Several witnesses testified that the items of the account were all used in the erection of the house, while one witness for the defendant, John Brady, who was the architect, and superintended the erection, deposed that "the account [sued on] is not correct, as there are several overcharges and charges for material that never went into the construction of the opera-house," etc.; going on to specify certain material and articles charged on the account which were not received for or used in the building. We have nothing to do with the weight of the evidence on the respective sides of this issue. Suffice it for us that there was some evidence upon either hand, thus making the question one for the jury. Going to this issue, the plaintiff was allowed to prove the size of the house, the value or amount of material necessary to its construction, and the value of the labor put upon it, against defendant's objection. This evidence would probably tend to induce the mind of a layman to the conclusion that all the material charged for was supplied, since that amount of material, or even more, was needed in the building. Hence we cannot affirm that, if the ruling of the court was erroneous, it involved no injury to the defendant. That it was erroneous is, we think, clear. We are unable to see how the fact that more material than plaintiff claims to have sold could have been used in the construction of the opera-house can have any legitimate tendency to prove that all the material charged for and specified in the account sued on was in truth sold and delivered to the defendant, and used in the building. This would be to prove a sale by evidence of the vendee's necessities, or his ability to utilize the thing alleged to have been sold. The testimony ought to have been excluded.

2. The inquiry of final importance in the case appears to be whether, in legal contemplation, John Brady was the agent of the defendant in the purchase of the materials which went into the building of the opera-house. There is no direct evidence that he was, since his own declaration to that effect cannot, standing alone, be looked to. But the evidence on the part of the plaintiff goes to show that it had been selling goods to Brady for his mother, Mrs. Gibson, "ever since it had been in business, and that she had always paid for goods so sold." It was in evidence also that Brady had prepared the

plans and specifications for the opera-house; that he was superintending its erection, seeing that the plans were executed, and the specifications complied with, and in some instances changing the same; and that he was constantly about the building supervising the work, etc. It also appeared upon one aspect of the testimony that at the commencement of the building, before, indeed, the work had been begun, he directed the plaintiff to let Allen, the contractor, have whatever was needed in the erection of the opera-house, and told the company's officers that his mother would pay for material so furnished; and that upon this direction and assurance the company, beginning about December 1, 1888, supplied between that time and March 18, 1889, the goods set out in the account sued on; that all these goods were charged to Mrs. Gibson; that on January 1, 1889, when the account amounted to about $375, a statement of it, showing that the credit was given to her, and the charge made against her, was presented to Mrs. Gibson for payment, paid by her without objection, and the statement kept by her, and produced on the trial. It further appears from plaintiff's evidence that on March 4, 1889, Mrs. Gibson had two accounts on its books, one known as the "opera-house account," and the other as her "individual account," the latter being for less than $20; and that on that date she paid plaintiff the sum of $100, with direction to satisfy the individual indebtedness, and apply the balance to the payment of the opera-house account. Then, too, it appeared that she was much about the opera-house during the time plaintiff was delivering the material there, and had in consequence abundant opportunity to know that the company was supplying such material, and that she received the benefit of the material in the erection of the opera-house. Now, these facts—the previous dealings by her with the plaintiff through Brady as her agent, Brady's connection with the building of the opera-house, her frequent presence there during these transactions, the payments by her on plaintiff's account for the materials furnished, with full knowledge that that account was made out against her, and without, at least in the first and main instance, any objection—were all proper to go to the jury as evidence of the agency of Brady; that the goods and wares, so supplied, went into the construction of her house and to her benefit; and, unexplained or unqualified, it cannot be doubted they were amply sufficient to authorize the jury to find the existence of the agency and hold her liable accordingly. 1 Amer. & Eng. Enc. Law, pp. 437, 438; Scott v. Railroad Co., 4 Amer. & Eng. R. Cas. 114; Herring v. Skaggs, 73 Ala. 446; Bearce v. Bowker, 115 Mass. 129; Tabler v. Sheffield Land, Iron & Coal Co., 87 Ala. 305, 6 South. Rep. 196; Railroad, etc., Co. v. Cheatham, 85 Ala. 292, 4 South. Rep. 828; Manufacturing Co. v. Belgart, 84 Ala. 519, 4 South. Rep. 400.

8. All those facts being properly before the jury, it was, of course, open to the defendant to overcome the evidence tending to establish them, either by evidence in flat contradiction and denial, or by way of explanation and qualification, going to rebut the inferences apparently afforded by the testimony in chief that Brady was her agent. Whether the evidence thus offered by the defendant in denial of her knowledge that plaintiff was furnishing the material and charging it to her, and in denial of Brady's authority to bind her, and in explanation of the payments made by her, so as to deprive her acts in that regard of any probative force in establishing a ratification by her, was sufficient to overcome the case made by the plaintiff, was manifestly a question for the jury. Upon the issue thus presented the triers of fact were at liberty to reach either of the two possible conclusions,—that Brady was or that he was not the agent of Mrs. Gibson in and about the erection of the opera-house and the purchase of materials therefor. The jury having before them the evidence upon which it was competent to find the fact of such agency, it was, of course, not only proper, but essential, that evidence of Brady's direction to plaintiff to supply the material and assurance that his mother would pay for it should go to them to be looked to, in the event they found that Brady was her agent, for the purpose of ascertaining, declaring, and enforcing the obligation Mrs. Gibson took upon herself through him. Nay, more, there being evidence before the jury tending to prove the agency or to make out a *prima facie* case thereof, it was then competent to prove all the acts and declarations of Brady in and about the business,—and, among the rest, his declaration that he was defendant's general agent,—and submit it all to the jury. Mechem, Ag. § 107; Reynolds v. Collins, 78 Ala. 94; Martin v. Brown, 75 Ala. 442.

4. We conceive of no plausible ground for defendant's objection to the testimony of the officers and employes of the plaintiff corporation that, acting upon the order of Brady and in strict consonance with it, they sold the material needed in the construction of the opera-house on the credit of Mrs. Gibson, and charged it to her account. If the jury found that Brady was her agent, this was necessary to fix her liability; and, if they found that Brady was not her agent, these facts would not tend to impose any obligation upon her.

5. The objections to charges and evidence which proceed on the idea that, assuming Brady's agency, defendant is liable for goods delivered into the hands of McLester and other employes of Allen at the opera-house are equally without merit. Brady's order was for the delivery to Allen of such material as should be needed in the erection of the house, on the credit of Mrs. Gibson. This was, of course, on the assumption that Brady was her agent, as if Mrs. Gibson in person had directed the furnishing of such supplies as Allen should need for the purpose in hand, thus lodging the discretion of selection in Allen. Nothing to the contrary appearing, it is to be taken that the wares were to be supplied at the market prices. The price thus being determined upon, and the selec-

tion of articles being made by Allen, his employes were not agents at all; no discretion was lodged in them; no confidence was involved in the service they performed in merely fetching to the opera-house articles selected by their master, and to be charged to Mrs. Gibson at prices before in effect agreed upon. They were mere servants performing manual service; and the goods delivered to them to be carried to the opera-house, and so carried, stand in no different aspect in this account than had they been carried by Allen's own hand. Mechem, Ag. § 2.

6. Nor was there error in excluding the testimony of Mrs. Gibson to the effect that she had paid Allen for the material charged in the account sued on. That fact could exert no influence on this case in any aspect. If Brady was her agent, and had authority to bind her to the payment of the account to the J. Snow Hardware Company, palpably payment by her to Allen or anybody else would not avoid her liability to plaintiff; and, if Brady was not her agent, she would not be liable to plaintiff, whether she had paid to Allen or not. The inquiry was foreign to the case, and properly eliminated from it. Agencies are of three classes,—universal, general, and special. "A universal agent is one authorized to transact all of the business of his principal of every kind; a general agent is one who is employed to transact all of the business of his principal of a particular kind or in a particular place; a special agent is one authorized to act only in a specific transaction." Mechem, Ag. § 6; 1 Amer. & Eng. Enc. Law, p. 348 et seq. "A special agency properly exists when there is a delegation of authority to do a special act." Story, Ag. § 17. "A special agent is one authorized to do one or two special things." 1 Ross, Cont. 41. "A special agent is appointed only for a particular purpose, and is invested with limited powers." Chit. Cont. 285. In the case at bar there was not only the declaration of Brady that he was Mrs. Gibson's general agent, but other evidence from which the jury might have inferred that he represented her generally in making purchases, or, at least, that he was her agent for all purposes in respect of the opera-house, including the making of the contract with Allen, the purchasing of material, the supervision of the work, changing of plans and specifications, etc. This would, in our opinion, constitute him her general agent with respect to that enterprise, if the jury found the facts in line with these tendencies of the evidence, having authority to do not "one or two special things," not "a single act" merely, but all acts necessary to the consummation of the enterprise in hand. And the court's charge to the jury at plaintiff's instance, that "one who deals with a general agent is not bound to inquire as to the extent of his authority with respect to the matter of the agency, and that, if the plaintiffs show that John Brady was Mrs. Gibson's general agent in building the opera-house, they [it] would have a right to deal with him in regard to matters connected with the opera-house, without inquiring the exact extent of his authority," was pertinent to the evidence adduced, and a correct exposition of the law applicable to it. Coffin Co. v. Stokes, 78 Ala. 372; Mechem, Ag. §§ 283–287.

9. It is an elementary principle, correctly stated in the second charge given for plaintiff, that one who by his conduct has justified the belief of a third party "that the person assuming to be his agent was authorized to do what was done, is estopped from denying" such authority. Mechem, Ag. §§ 83, 84.

10. What we have said will suffice to determine defendant's exceptions to the refusals of the court to give the first, second, and third charges asked by her against the appellant. The evidence was in conflict on every material point in the case, and hence charge 1 was properly refused. There was evidence that Brady was Mrs. Gibson's general agent in respect of the building of the opera-house, and hence charge 3 was bad. Whether this evidence was sufficient to establish the fact was a question for the jury, and not for the court, and therefore charge 2 was properly refused.

11. Charge 4 asked by defendant singles out the evidence of a named witness, and demands a verdict if the jury believe her. Instructions of this character have been expressly condemned by this court, as giving undue prominence to the testimony of the particular witness. Evans v. Railway Co., 78 Ala. 341. For the error committed in allowing evidence of the size, etc., of the opera-house to go to the jury, the judgment must be reversed, and the cause remanded.

(94 Ala. 505)

WEEDON *et al.* v. CLARK.

(*Supreme Court of Alabama.* Dec. 2, 1891.)

CERTIORARI TO JUSTICE COURT—EXECUTION AGAINST SURETIES—CLAIMS BY THIRD PARTIES.

1. The issuance of execution against sureties on a forfeited claim-bond by a justice of the peace does not operate as a judgment; and under Code, § 3405, providing that cases brought to the circuit court by *certiorari* from judgments of justices of the peace must be tried *de novo*, such action of the justice was properly ignored.

2. The claimant of a mule levied upon under execution testified that he told his son to take it in payment of a debt; that he replied he would do so; that the mule was not delivered at the time, nor taken off the farm, where his son was employed; and that nothing more was said about it until after a levy on the mule as the property of a third party, when he delivered the mule to his son, and charged him with it. Others testified that claimant said before the levy that the mule was not his, but his son's, but this claimant denied. *Held*, that it was improper to instruct the jury that claimant's offer and the son's acceptance of the mule divested claimant of property therein, since there was evidence from which the jury might have found that there had been no delivery.

Appeal from circuit court, Henry county; J. M. CARMICHAEL, Judge.

William F. Clark made a claim-bond for a mule levied upon under execution issued on a judgment recovered by Weedon & Dent against Warren G. Clark, and a trial of the right of property was had before a justice of the peace on the 24th day of October, 1888. Judgment was rendered in favor of plaintiffs and against claimant,

condemning the property as the property of the defendant and liable to the execution. An appeal was taken by claimant to a jury; whereupon a jury was impaneled, and a trial had, and they also rendered judgment for plaintiffs and against claimant, condemning the property as liable to the execution. No appeal was taken after the expiration of 10 days, and, the claimant having failed to deliver the property to the constable, he indorsed the claim-bond "Forfeited," and returned same to the justice. Thereupon, on November 24, 1888, the justice entered up the summary judgment on the forfeited claim-bond, and issued execution thereon against the claimant and the other obligors on the claim-bond. This execution was stayed by a writ of *supersedeas* issued by the probate judge of Henry county. A writ of *certiorari* was issued at the same time, removing the proceedings to the circuit court for review, both writs being issued on the petition of William F. Clark. The circuit court refused to grant plaintiffs' motion to dismiss the *supersedeas*, and affirm the summary judgment, and give judgment accordingly; but, against plaintiffs' objection and protest, proceeded to a trial *de novo* of the original claim suit, ignoring the summary judgment on the forfeited claim-bond upon which the superseded execution had issued. Proceeding, then, to the trial *de novo* of claim suit, plaintiffs proved that Warren G. Clark, the defendant in execution, bought the mule Kate in Eufaula in the early part of 1887, and owned her and made a crop with her for 1888. Thereupon the claimant, William F. Clark, testifying in his own behalf, stated that he was the father of Warren G. Clark, the defendant in execution; that, several weeks before the execution was levied on the mule Kate, he had purchased her from Warren G. Clark by taking her in full satisfaction of a debt due him from said Warren G. Clark; that the amount paid for her was $130; that soon thereafter, and before the levy of the execution, he owed another son, Morgan Clark, $130 for services rendered; that he told Morgan that, if he wished, he could take the mule in satisfaction of that debt; that Morgan replied, "All right, he would do so;" that at the time the mule was in his (the claimant's) lot, and was not taken therefrom by Morgan, or delivered to him; that Morgan at the time was in his employ, acting as overseer and general manager of the farm, and lived with him on the farm; that nothing more was said about it until the end of the year, and after the levy of the execution, at which time he and Morgan had a settlement, and in the settlement Morgan was charged with the mule, $130, and it was delivered to him at that time; and that after he was cast in the claim suit in the justice's court Morgan put in a claim to the mule Kate, and he went on Morgan's claim-bond as security. At the time of the levy of the execution the mule was in claimant's possession. Plaintiffs then introduced one J. F. Phillips, who testified that before the execution was levied he heard claimant say the mule was Morgan's property; also one T. W. Malone, who testified that after the levy and trial in the justice's court he heard claimant declare the mule Kate was not his property, but was Morgan Clark's. But claimant, testifying again for himself, denied having made either the Phillips or Malone statement. The court refused plaintiffs' requests for the following written charges: (1) "If the jury believe from the evidence that, prior to the time at which the claimant put in his claim to the property, he owed Morgan Clark a debt, and told him (Morgan) that he could take the mule for said debt, and Morgan said he would, then the property is not the claimant's, and the plaintiffs ought to recover." (2) "If the jury believe the evidence in this case, they must find for the plaintiffs in execution, and against the claimant." From a judgment for the claimant, plaintiffs appeal. Affirmed.

Jackson E. Long, for appellants. *P. A. McDaniel, Jr.*, for appellee.

MCCLELLAN, J. There appears to have been a judgment rendered by the justice of the peace against the claimant on October 24, 1888, an appeal to and trial by jury on the same day, and a verdict rendered against claimant as to the property now involved, and in his favor as to other items condemned by the justice to the satisfaction of the execution, but no judgment was pronounced or entered on this verdict. The verdict itself, however, was recorded on the justice's docket; and under our statute, which provides that, on appeal or *certiorari* to the circuit court, the case must be tried "*de novo*, and according to equity and justice, without regard to any defect in the summons, or other process or proceedings before the justice," the verdict may, for the purposes of that appeal and this, stand for the judgment of the justice's court. That was the only judgment in the case. It is an error to suppose that the issuance of executions against the sureties on the claim-bond upon its return forfeited, under section 3368 of the Code, is a judgment, summary or otherwise, and that the *certiorari* brought that action of the justice under review. The writ which was invoked here was that provided by statute, and its effect was to require a new trial in the circuit court without any reference to the action of the justice's court. Code, §§ 3400, 3405; Abraham v. Alford, 64 Ala. 281; Harsh v. Heflin, 76 Ala. 499.

The general charge requested for the plaintiffs was properly refused. It proceeded on the theory that the claimant had sold the property to his son. The evidence cannot be said, as matter of law, to establish that theory. It bore a tendency, in one aspect, to show that there had been no sale by the claimant to his son, in that there had been no delivery essential to constitute a sale. At least, the jury might have so found, and the charge would have deprived them of the right to so find. The other charge requested for plaintiffs is bad upon like considerations. The facts that claimant told his son he might take the mule in payment of a debt which claimant owed him,

and that the son "said he would," manifestly do not of themselves constitute a sale of the property. Affirmed.

(94 Ala. 407)

REEVES v. SKIPPER.

(*Supreme Court of Alabama.* Dec. 1, 1891.)

FRAUDULENT CONVEYANCES — RELATIONSHIP — KNOWLEDGE OF VENDEE—WRONGFUL ATTACHMENT—NEW TRIAL.

1. Where a sale of personal property has been attacked on the ground of fraud, the vendee being a brother of the vendor, the law requires clearer and more convincing proof of the *bona fides* than where the transaction had been between persons not related. COLEMAN and MCCLELLAN, JJ., dissenting.

2. Where the sale was made with intent to defraud creditors, and the vendee knew of such intent, the transaction was fraudulent, though the vendee actually paid a cash consideration for the property.

3. A sheriff levied an attachment on goods which the vendee claimed to have purchased from defendants in the attachment suit before the levy. In an action against the sheriff for the wrongful levy, issue was joined on his plea that the vendee had no means by which he could make the purchase, and proof was made that the vendee had stated before the sale that he had no such means. *Held*, that it was not error to charge that unless the vendee had shown that he had the means to purchase the goods, or some source from which he could obtain the means, the verdict should be for the sheriff.

4. Where the vendee, after testifying that the receipt for the payment of the goods was lost, was allowed to testify as to its contents, his motion for a new trial on the ground that the receipt had been found was properly denied, as it did not come within Code, § 2871, which provides that when one has a release in writing of a claim on which judgment has been rendered against him, which was lost at the trial, and which he was unable to prove by secondary evidence, but has since found, he is entitled to new trial.

Appeal from circuit court, Henry county; J. M. CARMICHAEL, Judge.

Action by I. L. Reeves against A. B. Skipper, as sheriff, to recover damages for the wrongful levy on a stock of merchandise. Verdict and judgment for defendant. Motion for new trial denied. Plaintiff appeals. Affirmed.

The defendant, together with his other pleas, filed a special plea, alleging that at the time of the alleged sale the plaintiff did not have the means to make the purchase, nor any source from which he could obtain same, and in support of this plea proved by the witness Holland that a short time prior to the sale the plaintiff, in conversation with him, (Holland,) told him "that Sims & Reeves were embarrassed, and wanted to sell out, and that he would buy, but did not have the money, nor any source from which he could get the same." The plaintiff was allowed, after having testified that the receipt for the payment of the stock of goods was lost, to testify that it recited the payment of $1,427 19 for the stock of goods which was afterwards attached by the defendant, and which is the subject-matter of the present suit. The portion of the general charge of the court to which the plaintiff excepted is copied in the opinion. The court at the request of the defendant gave the following written charges, and plaintiff separately excepted to the giving of each of them: "(1) If the jury believe from the evidence that Sims & Reeves were insolvent, and sold their stock of goods and merchandise to I. L. Reeves with the intention to hinder, delay, or defraud their creditors, and that the plaintiff had notice of such intention, then the burden is on plaintiff to reasonably satisfy them that he actually paid a real, adequate consideration for said goods, and there should be clear proof of his (plaintiff's) means to make said purchase, or some source from which he could have obtained said means. (2) The court charges the jury that, unless the plaintiff has shown to their reasonable satisfaction that he had the means by which he could have purchased the goods in question, or some source from which he could have obtained said means, then their verdict should be for the defendant." There was verdict for the defendant. Thereupon the plaintiff moved for a new trial on the grounds that the charge which was given by the court of its own motion was erroneous, and that the receipt which was thought to have been lost during the trial had been found.

J. G. Cowan and *J. W. Foster*, for appellant. *S. H. Dent, Jr.*, for appellee.

COLEMAN, J. The action was in trespass to recover damages for the alleged wrongful levy of an attachment upon a stock of goods claimed to be the property of plaintiff. The trial resulted in a verdict for the defendants. The attachment was sued out by creditors of Sims & Reeves upon debts existing at the time of the sale of the goods and merchandise to plaintiff. The evidence showed that plaintiff was a brother of the Reeves of the firm of Sims & Reeves, the vendors. The court, of its own motion, charged the jury, among other things, "that the law requires clearer and more convincing proof of its *bona fides* when the transaction is between relatives than when it is between persons who are not related to each other." An exception was reserved by the plaintiff to the giving of this charge. In the following authorities—and there are others not cited—it has been stated that "fuller and more convincing proof is required in cases where the transaction is between relatives than would be required if the parties were strangers:" Calhoun v. Hannan, 87 Ala. 285, 6 South. Rep. 291; Pollak v. Searcy, 84 Ala. 263, 4 South. Rep. 137; Gordon v. McIlwain, 82 Ala. 247, 2 South. Rep. 671; Moog v. Farley, 79 Ala. 252; Lipscomb v. McClellan, 72 Ala. 159; Marx v. Strauss, (Ala.) 9 South. Rep. 818. Under the influence of this principle, the majority of the court hold that the charge was properly given. A minority of the court are of opinion that when the principle is thus formulated into a charge to the jury it gives to the "fact" of relationship a legal weight not consistent with the purposes intended by permitting proof of the fact of relationship, and such a charge is also a clear invasion of the right of the jury to determine what weight shall be given to any proven fact, and their exclu-

sive right to draw all legal inferences from proven facts. The earlier cases held that relationship was a badge of fraud, but experience demonstrated that the rule was too harsh, and in many instances destroyed the validity of contracts which were free from fraud. Still it was recognized that it was an easy matter for parties related to each other "to feign a consideration for the transfer of property, or to fabricate evidence of its payment;" and to prevent the success of fraudulent conveyances it was held proper to admit evidence of the fact of the relationship of the parties, not that this fact was to be considered as a badge of fraud, or was available to shift the burden of proof, or imposed any additional burdens upon the parties. It was a circumstance in the case, to be considered by the jury in weighing the evidence, "dependent, more or less, for its value upon the degree of relationship, and its connection with other circumstances which throw light upon and give color to the transaction." The writer thinks this is the legitimate operation of the "fact of relationship," and in accord with the rule stated in the following cases: Young v. Dumas, 39 Ala. 60; Barnard v. Davis, 54 Ala. 565; Hubbard v. Allen, 59 Ala. 297; Moog v. Farley, 79 Ala. 251; Bump, Fraud. Conv. 56; Harrell v. Mitchell, 61 Ala. 279. The juries are the exclusive judges of the weight of the evidence. The court pronounces the conclusions of law upon proven facts. When the court, therefore, instructs the jury that, if the fact of relationship be proven, the law requires clearer and more conclusive proof than if this fact had not been proven, this is a conclusion of law, fixed and determined as to the weight to be given to this fact, and it no longer remains a fact to be weighed by the jury like other facts, and accorded such weight as they see proper to give it. It no longer is dependent for its value upon its connection with other facts, but in and of itself raises a presumption in law, which cannot be overcome except by clear and more convincing proof than if the fact had not been proven. What more would be required if such fact was held to be a badge of fraud? As was said in Stix v. Keith, 85 Ala. 471, 5 South. Rep. 184, the law declares rules for aiding juries in weighing, but never weighs, parol testimony; citing 1 Greenl. Ev. § 10, note *a*, and 1 Whart. Ev. (2d Ed.) § 417. The correctness of the rule of law as declared in 85 Ala. and 5 South. Rep., supra, is conceded by the court. Now, if the jury are the exclusive judges of the weight to be given to the evidence, a charge which substantially instructs them that, although the evidence may reasonably satisfy them of the *bona fides* of the transaction, yet, if relationship is proven as a fact, then as a matter of law they must not permit the evidence to produce this degree of conviction in their minds, unless it is clearer and more convincing than would be necessary if the facts of relationship had not been proven, giving to the fact of relationship undue prominence and a controlling influence upon the other facts of the case. Such an instruction fetters the free judgment of the jury, and infringes upon their peculiar and exclusive province. See 1 Whart. Ev. § 417, supra. If such an instruction was applied to any other fact introduced in evidence, the charge would be condemned, and, if not condemned when applied to the fact of relationship, it must be, because this fact is not to be weighed by the jury like other facts, but comes to the jury weighed by the law. It seems to me that a charge would be confused, inconsistent, and calculated to bewilder a jury which instructed them in effect that, if relationship be proven, the law requires clearer and more convincing proof than if this fact had not been proven, yet, being the exclusive judge of the weight to be given to the facts in evidence, the jury is at liberty, if it was proper, to disregard this rule of law, and attach to this fact no importance. I cannot see how the two propositions can stand together, or how a jury would construe such a charge. Cases might arise in which the rule should have no weight,—as where the relationship is very distant, or where the proof shows that, although related, the parties did not know it, or that there had been no previous social or business intercourse with each other, or they were in fact at variance with each other at the time of the transaction. Is the jury to be instructed, as a rule of law, under such circumstances, that, relationship having been proven, the law requires that clear and more convincing proof of the *bona fides* of the transaction be made than if relationship had not been proven? Is not the better and true rule that declared in those authorities which held that relationship is a circumstance to be considered by the jury in weighing the whole evidence of the case, and which is dependent for its value upon the degree of relationship, and its connection with other circumstances which throw light upon and give color to the transaction? Since the courts have repudiated the doctrine that relationship is a badge of fraud, and hold that no presumptions of unfairness arise from this fact, this is the legitimate and full purpose intended by permitting the fact of relationship to be proven as evidence.

The first charge given for the defendant is objectionable, but the objection is not available to appellant, as it is too favorable to him. If the jury were satisfied that Sims & Reeves sold their stock of goods to I. L. Reeves with the actual intent to defraud their creditors, and I. L. Reeves knew of this intent, and with this knowledge bought the goods for a present cash consideration, the transaction was fraudulent, and would not be relieved in law of its vitiating character by any proof that I. L. Reeves might offer as to his ability to make the purchase, or the source from whence he obtained the money. The charge asserted, in effect, that, although the transaction was fraudulent, if the purchaser clearly showed he was able to make the purchase, that proof would relieve the transaction of its fraudulent character.

The second charge given at the request of the defendant asserts an incorrect prop-

osition of law, but in giving it the court was not in error, for the reason hereafter given. If the jury was otherwise satisfied that plaintiff paid for the goods with his own money, he was not required to further satisfy the jury of the source from which he obtained the means. It is not a canon or rule of law that, when creditors attack the *bona fides* of a sale of goods by the debtor, the purchaser, in addition to the fact of payment, must also reasonably satisfy the jury as to his means or source of means to make the purchase. The rule is that, if the payment or its *bona fides* is questioned, a matter controverted, the inability of the purchaser to show that he had the means, or any source from whence he could obtain the means, tends to discredit the evidence offered to show the payment of an actual and adequate consideration and the *bona fides* of the transaction. If, however, the jury are satisfied that payment in good faith was actually made, it is not incumbent on the purchaser to go further, and also satisfy them as to his means and resources. The statement in the case of Harrell v. Mitchell, 61 Ala. 276, embodied in this charge, was used by the court in argument upon the facts, and the inability of the purchaser in that case to show that he had means with which to make the purchase was stated as a reason why the court should not credit other testimony in the case tending to show the payment of an adequate consideration. In criticising charge 2 we have not overlooked the fact that the charge is based upon a plea upon which issue was joined. Issue having been joined upon the plea, although demurrable, the defendant had the right to introduce evidence in support of his plea, and to ask for an instruction upon the evidence adduced in support of it. There was no error in giving the charge.

If the suit in this case had been by the vendor against the purchaser to recover the purchase money for the goods, the fact that the receipt was lost or mislaid at the time of the trial would have furnished grounds for a new trial, under section 2871[1] of the Code, but in a suit by the creditors of the vendor, attacking the *bona fides* of the conveyance, the case is not covered by the statute. The court permitted parol proof of the contents of the receipt. If the receipt had been produced in court, and it had specified in terms that the money was paid for goods, it would have been permissible to have shown by parol that in fact and in truth notes and accounts entered into the consideration. We cannot see from anything in the record that the court erred in overruling the motion for a new trial. It is the opinion of the court that the judgment of the lower court should be affirmed.

McCLELLAN, J., concurs with the writer.

[1] Section 2871 provides that where one has a release in writing of a claim on which judgment has been rendered against him, which was lost or mislaid at the trial, and which he was unable to prove by secondary evidence, but has since found, he is entitled to new trial.

(95 Ala. 315)

DUNDEE MORTGAGE, TRUST & INV. CO. v. NIXON *et al.*

(*Supreme Court of Alabama.* Dec. 2, 1891.)

FOREIGN CORPORATIONS—LOANING MONEY—PLACE OF BUSINESS—VOLUNTARY NONSUIT—REVIEW ON APPEAL.

1. In an action on a note, plaintiff in its complaint styled itself a corporation of Great Britain. The only evidence as to where the note was executed was the note itself, which was headed and dated as executed at a place in Alabama. There was no other evidence, except that it was proven that plaintiff had not complied with Const. art. 14, § 4, and Act Feb. 28, 1887, which require that foreign corporations shall have a known place of business and an authorized agent in the state before doing business therein. Defendants had filed a plea alleging that plaintiff had not complied with these provisions, and no sufficient demurrer was interposed. *Held*, that a verdict was properly directed for defendants.

2. A nonsuit taken in consequence of adverse rulings on a pleading is voluntary, and does not fall within the statute authorizing a plaintiff suffering a nonsuit to reserve, by bill of exceptions, rulings of the court for review on appeal.

Appeal from circuit court, Marengo county; WILLIAM E. CLARKE, Judge.

Assumpsit by the Dundee Mortgage, Trust & Investment Company against W. G. Nixon and others on a note under seal, executed by Nixon as principal, and the other defendants as sureties. There was judgment of nonsuit, and plaintiff appeals. Affirmed.

The plaintiff in its complaint styled itself as a corporation under the laws of Great Britain. The defendants interposed as pleas: *First*, the general issue; *second*, payment; *third*, that the note upon which the action was founded was usurious; *fourth*, want of consideration; *fifth*, *sixth*, and *seventh*, that the plaintiff is a foreign corporation, and had not complied with the statutory and constitutional provisions which warranted it in doing business in this state at the time of the execution of the note sued on. There were demurrers interposed by the plaintiff to these several pleas of the defendants. Upon the trial of the case the plaintiff introduced in evidence the note sued on, and then rested. The defendants proved, which was not controverted, that at the time of the execution of the note the plaintiff had failed to comply with the act of the general assembly of Alabama, approved February 28, 1887, which was entitled "An act to give force and effect to section 4, art. 14, of the constitution of the state of Alabama." This was all the evidence in the case; whereupon the court, at the request of the defendants, gave the general charge in their behalf; to the giving of which the plaintiff duly excepted.

G. B. Johnston, for appellant. *John C. Henderson* and *Watts & Son*, for appellees.

COLEMAN, J. Facts which are averred in a complaint need not be pleaded in defense, or if set up in a plea, as a general rule, need not be proven by the plaintiff. So far as the rights of the plaintiff are concerned, the defendant has the right to consider facts averred in the complaint to be true. The complaint in this case sufficiently shows that plaintiff is a foreign corporation. The plaintiff offered

in evidence a promissory note, headed and dated Uniontown, Ala. *Prima facie* Alabama was the place of its execution, and, no other evidence being offered on this question, the law presumes the contract was made at Uniontown, Ala. Farrior v. Security Co., 88 Ala. 275, 7 South. Rep. 200; Mortgage Co. v. Sewell, (Ala.) 9 South. Rep. 143. It was proven without dispute that plaintiff had not complied with the constitution of the state, and the statutory provision which requires that foreign corporations shall have a known place of business and an authorized agent before doing business in this state. It has been frequently decided that, however immaterial, defective, or demurrable a plea may be, if issue be joined upon the plea, and the evidence sustains it, the defendant has the right to have the court charge the jury upon such plea. The record shows that plaintiff filed several demurrers to the pleas of the defendants. After this was done, the defendants by leave of the court, withdrew their pleas, and demurred to the complaint. The court overruled the demurrer to the complaint, and by leave of the court the defendants refiled their former pleas. The record does not inform us that plaintiff refiled its former demurrer to the pleas of defendants. After the defendants' pleas were refiled, as shown in the judgment of the court, the only entry is that "plaintiff, by its attorney, demurs to said pleas." The demurrer or assignments for cause of demurrer upon which the court ruled being nowhere stated in the record, we must presume, in favor of the correct ruling of the court, that the demurrer was general or insufficient, even though the plea might have been held defective as against a demurrer properly framed. Masterson v. Gibson, 56 Ala. 56. We must consider the pleading as if issue had been joined upon all the pleas except the fourth, without the interposition of a sufficient demurrer. The seventh plea of defendants, not to mention others, was fully sustained by evidence which was not controverted.

The bill of exceptions states that, in consequence of the charge given by the court to the jury, the plaintiff "took a nonsuit, and reserved the point for the determination of the supreme court by bill of exception." The record of the judgment shows that "plaintiff in open court excepts to the ruling of the court overruling its demurrer to the pleas Nos. 1, 2, 3, 5, 6, and 7, and also excepts to the charge of the court to the jury, and by consent of the court takes a nonsuit, with a bill of exceptions." A nonsuit taken in consequence of adverse rulings on the pleading is voluntary, and does not fall within the statute which authorizes a plaintiff suffering a nonsuit to reserve by bill of exceptions rulings of the court for review on appeal to this court. 3 Brick. Dig. p. 678, § 5, and authorities cited. A nonsuit was taken in consequence of the charge given by the court to the jury. The correctness of the charge is properly before us for review. In view of the pleading and the evidence, there was no error in the charge given. It is not every act done by a foreign corporation in this state to which the constitution and statute applies, which requires that it shall have a known place of business and an authorized agent. Shoe Co. v. Ware, 92 Ala. 145, 9 South. Rep. 137. The statute does apply to the loaning of money. Nelms v. Mortgage Co., (Ala.) 9 South. Rep. 141. The application of the foregoing principles leads to an affirmance of the case. Affirmed.

(94 Ala. 380)

HIGGINS v. BOARD OF TRUSTEES OF UNIVERSITY OF ALABAMA.

(*Supreme Court of Alabama.* Dec. 8, 1891.)

PUBLIC LANDS—GRANTS—RIGHTS OF OCCUPANTS.

Under Act Cong. April 23, 1884, granting lands to the state of Alabama for the state university, and, by section 8, declaring that the provisions of the act shall not apply to any land to which the right of homestead entry shall have attached in favor of any person who is entitled to such homestead entry, and who is occupying and claiming the land at the time when such selections are approved by the secretary of the interior, and, in cases where it is found that such claims are superior to the rights granted the state, it may select other lands in lieu thereof, and, by section 4, providing that when such selections are made and approved the title shall vest in the state, one who has occupied government land with the intention of obtaining it as a homestead, but who has filed no affidavit, and made no payment, and performed none of the other conditions precedent on which his rights under the homestead laws are made to depend, loses all right to obtain the land by failing to contest the state's selection before approval.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Suit by Elias M. Higgins against the Board of Trustees of the University of Alabama, to have certain lands held by respondents declared to be held by them as trustees for complainant, and to have a conveyance thereof made to complainant. Demurrers to the bill were sustained, and the bill dismissed. Complainant appeals. Affirmed.

Brown & Crems, for appellant. *A. E. Hargrove* and *I. E. Webb*, for appellees.

MCCLELLAN, J. We will concede, for the purposes of this appeal, that the complainant, appellant here, had made entry on the land in controversy as a homesteader prior to the approval of its selection by agents of the state of Alabama, under the act of congress of April 23, 1884, "to increase the endowment of the university of Alabama from the public lands in said state," and that he had cleared and put improvements upon it prior to, and was cultivating and occupying it as a home at the time of, the approval of such selection by the secretary of the interior, on May 19, 1885. It is not clear from the averments of the bill that the land was subject to homestead entry, but, pretermitting a discussion of that point, the further concession will be made that the land was subject to such entry. There is no pretense advanced by the bill that complainant did aught else at any time towards perfecting a homestead entry than to enter upon, improve, clear, live on, and cultivate the land with the intention of making it his homestead. No declaration was ever made or filed. No pay-

ments required by the statutes of the United States to perfect entry and entitle the entryman to a patent have ever been made. Occupation for the length of time, and cultivation and improvements of the character, required by the homestead laws are the facts, linked to an intention to make the premises his home, and the sole facts, upon which the demand advanced by complainant's bill is made to rest. That demand is that the legal title to the land, which has vested in the trustees of the university of Alabama by approval and certification by the secretary of the interior of the list containing this, among many other parcels, to the state of Alabama, and by an act of the legislature of Alabama, shall be divested out of said trustees, and vested in the complainant. This title is of the absolute fee, without limitations or restrictions upon the uses to which the grantees may devote the land, or upon their power of disposition, or with respect to the charges that may be made upon it by them, or which the law may impose by way of enforcing liabilities incurred by them, further than is implied in the general purposes of the grant to provide suitable buildings and appliances and an endowment fund for the university of Alabama. This title, if passed into the complainant as prayed in his bill, would, of course, be of the absolute fee, discharged not only of the trusts with which it is charged in the hands of its present holders, but also free from all limitations of the homestead laws of the United States. The land, for instance, would be chargeable for indebtedness of the complainant contracted prior to the vesting of the title in him, which is specially provided against in respect of homesteads. Rev. St. U. S. § 2296. In other words, the effectuation of the prayer of complainant's bill involves, not his investiture of a homestead title, but of an ordinary title in fee-simple to the land in question; and he would become not the homestead owner only, but the owner, without restriction, of 80 acres of land, which might be taken from him immediately by the enforcement of an antecedent liability. Not only would he thus acquire an estate to which he was not entitled from the government on the facts upon which his claims rested, and which, in contravention of the policy of federal legislation respecting homesteads, might at once be taken away from him, but that estate would be acquired without the performance by him of the conditions precedent upon which his rights, under homestead laws, are made to depend. It is just as essential to the issuance of a patent to a homestead, or to the perfect right to demand a patent, that the affidavit required by Rev. St. U. S. § 2290, should at some time be made, and that the sum of money prescribed by that section should be paid, as that the would be entryman should comply with statutory requirements as to occupation, cultivation, and the like. Conceding that, under the act of May 14, 1880. (21 St. at Large, 140,) an entry may be initiated by settlement alone, and that the declaratory affidavit above referred to need not be made *in limine*, it by no means follows that the necessity for such affidavit is obviated. On the contrary, we are clear to the conclusion that the sworn declaration must in all cases be filed before the inchoate entry can ripen into such right as draws to it title, or the right to demand the issuance of a patent. And so with the money necessary to perfect a homestead entry. Whether the entry be initiated by formal filings and possession taken, or only by settlement, the fees must be paid before it can be perfected, and before a patent can be issued or demanded. As we have seen, no declaration has ever been made, or fees paid, by the complainant. He cannot now file such affidavit, and make such payment. To do so would not entitle him to a patent from the United States, because the government has no title to the land. The defendants' attitude and rights respecting the property manifestly could not be affected by any declaration or payments made to them, such as the statute requires to be made to government officials. The time for these things to be done by the complainant, if there has been any such time, has forever passed. No offer to do them is, or could with propriety have been, embodied in the bill. Yet the complainant, without having complied with these conditions precedent to the right to demand a patent for a homestead estate in the land, without having put himself in a position to require a conveyance of such estate from the United States, having, in short, no right to the relief prayed as against the grantor of the defendants, would, if the theory of his bill be a sound one, not only effectuate a non-existing and never existing right as between him and the United States against the latter's grantees, but, in doing so, would acquire a larger estate in the land than he would have been entitled to had he fully complied with all the requirements of the homestead laws. A theory upon which such results may be worked out cannot be tolerated. The true doctrine is that, until the complainant had complied with all the statutory requisitions,—had filed his declaration and paid the sum of money required, as well as occupied, cultivated, and improved the land, as provided in the statute,—he had no vested rights in the premises,—no rights which might not be cut off and defeated by a grant by the United States to a third party,—and hence no right which, at least in the absence of fraud or gross mistake, he could assert against such third party. This appears to be the understanding of congress in all cases like the present one. Statutes like that involved here uniformly, it is believed, contain a saving clause for the protection of settlers or homesteaders whose entries are inchoate. The necessity for such clause is uniformly recognized, and this recognition must be rested on the consideration that such inchoate entries vest no estate or interest in the entryman, since, if he had vested rights, they would be saved to him under organic guaranties, in the absence of any such provision in the statute. And, in all reason, it must be the law that mere settlers on the public domain, with whatever intention and to what extent

soever they cultivate and improve the land, acquire no vested rights in the premises,—no rights which can be supported against a grantee of the government. It is an anomaly too flagrant to receive the sanction of any court that the United States, against which statutes of limitations do not run, and as to which the doctrines of adverse possession and laches have no application, should be deprived of the title to land by the mere possession and use of it by others, unaccompanied by those further acts on the part of the settler which the statute prescribes as conditions precedent to the vesting of his rights, and which are intended to advise the officials charged in that regard of the claim desired to be effectuated. If this could be done, no grant of public lands could ever be made until the government had made inquisition in respect of every legal subdivision, and ascertained that no settlement had been made upon it; and, if the position of complainant be correct, whenever such inquiry disclosed settlement, no grant could ever be made; and this, notwithstanding the settler might never comply with the statutes as to payments, declaratory affidavits, and proof of occupation and cultivation. That this is not the law is clear, we think, logically, and upon authority. Newkirk v. Marshall, 35 Kan. 77, 10 Pac. Rep. 571; Thrift v. Delaney, 69 Cal. 188, 10 Pac. Rep. 475; Frisbie v. Whitney, 9 Wall. 187, 189.

It is very true that the policy of the general government towards persons who have settled upon and reclaimed public land ought to be and is a liberal one. Congress has always been careful to conserve their welfare, and to secure to them the fruits of their labor by which such land is made productive; but, no vested rights adverse to the United States being involved, it lies in the unfettered election of congress to say to what extent such conservation is to be carried, and to prescribe the terms, conditions, and methods under which it is to be effectuated. Pursuing that broad and liberal policy which has always obtained in these matters, congress has provided, in the third and fifth sections of the act granting lands to Alabama for the state university, the manner in which land selected by the state upon which settlements have been made may be reserved out of the grant and saved to settlers. Section 3 is as follows: "That the provisions of this act shall not apply to any legal subdivision of land to which the right of homestead entry or pre-emption shall have attached in favor of any person who is entitled to such homestead and pre-emption entries, and who is occupying and claiming such subdivision of the public lands in Alabama at the time when such selections are approved by the secretary of the interior; and in cases where it is found that such claims are superior to the rights of the state of Alabama, herein granted, the said state may select other lands in lieu thereof, and in like quantity, elsewhere in said state, from the public land of the United States, so as to make up, as nearly as may be, the total number of acres of land granted in this act to said state." Section 5 provides "that the secretary of the interior is empowered to make all needful and proper regulations and rules for carrying this act into effect, and for the decision of all questions that may arise as to the right of the state of Alabama to any lands that may be claimed under the provisions of this act;" and by section 4 of the act it is provided "that when the selections of said lands are so made, (*i. e.*, by the agents of the state whose duty it is to report lists of selections to the commissioner of the general land-office,) and are approved by the secretary of the interior, the title to the same shall vest in the state of Alabama," for the benefit of the university, as prescribed in the act. These provisions came before Acting Secretary of the Interior Joslyn in January, 1885, for consideration and interpretation in respect of the rights of settlers upon lands so selected, and the time and manner of their assertion. The precise question involved was whether the rights of one claiming entry initiated by occupation only were foreclosed and forever barred by the approval of the selection of the particular subdivisions by the secretary; and the conclusion reached was that the statute contemplated and provided for a contest of the selection only before such approval; that the *onus* of instituting and prosecuting the contest was upon the settler; that, if no contest was instituted in a given instance prior to the secretary's final action on the selection, "the selection took the land," and it was his duty to approve the same, and that thereby the absolute title, freed from the unpropounded claims of the settler, at once vested in the state of Alabama. The secretary, referring in his opinion to section 3 above set out, said: "I construe this to mean that the selection is entitled to be admitted and reported, subject to the inchoate claim which has been or may be filed within the time required by law, although subsequently to the date of selection; and that, if such claim is not perfected, or prosecuted in good faith by the observance of legal requirements, up to the date of approval of the selection, the latter will prevail, and take the land; for the act goes on to provide that, 'in cases where it is found that such claims are superior to the rights of the state of Alabama herein granted, the said state may select other lands in lieu thereof, and in like quantity,' etc. This provision evidently contemplates an adjudication of the claim of the settler upon selected lands, and an award as to superiority; with the privilege to the state, if the issue be against her right, to select lieu lands to make up the quantity so stricken from her lists. Now a lieu selection is not made because of original refusal to admit to record, but in place of one admitted, and afterwards stricken therefrom. If this be so, it is evident that the *onus* is upon the settler to prefer his claim, show his compliance, and receive his award, at least in so far as to give legal notice of its existence by proper filing, without requiring [as had been done by the commissioner of the general land-office, whose action in that behalf was being revised by the secre-

tary] advertisement of the lists, or preliminary affidavit as to non-settlement upon the lands as matter of fact." We are not aware that this construction of the statute by the department charged with its execution has ever been departed from. Many decisions of the interior department have been referred to in argument, and cited on the briefs of counsel, but they involve only the rights of the settler as against the United States in the absence of a grant by the government to a third party, and hence in the absence of an adverse claimant. Such was the Case of Newman, 8 Dec. Dep. Int. 448. We have, in the outset of this opinion, conceded the proposition advanced by this case, the gist of which, when applied to the relations existing between the complainant and the government, is that, if the title to the land in controversy were still in the United States, he would be entitled, by complying with the homestead laws in respect of filing the declaratory affidavit, making payment, and proving settlement, etc., to have a patent issued to him. But that is not to say that he may do these things after the land has been granted to another, and have a patent from the government, or that, without doing these things, he may now have the grantees of the government convey the land to him. On the contrary, one of the factors in the conclusion reached in the Newman Case was the fact that no adverse claim to the land existed. Even if decisions of the interior department have been made at variance with the construction put on this act by Acting Secretary Joslyn, we would feel in no degree constrained to follow them. We regard that construction as eminently sound. The approval of selections by the secretary of the interior is, from the clear intendment of the statute, a judicial act. Congress, having plenary power in the premises, has said to the settler that his moral right is recognized; that he should have an opportunity to bring forward his claim; that he was entitled to his day in court, so to speak; and that, if he fail to avail himself of the opportunity thus afforded, as a matter of favor and grace, to propound his claim, and have the court, the secretary of the interior, to adjudge the saving clause of the statute, it shall, in effect, be adjudged whether he is within or not, that he is not, and that "the selection," and not he, "takes the land." This is the meaning of the act construed by the acting secretary, and as we construe it. The result reached by this construction,—the vesting of title in the state, notwithstanding a settlement, if the settler fail to contest the state's selection before approval,—is not only supported by the terms of section 3 of the act, but is further reinforced by the explicit provision of section 4, that such approval vests the title in the state. The title referred to is the unincumbered fee in the United States, against which the settler has no vested rights, as we have seen, but only the right given him as a matter of grace by this statute to defeat the state's selection by seasonably propounding his claim before the officer who is required to approve the selection.

As was pointed out in the opinion of the judge of the city court, some very anomalous consequences would ensue from a construction which would admit of the approval of the secretary of the interior being contested and defeated. In the first place, such approval is the end of the law. It is the final act by which title passes into the state, and by which the purpose of congress is completely effectuated. That done, the state is invested with title to 46,080 acres of land, the quantity granted by the act, and every term of the act is filled. Thereafter no authority exists in the estate to make other selections, and none in the secretary of the interior to approve other selections if made. To allow settlers who have failed to assert their claim upon the reasonable opportunity afforded them by the act prior to approval to bring them forward, and have them effectuated subsequently thereto, would be to reduce the grant made to the state to that extent. It was stated, in argument, that there are many settlers on lands selected and approved, whose claims are identical with complainant's, and who are awaiting the decision of this case. If the position of complainant be correct, the state would get very much less than the 46,080 acres granted by congress, since there is no authority in the act for the selection of lieu lands to make up for land thus taken from the state. Such a construction violates the letter and spirit of the statute, and cannot be tolerated. Another anomalous result is well stated by the city judge. He says: "After the title has so passed, [by the approval of selection,] and in a suit to which the United States is not a party, it could not be bound by the decree of any court so as to require, or even to authorize, its officers to approve other selections in lieu of lands divested out of the state by such decree. Otherwise, it would be within the power of the state's agents to select other lands in the same condition, and the settler may go into a court, and by its decree clothe himself with the title, and like proceedings could be continued until every such settler in the state has been invested with the title to the land occupied by him without any further compliance with the laws and regulations of the United States;" and this process might be continued *ad infinitum*, or until the public domain of the state had been exhausted and passed into individual proprietorship, without any semblance of compliance on the part of the individual with provisions of the homestead laws which are essential conditions precedent to the acquisition of any estate under them. These considerations serve to illustrate the absurd possibilities of the construction contended for by the appellant, and to demonstrate the soundness of the contrary view, which we have elaborated. Adopting that view, we hold that whatever right or claim the complainant had, conceding that he had any, was cut off by the judicial ascertainment of the secretary of the interior, evidenced by his approval of the selections, that the land in question was subject to the selection of the state; that the state took an absolute title in fee, unincumbered and un-

affected by the fact of complainant's prior settlement on the land, and that, this title having passed to the defendants, the trustees of the university of Alabama, they are beneficially, as well as nominally, the owners of the property, against the complainant and all the world.

The decree of the city court dismissing the bill is accordingly affirmed.

(94 Ala. 497)

SCARBROUGH v. ALABAMA MIDLAND RY. CO.

(*Supreme Court of Alabama.* Dec. 15, 1891.)

INJURY TO EMPLOYE — NEGLIGENCE OF INDEPENDENT CONTRACTOR.

In an action for personal injuries, it appeared that B. & Co. were subcontractors of A. T. & I. Co. in constructing defendant's railroad; that plaintiff was injured while a passenger on a pass issued by B. & Co. over a portion of the road yet in their possession and under their control, on a train furnished by defendant to B. & Co. and A. T. & I. Co., as a construction train, through the negligence of an engineer employed by and under control of the latter company. *Held*, that defendant was not liable.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Action for personal injuries by Simon Scarbrough against the Alabama Midland Railway Company. Defendant had judgment, and plaintiff appeals. Affirmed.

Sayre & Pearson, for appellant. *A. A. Wiley*, for appellee.

WALKER, J. The plaintiff had been employed by J. M. Brown & Co. as a laborer in the construction of the Alabama Midland Railway up to the time when he received from them a pass from Ramer, where he had been in camp, to Bainbridge, Ga. He got on the train on which the pass was to be used, and received personal injuries in a collision between that and another train. The portion of the railway on which the collision occurred was, at that time, still in process of construction, and was in the possession, exclusive control, and management of Brown & Co., who, as independent contractors, were engaged in building the railway from Sprague Junction, Ala., to Bainbridge, Ga. The contract of Brown & Co. was with the defendant and the Alabama Terminal & Improvement Company. Prior to the date of the plaintiff's injury, the portion of the railroad from Bainbridge, Ga., to Ozark, Ala., had been completed and turned over by Brown & Co. to the Alabama Terminal & Improvement Company, and that company, as a construction company, was then operating this completed portion of the line. The collision occurred between Ozark and Sprague Junction. The contractors had laid the track over this last-named portion of the line, and they were running construction trains over it, but this part of the railway was still uncompleted, and had not been turned over to the construction company or to the defendant railway company. A clause of the contract with Brown & Co. was in these words: "The railway company to furnish engines and cars, with train supplies, with engineer and fireman, and such other force as may be required to handle said train, free of charge, for the transportation of men and material in the construction of the road, such trains to be subject to the order of the contractor during construction." The bill of exceptions states that the two construction trains which collided were furnished to Brown & Co. under and in accordance with, and in the manner prescribed by, the contract. It appears, however, without contradiction, that the engineers of the two construction trains which collided were employed and paid, not by the defendant, but by the Alabama Terminal & Improvement Company, and that that company alone had the power to discharge them. The evidence tended to show that the collision was attributable to the negligence of the engineer in charge of the train upon which the plaintiff was riding. That the defendant was authorized to commit the work of building its road to independent contractors is not questioned; and that J. M. Brown & Co. occupied the position of independent contractors, in reference to the work in which they were engaged, is clear beyond dispute. For their negligence, or for the negligence of their employes, in doing the work contracted for, the defendant is not liable. Railroad Co. v. Chasteen, 88 Ala. 591, 7 South. Rep. 94. The plaintiff accepted the pass from them, and was looking to them for his carriage. There is nothing to indicate that he understood that the defendant had anything to do with his transportation. The claim that the injury complained of is attributable to the negligence of the employes of the defendant is not supported by any tendency of the evidence. The statement in the bill of exceptions to the effect that the train on which the plaintiff was riding was furnished to Brown & Co. in accordance with the terms of the contract with them cannot be construed to involve the assertion that the engineer in charge of that train was employed by the defendant or was subject to its orders; for the proof shows clearly and distinctly that the engineer was not an employe of the defendant at all, and was not subject to its orders. He was the servant or employe of another party. The defendant did not select him, or have the right to discharge him or to control his work, and he was engaged in doing the work of an independent contractor. The result of applying the tests for determining whether one person is to be regarded as the servant of another is that that relation is not shown to have existed between the defendant and the negligent engineer. The fact that the engine and train belonged to the defendant is not, by itself, sufficient to charge the defendant for their negligent operation in the work of constructing the road. There is a class of cases in which the negligence of the driver or manager of a vehicle is held to be chargeable, not to the hirer thereof, who, at the time, was getting the benefit of its use, and, in a limited sense, directing its movements, but to the owner or proprietor who had intrusted the general management and control of the vehicle to his own servant. In such cases the owner or proprietor is held responsible because the driver or manager was really his agent, and was acting in

his service; and the hirer of the vehicle cannot be regarded as the master of the driver or manager, or as controlling the conduct of the latter in the matter wherein he was negligent. Land Co. v. Mingea, 89 Ala. 521, 7 South. Rep. 666; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391; Railroad Co. v. Norwood, 62 Miss. 565. When, however, the person in charge of a vehicle is not in fact the employe of the owner thereof, and is not subject to his orders or control, and the vehicle is really operated by the hirer or bailee thereof in the lawful exercise of a complete and exclusive dominion over it, then one who is injured in consequence of the negligent management of the vehicle cannot hold the owner responsible therefor, because the negligence is not that of the owner or his agent or servant. The train on which the plaintiff was riding was subject to the orders of the contractors while it was used as a construction train. They controlled its operation. It was doing service for them alone. It was operated as an agency to execute their will and to do their work. It was engaged in an employment over which J. M. Brown & Co., as independent contractors, had the general control, with the right to direct what should be done, and the manner of doing it. As a general rule, the owner of property may surrender to another the control thereof, and of the employe who is intrusted with the management of it. There are special cases in which the law does not permit such a surrender of control, or holds the owner responsible for the management of the property, though it is actually controlled by another; as where the law charges the owner with the duy of performing the service in which the property is used, or where the work in which the property is to be used, under a contract with the owner, is necessarily or intrinsically dangerous. Mayor, etc., v. McCary, 84 Ala. 469, 4 South. Rep. 630. Unless the owner is held to responsibility upon some such consideration, the rule which is sustained by the weight of the authorities is that, though the property of one person which is used in a special service for another is at the time managed or operated by an employe of the owner or proprietor, yet if such employe, in regard to the particular matter in which he is engaged, is under the control, not of his general master, but of the person for whom the special service is rendered, who, in reference to the details of that work, had the management thereof as an independent contractor, then such property is to be regarded as used in the service of the independent contractor, and, as to that particular service, the employe is to be regarded as the servant, not of his general master, but of the independent contractor whose work he is doing. In such case the contractor has the actual management, in details, of the property while it is used in his business, and the person in direct charge of the property is identified with him as his servant as to that special service. In applying the rule just stated, several courts have held that a railroad company is not liable for damages resulting from the negligent management of one of its trains used and controlled by construction contractors for construction purposes on a portion of its road built under construction contract, and not yet turned over to the railroad company, though the train employes are hired and paid by the railroad company. Powell v. Construction Co., 88 Tenn. 692, 13 S. W. Rep. 691; Cunningham v. Railroad Co., 51 Tex. 503; Miller v. Railroad Co., 76 Iowa, 655, 39 N. W. Rep. 188; Hitte v. Railroad Co., 19 Neb. 620, 28 N. W. Rep. 284; 14 Amer. & Eng. Enc. Law, 838. The present case does not call for the application of the rule stated in the authorities just cited, for the person who, on the evidence, was guilty of negligence of which the plaintiff complains was not in any sense the servant of the defendant; and, in the circumstances disclosed, it is plain that the defendant cannot be charged with responsibility merely because the train on which the plaintiff was riding was the property of the defendant. The defendant did not have any such control of the trains as to render it chargeable with their negligent management. There was no error in the charge given by the circuit court at the request of the defendant. Affirmed.

(95 Ala. 111)

DONALD *et al.* v. NELSON *et al.*

(*Supreme Court of Alabama.* Dec. 15, 1891.)

GARNISHMENT — SERVICE OF WRIT — PLEADING — ISSUES — SUFFICIENCY OF AFFIDAVIT.

1. Under Code, § 2945, which provides that attachments may be executed by summoning any person indebted to defendant, or having in his possession any money or effects belonging to defendant, the issue of the attachment, and its possession by the officer, are essential prerequisites to a valid execution by service of garnishment.

2. Where service of garnishment process is void for the non-existence of an attachment, such defect may be pleaded in abatement.

3. Leave to file a replication to a plea in abatement, after the expiration of the time allowed by rule, rests in the discretion of the court, and its exercise is not reviewable on appeal.

4. An affidavit of plaintiff denying the truth of a garnishee's disclosure, which alleges that on a certain day, several months prior to the service of the garnishment, the garnishee had money in his hands belonging to defendant, is insufficient as a basis for an issue under Code, § 2981, which provides that plaintiff shall make oath in what respect the answer is untrue.

5. Where a garnishee made disclosure, alleging ownership of the property sought to be reached in a third party, and plaintiff declined to controvert the truth of such disclosure by a sufficient answer thereto, pursuant to Code, § 2981, or to proceed against the third party by notice, pursuant to section 2984, the garnishee was properly discharged.

Appeal from circuit court, Mobile county; W. E. CLARKE, Judge.

Action in attachment by Donald Bros. & Co. against James Nelson & Sons, defendants, and W. H. Lienkauff & Sons, garnishees. From an order sustaining the garnishees' pleas in abatement, and overruling plaintiffs' demurrer to such pleas, plaintiffs appeal. Affirmed.

Faith & Ervine, for appellants. *Pillans, Torrey & Hanaw*, for appellees.

CLOPTON, J. Appellants having made before the clerk of the circuit court the requisite affidavit and bond to obtain an

attachment against the estate of James Nelson & Sons, the clerk, without issuing an attachment writ, issued a garnishment process, directed to and commanding the sheriff to summon W. H. Lienkauff & Sons as garnishees. The process having been served, the garnishees appeared and filed pleas in abatement, setting up that no attachment was issued, and that the sheriff was without authority to serve the summons of garnishment. Plaintiffs first moved to strike out the pleas, and then demurred. Both the motion and the demurrer were overruled. On a subsequent day the garnishees were, on their motion, discharged upon their pleas in abatement, no replication thereto having been filed, nor issue taken thereon, within the time required by the rules and practice of the court. During the hearing of this motion, plaintiffs asked leave to file a replication, which was refused. The exceptions to these several rulings constitute the first four assignments of error.

Section 2945 of the Code provides that attachments may be levied on the real estate or personal property of the defendant, or may be executed by summoning any person indebted to him, or liable to him on a contract of either of the kinds specified, or having in his possession or under his control any money or effects belonging to the defendant. Under the statute, garnishment is a mode of levying an original attachment. The sheriff cannot make a valid levy on real or personal property, or by garnishment, without having in his possession the attachment authorizing it. His power and duty arise when the attachment is placed in his hands. Until then he has no authority to act, and becomes a trespasser if he seizes the property of the defendant. The issue of the attachment and possession by the sheriff are essential prerequisites to a valid execution by service of garnishment. Wales v. Clark, 43 Conn. 183; Drake, Attachm. § 183*a*. The attachment must be levied by the officer to whom the writ is directed; and, when executed by garnishment, the officer levying must officially sign, as well as serve, the summons requiring the garnishee to appear within the time, and answer as to the matters prescribed in section 2946, and indorse such service on the attachment writ. Garnishment is a statutory proceeding, and can be issued only in the cases and by the officer authorized by statute. The clerk has authority to issue a garnishment when in aid of a pending suit, or on a judgment, or in cases in which the process is merely auxiliary; but such authority is not conferred when it is resorted to as a mode of levying an original attachment. The clerk is as much without authority to direct or command the sheriff to execute the attachment by summoning any particular person as garnishee as he is to direct or command on what property the sheriff shall levy. His authority ceases with the issue of the attachment. He is not authorized to do any act thereafter in reference to, or involving, the levy. It follows that the garnishment process issued by the clerk, and the service thereof, are nullities.

A garnishee cannot avail himself of irregularities in the attachment proceedings; but when the writ is void, or the garnishment process is issued by an officer without authority, or the service is invalid because of the non-existence of an attachment, the objection is available to the garnishee, and any available defects in the process may be taken advantage of by plea in abatement. Flash v. Paul, 29 Ala. 141; Curry v. Woodward, 50 Ala. 258. Leave to file a replication to a plea in abatement, after the expiration of the time allowed by the rules of practice, rests in the discretion of the court, the exercise of which is not revisable.

During the foregoing proceedings, after the filing of the pleas in abatement, and before the discharge of the garnishees, plaintiffs obtained, under an order of the court, the issue of an attachment, based on the original affidavit and bond, which was executed December 15, 1890, by the service of another summons of garnishment on Lienkauff & Sons. The garnishees answered in writing, denying indebtedness, and on subsequent oral examination in court, required by plaintiffs, stated that on February 5, 1890, the captain of the steamer Spindrift, of which James Nelson was agent, deposited with them $5,580 in lieu of a bond which they had made at the custom-house for the steamer, and that they were informed that the Highland Scot Steam-Ship Company claimed the money. Thereupon plaintiffs filed an affidavit for the purpose of contesting the answer. The affidavit and the issues were stricken out, on motion of the garnishees, on the ground of their insufficiency; and, plaintiffs declining to proceed further, the garnishees were discharged. The affidavit states that, in the belief of affiants, the answer of the garnishees is untrue, in this: that they were indebted, on the 14th of June, 1890, when the first garnishment was served on them, to James Nelson & Sons, and that the money deposited with them was the money of the defendants in attachment. Section 2981 of the Code provides the mode by which a contest of the answer may be initiated: "The plaintiff, his agent or attorney, may controvert the answer of the garnishee by making oath, at the term the answer is made, that he believes it to be untrue; and thereupon an issue must be made up, under the direction of the court, in which the plaintiff must allege in what respect the answer is untrue." Had the affidavit stated generally that the affiants believe the answer of the garnishees to be untrue, without more, it would have been sufficient, under the statute, to inaugurate a contest. But it does not stop here. It proceeds to allege the particular respect in which the answer is untrue,—that is, that the garnishees were indebted on June 14, 1890, to James Nelson & Sons; thus presenting an immaterial issue. The garnishees were required to answer only as to indebtedness at the time of the service of the garnishment, or at the time of making their answer, or at any intervening time. Code, § 2946. The garnishees may have been indebted several months prior to service of the gar-

nishment, and yet not have been indebted at the time of the service. Whether or not there was a prior indebtedness is not the issue to be found on such contest; though evidence thereof may be admissible, in connection with proof of its continuance, on a proper issue. In this respect the affidavit was insufficient.

When a third person claims the debt or demand, or the money or effects, which by his answer the garnishee admits to be due or in his possession, and he so informs the court by his answer, it becomes the duty of the court to suspend proceedings against the garnishee, and cause a notice to issue to such person to appear at the next term, and contest with the plaintiff the right to such debt, money, or effects. Code, § 2984. Prior to the enactment of 1840, which is substantially incorporated in section 2984 of the Code, the only mode by which the plaintiff could contest the validity of the transfer of the debt or effects was by controverting the answer of the garnishee, and, if the issue was found in favor of the plaintiff, judgment was rendered against the garnishee. As the judgment was not conclusive on the claimant, not being a party to the contest, the garnishee was exposed to a double liability. To remedy this evil, the act of 1840 was enacted. Since its enactment the garnishee may protect himself against a double liability by informing the court by his answer, or at any time before final judgment against him, that he has been notified that another person claims the debt, money, or effects. In such case judgment cannot be rendered against the garnishee on his answer until notice is served on the claimant, and the issue found in favor of the plaintiff on a contest with the claimant, or unless he is in default, or, if a resident, two notices are returned, "Not found." Sections 2985, 2987. The plaintiff cannot compel the garnishee to contest the validity of the claim of such third person by controverting his answer. The garnishees having informed the court by their answer that a third person claimed the money deposited with them by the captain of the steamer, no judgment could be rendered against them on their answer at that time. Moore v. Jones, 18 Ala. 296; Ex parte Opdyke, 62 Ala. 68; Fowler v. Williamson, 52 Ala. 16. The court having properly stricken out the affidavit as being insufficient, and the plaintiffs having declined to proceed further, and to contest with the claimant the right to the money, the garnishees were entitled to a discharge. Affirmed.

(94 Ala. 479)

WRIGHT v. ROBINSON *et al.*

(*Supreme Court of Alabama.* Dec. 15, 1891.)

ACCOUNTING BY GUARDIAN—FORECLOSURE OF MORTGAGE—PARTIES.

1. Where the guardian of a minor loaned money belonging to her, and the note and mortgage taken therefor ran to himself as such guardian, and he afterwards settled his accounts with and paid her in full, such note and mortgage became his property.

2. Though such guardian died intestate and no administration of his estate was had, yet where his wife and children were living, and none of the children were under the disability of minority, and his debts were paid, such wife and children could sue in their own names to foreclose such mortgage.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

Suit by Mary E. Robinson and others against John D. Wright to foreclose a real-estate mortgage. Decree for plaintiffs. Defendant appeals. Affirmed.

Moore & Finlay, for appellant. *Watts & Son*, for appellees.

STONE, C. J. N. D. Wright died intestate in October, 1883, leaving a widow and four children surviving him, all of whom are still living. He had been guardian of one Caroline Wright, and had lent $800 to J. D. Wright, taking, as security for its repayment, a mortgage on real estate. The note evidencing the debt, and the mortgage to secure its payment, express in each that they are made to "N D. Wright, guardian of Caroline Wright." This note and the mortgage were found among N. D. Wright's papers after his death. N. D. Wright in his life-time, and shortly before his death, had made a final settlement of his guardianship of Caroline Wright, and had accounted for the $800 previously loaned to J. D. Wright. He paid her in full. There was never any administration on the estate of N. D. Wright, but Robinson and Eubanks, husbands of two of the daughters, under authority from the widow and adult children, proceeded to collect the assets and pay the debts of the estate. The present bill was filed in May, 1890, near seven years after the death of N. D. Wright. The widow and the four children are made complainants, and the object of the bill is to foreclose said mortgage for a balance alleged to be due. The bill in its averments sets forth the facts stated above. It also avers that all the complainants were adults save one,—the youngest daughter,—and that she had been relieved of the disabilities of minority. It avers further that all the debts of N. D. Wright, the intestate, had been paid. There was a demurrer to the bill, the main ground being that the suit was brought in the names of others than the personal representative of N. D. Wright's estate.

Questions almost identical with the one raised by the demurrer have been very often before this court. We have uniformly held that, where nothing remains to be done except the reduction of the assets to possession, and their distribution among the next of kin, administration may be dispensed with. Bethea v. McColl, 5 Ala. 308; Miller v. Eatman, 11 Ala. 614; Vanzant v. Morris, 25 Ala. 285; Marshall v. Crow, 29 Ala. 278; Carter v. Owens, 41 Ala. 219; Fretwell v. McLemore, 52 Ala. 124; Sullivan v. Lawler, 72 Ala. 68, 72; Cooper v. Davison, 86 Ala. 367, 5 South. Rep. 650. The demurrer was rightly overruled.

The averred facts show that, when N. D. Wright paid his ward in full, the note and mortgage became his property. Tomkies v. Reynolds, 17 Ala. 109. Producing the note and mortgage from the proper custody, proof that N. D. Wright settled with his ward and paid her off, and the testi-

mony of Robinson, make a very strong showing in favor of complainants. Rejecting as illegal all testimony given by J. D. Wright of transactions alleged to have been had with the deceased, and the defense is left without material evidence in its support. There is no testimony to overturn the presumptions raised by the papers. Complainants have fully made out their case. Affirmed.

(95 Ala. 64)

IRWIN v. EVERSON.

(*Supreme Court of Alabama.* Dec. 15, 1891.)

APPOINTMENT OF RECEIVER.

In a suit to settle a partnership, where the defendant, in possession of property which was claimed to constitute its assets, denied the existence of a partnership, and showed that he was entirely solvent, and able to respond to any measure of relief which might be decreed plaintiff, it was error to appoint a receiver of such property.

Appeal from chancery court, Elmore county; S. K. MCSPADDEN, Chancellor.

Suit by Georve V. Everson against Robert L. Irwin, for the settlement of a partnership. From an order appointing a receiver, defendant appeals. Reversed.

J. T. Holtzclaw, H. C. Bullock, and *A. A. Wiley,* for appellant. *W. S. Thorington* and *J. M. Chilton,* for appellee.

MCCLELLAN, J. This appeal is prosecuted from an interlocutory order appointing a receiver of the partnership alleged to exist between Everson, the complainant, and the defendant, Irwin. The fact of partnership, alleged in the bill, is denied by the answer; and, on the application of complainant for the appointment of a receiver, affidavits were submitted on both sides of the issue thus made. Moreover it is manifest, indeed is admitted, that the contemplated copartnership was never consummated as to that part of its subject-matter which consisted of realty, for the want of articles in writing signed by the parties; and it may be that the alleged contract, even conceding one to have been entered into by parol, will have to be taken as an entirety in such sort that it cannot be upheld as to the personalty, and avoided as to the realty. It is not necessary for us, however, to decide either the issue of fact as to the existence of any contract of copartnership, or the question of law as to the effect of the failure of the alleged arrangement as to the land upon that part of the transaction which related to personal property. Not only so, but we apprehend that it would be affirmatively improper to decide, at this stage of the litigation, and upon the *ex parte* showings found in this record, whether or not any partnership has ever existed between the parties. Suffice it, for all the purposes of this appeal, that there is a *bona fide* dispute between the parties as to the existence of the partnership averred in the bill, and a substantial doubt enveloping that issue; and that it clearly appears, the contrary not even being alleged, that Irwin, who denies the partnership, and has possession of the property claimed to constitute its assets in part, is entirely solvent, amply able to respond fully to any measure of relief which can possibly be decreed to the complainant on the facts set forth in his bill. In such case the chancery court should not intervene by its receiver. To do so, thus, without any concession of the existence of a partnership, but, on the contrary, in the face of a *bona fide* denial of the fact, and in advance of any final determination that the alleged relation does exist, might well be to take from the defendant property in which the complainant has no interest, and subject it to an expensive and exhausting administration on the joint account of parties, one of whom is, in fact, without any right in the premises, only to the end of ultimately adjudging it to be the defendant's property, and making restitution to him of such of its proceeds as have not been expended under the receivership; and all this when, even from the point of view of the complainant, his rights could be fully conserved by a mere accounting between the parties, and the enforcement of the decree for any balance in his favor against the property of the defendant. Peacock v. Peacock, 16 Ves. 49; Fairburn v. Pearson, 2 Macn. & G. 144; Goulding v. Bain, 4 Sandf. 716; Hobart v. Ballard, 31 Iowa, 521; Williamson v. Monroe, 3 Cal. 383; Popper v. Scheider, 7 Abb. Pr. (N. S.) 56; High, Rec. §§ 476-478.

The chancellor, in our opinion, erred in appointing the receiver; and his order in that behalf is reversed, and it is here ordered that the receiver be discharged. Reversed and rendered.

(94 Ala. 135)

TORREY v. FORBES *et al.*

(*Supreme Court of Alabama.* Dec. 16, 1891.)

EJECTMENT—DISCLAIMER—PLEADING—NONSUIT—DISMISSAL—WAIVER—PROOF OF DEEDS.

1. Code, § 2699, provides that the defendant in ejectment may disclaim possession of the premises sued for, in whole or in part, and, upon such disclaimer, the plaintiff may, if he so elect, take issue. *Held,* that a plea of not guilty and a disclaimer could not be entered together, since the former admits, and the latter denies, possession.

2. Where defendant in ejectment pleads not guilty as to the whole tract in dispute, and enters a disclaimer as to a part of the land, plaintiff may, if he so elect, take issue on the plea of disclaimer; otherwise, he should take judgment for want of plea as to the lands disclaimed, and join issue on the plea of not guilty as to the balance.

3. Under section 2737, providing that nonsuits must be taken before the jury retire, and section 2759, providing that when, from any decision of the court on the trial of a cause, it may become necessary for the plaintiff to suffer a nonsuit, the facts, point, or decision may be reserved for the decision of the supreme court by bill of exceptions, a nonsuit cannot be taken in ejectment after the cause has been discontinued by order of the court on defendant's motion.

4. Although section 2710 provides that when in actions for the recovery of land, there are more defendants than one, the jury may assess the damages arising from the detention of the land, and the injury thereto, in severalty, against each defendant for distinct damages, yet the discontinuance by plaintiff of a suit in ejectment as to one defendant is a discontinuance as to all.

5. Where, after a discontinuance as to one defendant, the other defendant does not object to the introduction of evidence or final argument by both parties, he waives his right to a discontinuance.

6. Where defendant in ejectment has taken possession of land under a deed purporting to convey it to him, the deed, though void as a conveyance, is admissible to show color of title.

7. Code 1867, § 1546, provides that acknowledgments may be made within the United States, and beyond the state of Alabama, by judges of any "court of record" in any state. *Held* that, though a certificate of acknowledgment purporting to be taken by a judge of a superior court of North Carolina failed to show that such court was a court of record, yet the signature was valid as the attestation of a witness.

Appeal from circuit court, Baldwin county; W. E. CLARKE, Judge.

Ejectment by Charles Torrey, as executor of John Bowen, against Elisha Forbes and another. Nonsuit granted. Plaintiff appeals. Reversed.

The plaintiff's testator derived title from Grist, Hughes & Co., and, in order to prove the chain of title, he introduced, among other proceedings and deeds, the deed of Annie M. Hughes to Zophar Mills, and also the deed of Isaac W. Hughes to Zophar Mills, and also introduced in evidence the depositions of William J. Clark and Annie M. Hughes, taken in North Carolina, who testified that the signatures to the deeds were respectively those of Annie M. Hughes and Isaac W. Hughes and William J. Clark, and that Isaac W. Hughes and William J. Clark had been dead for some years. The defendant moved to exclude the deed of Isaac W. Hughes—*First*, because the acknowledgment was defective; *second*, because the said deed had never been recorded; *third*, there was no witness thereto; *fourth*, the judge making the certificate was not shown to have been a judge of a court of record. The court sustained the defendant's objection to exclude the said deed, to which the plaintiff duly excepted. The substance of the certificate of said deed is stated in the opinion. The plaintiff then introduced in evidence the deed of Zophar Mills to his testator, John Bowen, and also introduced evidence tending to show that the defendants did not enter upon said lands until the spring of 1882. The defendants, to sustain their contention, introduced a deed of Sallie A. Forbes to James A. Bishop, and also a deed from Sarah A. Grist to Sallie A. Forbes, purporting to convey the lands involved in this controversy; and the defendant testified that he bought the lands described in said deed as lands owned by Sarah A. Grist. The plaintiff thereupon moved to exclude said deed of Sarah A. Grist to Sallie A. Forbes—*First*, because there was no witness thereto; *second*, that said deed was void; *third*, that it was not acknowledged by Benjamin Grist, the husband of the grantor. The court overruled the plaintiff's motion, and admitted the deed in evidence as a color of title, and plaintiff excepted.

Fredk. G. Bromberg, for appellant. *Pillans, Torrey & Hanaw*, for appellees.

COLEMAN, J. Plaintiff brought suit in ejectment against James A. Bishop and Elisha Forbes. Both defendants entered a joint plea of not guilty. On the same day, the defendant Forbes filed a disclaimer as to all the lands sued for, except 160 acres. The plea of not guilty and a disclaimer cannot be pleaded together. They are inconsistent with each other. The plea of not guilty is a conclusive admission of possession, and puts in issue the title. A disclaimer is an admission of plaintiff's title, but denies the possession. McQueen v. Lampley, 74 Ala. 408; Bernstein v. Humes, 60 Ala. 582. The plaintiff may, if he elects, take issue upon the plea of disclaimer; but upon such issue the question involved is not one of title. Code, § 2699.[1] If the plaintiff does not wish to contest the plea of disclaimer, his proper course would be to take judgment for the lands disclaimed as to the party disclaiming for want of plea, but without damages or cost, (74 Ala., supra,) and join issue upon the plea of not guilty as to the balance of the lands. The judgment entry recites as follows: "That during the trial of the cause plaintiff dismissed the suit as to the defendant Bishop, and the defendant Elisha Forbes asked and was granted leave to disclaim as to all the lands except those described in his disclaimer. The defendant Forbes moved to abate the suit upon the ground that the dismissal of the suit as to Bishop operated a discontinuance of the suit, and the court granted the motion; whereupon the plaintiff asked leave to take a nonsuit, with bill of exceptions," etc. We do not think the cause was in a condition to authorize the taking of a nonsuit after, by the order of the court granting the motion, the cause had been discontinued. The statute (section 2737, Code) provides that nonsuits must be taken before the jury retire; and section 2759 of the Code provides when, from the decision of the court on the trial of a cause, it may become necessary for the plaintiff to suffer a nonsuit, the facts, point, or decision may be reserved for the decision of the supreme court by bill of exceptions as in other cases. The rulings of the court upon questions of evidence, or in a charge to the jury, or upon other points, may be such as to render it necessary for the plaintiff to suffer a nonsuit; and he is permitted by statute to do this at any time before the jury retire. The statute contemplates that the nonsuit shall be taken during the trial, not after it is ended by an order discontinuing the entire suit. It is contended that the rule as to discontinuance does not apply in cases of tort. We think it applies in all cases. A legal chasm discontinues a cause, whether it occurs in a criminal or civil action. Ex parte Hall, 47 Ala. 675; Drinkard's Case, 20 Ala. 9.

It is well settled that a discontinuance without sufficient cause shown, as to one of several defendants, who has been served with process, is a discontinuance of the entire action. Kendall v. Lassiter, 68 Ala. 182. The exception obtains where one of the defendants, by plea such as coverture, infancy, the statute of limitations, or the

[1] Code, § 2699, provides that "the defendant may, in an action of ejectment, or in an action in the nature of ejectment, disclaim possession of the premises sued for, in whole or in part, and, upon such disclaimer, the plaintiff may, if he elects, take issue," etc.

like, can successfully interpose a defense personal to himself; or, where the proof shows that plaintiff has no just cause of action as against such defendant, an amendment by dismissing as to him, or by striking his name out of the complaint, will not operate to discontinue the cause. Jones v. Engelhardt, 78 Ala. 506; Reynolds v. Simpkins, 67 Ala. 380; Mock v. Walker, 42 Ala. 670; Givens v. Robbins, 5 Ala. 676. The fact that a plaintiff may sue jointly several tenants, and recover of each the portion of land held and occupied by him separately, or that tenants in possession of distinct parts may protect themselves from a joint judgment for damages, as held in Rowland v. Ladiga, 21 Ala. 33, and as provided for in the Code, § 2710,[1] does not prevent the rule in regard to discontinuances from applying to suits in ejectment. There may be an unlawful joint withholding of the land by several tenants. The same principle applies as in suits to recover damages for a joint trespass to property. Slade v. Street, 77 Ala. 576.

A discontinuance may be waived by the defendant. The rule recognized by the authorities is that, if an order or judgment is entered which operates a chasm in the proceedings, the advantage must be claimed by the party who desires to avail himself of it at the earliest period; and any subsequent pleading or prosecution of the defense on the part of the defendant will be held a waiver by him of the irregularity. Walker v. Cuthbert, 10 Ala. 219; Hair v. Moody, 9 Ala. 399; Shorter v. Urquhart, 28 Ala. 365. According to the judgment entry, the defendant Forbes filed his disclaimer after the suit was dismissed as to Bishop, and the bill of exceptions shows that, after the dismissal of the suit as to Bishop, both parties introduced and closed their evidence; and not until after the opening argument by plaintiff, and the reply thereto by the defendant, was concluded, was the motion made that the cause be discontinued as to the defendant Forbes. We think the motion came too late. The order should have been asked for immediately upon the dismissal of the suit as to Bishop; at least, before other proceedings were had by the defendant upon the merits in defense of the action.

Where parties go into possession of land under a purchase, evidenced by a written instrument purporting to convey it, and claim the land under such purchase, the instrument, though void as a legal conveyance, is admissible to show color of title and the extent of the possession of the property described in the instrument. Black v. Iron Co., (Ala.) 9 South. Rep. 537; Cooper v. Watson, 73 Ala. 252; Stovall v. Fowler, 72 Ala. 77; Riggs v. Fuller, 54 Ala. 144. The plaintiff moved to exclude the deed from Grist to Forbes. The motion was overruled, and the deed admitted to show color of title. There was no error in this ruling of the court. We presume the deed from Sallie Forbes to Bishop was introduced before the suit was dismissed as to him. The record does not show. If such was the case, under the rule we have announced it was competent as color of title to Bishop. If offered in evidence after the suit as to Bishop was dismissed, we cannot see its relevancy, as this instrument purported to convey away the lands to Bishop for which the defendant Forbes was being sued.

The court sustained an objection to the introduction of the deed of Hughes to Mills. The certificate of acknowledgment was taken in North Carolina, and is dated 3d day of May, 1875, and signed, "Wm. J. Clark. [Seal] J. S. C." The body of the certificate states that he was a judge of the superior court. The governor of the state, under the great seal of the state, certifies that he was judge of the superior court of the third judicial circuit. Section 1546 of the Code of 1867 provides that acknowledgments may be taken within the United States, and beyond the state of Alabama, by judges and clerks of any federal court, judges of any court of record in any state, notaries public, etc. Neither the certificate of the judge nor that of the governor certifies that the superior court is a court of record. The act of congress provides that "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." 1 Greenl. Ev. § 504. It is unnecessary, however, to determine whether the certificates in this case are sufficient to show that William J. Clark was a judge of a court of record in the state of North Carolina, and authorized by the law of this state to take acknowledgments of deeds. The acknowledgment and certificate is defective in form and substance, and, although recorded within 12 months, was not admissible in evidence without further proof. The question is whether the defective acknowledgment and certificate will operate as the attestation of William J. Clark as a witness to the conveyance. In the case of Merritt v. Phenix, 48 Ala. 90, it was held that an insufficient acknowledgment was equivalent to the attest of one witness, and, though not sufficiently authenticated to be received in evidence, it was entirely competent to supply the deficiency by proof of its due execution. In the case of Sharpe v. Orme, 61 Ala. 268, the deed was not recorded in time to authorize its being read in evidence without further proof. The court declared: "The acknowledgment and certificate in this case is merely a substitute for an attestation by a witness. If it had been attested, no more than the signature of the witness would have been necessary; no affirmation by him of his knowledge of the parties, or of their identity, or of their acknowledgment that, with knowledge of its contents, they vol-

[1] Code, § 2710, relative to actions for the recovery of land, provides: "When there are more defendants than one, the jury may assess the damages arising from the detention of the land, and the injury thereto, in severalty, against each defendant for distinct damages."

untarily executed it, could be required. The certificate of acknowledgment, operating as the substitute for the attestation of a witness, when it is shown that it is legally impossible to produce the officer making it, by reason of his residence without the jurisdiction of the court, may be proved by evidence of his handwriting, and, when the evidence is given, may be read in evidence." The principle decided in these cases was afterwards reaffirmed in the case of Rogers v. Adams, 66 Ala. 602, in which it was held that a certificate of acknowledgment was fatally defective in not reciting that the grantor was known to the officer, yet it would operate as a substitute for the attestation of a witness; the court holding that "the justice himself thus becomes a witness, and his signature an attestation," and which may be proven by proof of his handwriting. In each of the foregoing cases the principle declared, that the signature of the person before whom the acknowledgment was made, or attempted to be made, should operate as the attestation of a witness, does not rest upon the fact that such person was authorized by the statute to take acknowledgments, or one whose official signature in proper cases would be judicially known by the court; nor are the recitals of the certificate considered as evidence. As stated in the case of Sharpe v. Orme, supra, "the acknowledgment and certificate is merely a substitute for an attestation by a witness, in which no affirmation by him of his knowledge of the parties, or of their acknowledgment of knowledge of the contents of the conveyance, could be required." Strike out from the certificate all that indicates that the person before whom it was taken was an officer, and a sufficient legal attestation remains to comply with the statute, and make the deed valid as a conveyance. It was proven that William J. Clark was dead. Proof of handwriting was admissible, and, upon such proof being made, the deed should have been admitted in evidence. Reversed and remanded.

(95 Ala. 149)

SAVANNAH & W. R. CO. v. JARVIS.

(*Supreme Court of Alabama.* Dec. 16, 1891.)

RAILROAD COMPANIES—STOCK-KILLING—INSTRUCTIONS.

1. Code, § 1144, provides that the engineer must, on perceiving any obstruction on the track of a railroad company, use all the means in his power known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train. Section 1147 provides that, when stock is killed or injured, the burden of proof is on the company to show compliance with the statute. *Held*, that where, in an action for killing a cow, there was evidence that, when the engine was 40 yards distant, the animal ran upon the track from behind an obstruction in a cut; that the engineer could not have seen her sooner; and that he could not then by any means have averted the collision,—an instruction that "the burden was upon the defendant to show a compliance with the requirements of the statute as to reversing the engine and applying the brakes after discovering or seeing the cow on the track" was error, since, if the evidence was true, the engineer needed not to comply with the statute.

2. An instruction that the jury must find for defendant, if they believed that the animal came down the side of a cut from behind an obstruction about 40 yards in front of the approaching train, was properly refused, since it omitted a qualification that the engineer could not have sooner discovered the cow because of the obstruction.

Appeal from circuit court, Tallapoosa county; J. R. DOWDELL, Judge.

Action by M. P. Jarvis against the Savannah & Western Railroad Company for the alleged wrongful killing of plaintiff's cow. Plaintiff's evidence, which was directly in conflict with that of defendant, tended to show that, if the engineer in control of the engine which ran over the cow had been on proper lookout, he could have seen the cow in time to avoid the collision. Verdict and judgment for plaintiff, assessing his damages at $20. Defendant appeals. Reversed.

Geo. P. Harrison, for appellant.

CLOPTON, J. The statutes provide that the engineer must, on perceiving any obstruction on the track of a railroad company, use all the means within his power known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train; and also, when stock is killed or injured, the burden of proof is on the company to show a compliance with the statutory requirement. Code, §§ 1144, 1147. The duty, however, to apply the brakes and reverse the engine does not arise unless the obstruction is on the track and perceived by the engineer. Railroad Co. v. Bayliss, 77 Ala. 429. In a suit against a railroad company for injury to stock, proof of the mere fact that the stock was killed by a moving train casts, under the statutory provisions, the burden on the company to acquit itself of the negligence presumed by the law in such cases, and, unless the burden is lifted, entitles the plaintiff to a verdict. Notwithstanding, under a literal construction of its imperative and unqualified terms, the statute may be regarded as commanding observance of the statutory requirement in all cases, and under any circumstances, where an obstruction is perceived on the track, it has been repeatedly and uniformly construed not to exact strict observance, when there is no reasonable possibility of averting the disaster by any amount of diligence; such a contingency being considered without the reason, spirit, and policy of the statute. Under this construction the presumption of negligence arising from the fact of injury is overcome when the defendant shows that the failure to discover the obstruction sooner was not owing to a want of care and watchfulness, and that, when discovered, the use of all means known to skillful engineers would have been powerless to stop the train in time to prevent a collision. Railroad Co. v. Caldwell, 83 Ala. 196, 3 South. Rep. 445; Railroad Co. v. Deaver, 79 Ala. 216; Railroad Co. v. McAlpine, 80 Ala. 73. In the general charge the court instructed the jury "that the burden was upon the defendant to show a compliance with the requirements of the statute as to reversing the engine and applying the brakes after discovering or seeing the cow on the track." There was testimony tending to show that the cow, be-

ing in a wash in a cut, was obscured from view, and was not, and could not have been, discovered until she ran from the wash on the track about 40 yards in front of the engine, and that, when discovered, reversing the engine and applying the brakes could not possibly have prevented the injury. If these be the facts, the engineer need not attempt to stop the train, and, if satisfactorily shown, defendant is not required to show a compliance with the requirement of the statute as to reversing the engine and applying the brakes; the defense is complete without showing such compliance. When referred to the evidence, and construed in connection with its tendencies, the proposition of the charge implies that it was the duty of the engineer to reverse the engine and apply the brakes on perceiving the obstruction, though the cow suddenly ran on the track in such close proximity to the engine as to leave no room for a reasonable possibility of avoiding a collision by the use of all the means in the power of the engineer. The charge may assert a correct general proposition, but, when applied to each phase of the facts which the evidence tended to show, it is incomplete, in that it ignores and draws from the consideration of the jury the testimony tending to show that, without fault on the part of those in charge of the engine and train, the cow was not, and could not have been, discovered until no skill or diligence could have prevented the disaster. In Railroad Co. v. Hembree, 85 Ala. 481, 5 South. Rep. 173, the charge given at the instance of the plaintiff was as follows: "If the jury are reasonably satisfied that plaintiff's mare was killed by defendant's train at the time alleged, then, unless defendant has reasonably satisfied them that its agents or servants in charge of the train did all in their power to avoid the killing, they must find for the plaintiff;" substantially asserting the same principle as the charge under consideration, except that the latter requires specific proof of compliance with the requirements of the statutes in particular respects. In view of the testimony the charge was held to be erroneous. It is said: "Engineers are not required to do all in their power, nor to do anything, when it is manifest that nothing they can do can possibly prevent the injury. The charge would have been correct if it had contained this additional clause: 'Unless the jury are reasonably convinced that there was no fault in not sooner discovering the mare, and that, when discovered, no amount of diligence could have prevented the collision.'" A similar qualifying clause would have rendered the charge we are considering complete and correct.

The charge asked by defendant in the following language, "If the jury believe from the evidence that the animal came down the side of a cut from behind an obstruction about 40 yards in front of the approaching train they must find for the defendant," is too meager. That the engineer could not have sooner discovered the cow because of the obstruction should have been embraced in the hypothesis. The affirmative charge requested by defendant was properly refused. Plaintiff, having proved the killing, made a *prima facie* case of negligence, which called for rebuttal. On the entire evidence, whether the presumption of negligence was satisfactorily rebutted was a question for the jury. Reversed and remanded.

(94 Ala. 423)

NEW ENGLAND MORTGAGE SECURITY CO. v. POWELL, (two cases.)

(*Supreme Court of Alabama.* Dec. 16, 1891.)

MARRIED WOMAN—REMOVAL OF DISABILITIES—PETITION—MORTGAGES.

1. A petition which avers that the petitioner, a married woman, owns lands—her statutory separate estate—which she desires to incumber for the purpose of raising money, and prays that she may sue and be sued as a *feme sole*, mortgage, convey, and otherwise dispose of her separate estate as fully as if she were a *feme sole*, is insufficient to support a decree relieving her of the disabilities of coverture, under Code 1876, § 2731, which provides that such relief may be granted on a petition praying that the married woman be decreed a *feme sole* so far as to invest her with "the right to buy, sell, hold, convey, and mortgage real and personal property, and to sue and be sued as a *feme sole*." 6 South. Rep. 339, reaffirmed.

2. Where the wife, by reason of such void decree, executes a mortgage on her land, such mortgage is void, and a new and independent consideration is necessary to support an alleged ratification thereof, after the enactment of Act Feb. 28, 1887, giving a married woman the rights of a *feme sole*.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Bill by the New England Mortgage Security Company against Virginia D. Powell. Defendant's demurrer thereto sustained. Plaintiff appeals. Affirmed.

Ejectment by Virginia D. Powell against James Fitzpatrick. On motion of Fitzpatrick the New England Mortgage Security Company was required to come in and defend as landlord. Judgment for plaintiff. Defendant appeals. Affirmed.

The appellant corporation loaned money to the appellee, Mrs. Virginia D. Powell, a married woman, after a decree had been rendered by the chancery court relieving her of the disabilities of coverture. The said loan company took a mortgage on the land which was a part of the statutory separate estate of Mrs. Powell, to secure the payment of the loan thus made. Mrs. Powell failing to pay the debt at maturity, the present bill was filed, on January 15, 1889, by the New England Mortgage Security Company, to foreclose the mortgage. The defendant interposed a demurrer to the bill, assigning, as grounds thereof, that the proceedings relieving her of the disabilities of coverture were void for want of jurisdiction in the court which rendered said decree, the petition not averring the proper jurisdictional facts, and the decree not following the requirements of the statute. The chancellor sustained this demurrer, and ordered the bill dismissed. The appeal is taken here from this decree of dismissal by the chancery court, and the same is assigned as error.

On October 16, 1889, the appellee, Mrs. Vir-

ginia D. Powell, brought a statutory action of ejectment against James Fitzpatrick and others, to recover possession of the land which was included in the mortgage made by her to the New England Mortgage Security Company. On motion of Fitzpatrick, who was the tenant of the Mortgage Security Company, the said New England Mortgage Security Company was required to come in and defend as landlord, and it pleaded the general issue. On the trial of the case, the evidence introduced showed that the plaintiff, having been relieved of the disabilities of coverture by the chancery court, mortgaged said lands to the defendant, the New England Mortgage Security Company, on November 17, 1881, to secure the payment of the loan made by said company to her; that on October 18, 1887, the said defendant was, by agreement with the plaintiff, let into possession of the land here sued for, and held possession thereof by its tenant at the time of the bringing of this suit; that the mortgage has since been declared void for the reason that the proceedings to relieve plaintiff of the disabilities of coverture were void, and ineffectual for that purpose. At the request of the plaintiff the court gave the following charge: "If the jury believe the evidence, they will find for the plaintiff for the land sued for; and if the defendant has been in possession of the said lands, under color of title, for more than one year before the suit was brought, then the jury will also find a verdict for the plaintiff for the value of the use and occupation of the land from one year before the commencement of suit down to the time of their verdict." The defendant excepted to the giving of this charge, and also separately excepted to the court's refusal to give each of the following written charges asked by it: "(1) The plaintiff can recover in this action no rents accruing since the commencement of this suit. (2) If the jury believe all the evidence, they will find a verdict for the defendant."

Semple & Gunter, *L. C. Smith*, and *W. S. Thorington*, for appellants. *Watts & Son*, for appellees.

McCLELLAN, J. These cases involve the same questions, and were submitted together. Those questions are—*First*, whether a decree rendered in 1878, having for its purpose the relief of Mrs. Powell from the disabilities of coverture to the extent and as provided in section 2731 of the Code of 1876, is void for insufficiency of the petition filed to that end; and, *second*, whether, conceding the invalidity of that decree, the mortgages, upon which the claim of the New England Mortgage Security Company is rested, were validated by an attempted ratification on the part of the married woman after the enactment of February 28, 1887, entitled "An act to define the rights and liabilities of husband and wife."

The first question stated came before this court on a former appeal in the chancery suit now again submitted; and it was then held that the petition filed by Mrs. Powell seeking to be relieved of disabilities of coverture was fatally defective, and insufficient to confer jurisdiction in the premises upon the chancellor, in that it did not ask for all the relief offered by the statute, and that, of consequence, the decree was *coram non judice* and void; and also that the decree, considered apart from the petition, was itself defective, for that, while broader than the petition, it yet did not grant the full measure of relief which the statute was intended to afford. Powell v. Security Co., 87 Ala. 602, 6 South. Rep. 339. The averments and prayer of the petition are as follows: (1) That Mrs. Powell "is a resident citizen of Montgomery county, Alabama, over 21 years of age, and the wife of James W. Powell; (2) that she is the owner of certain real estate, and an interest in lands, in Montgomery county, which are her separate statutory estate, and which she desires to incumber or mortgage for the purpose of raising money. * * * Wherefore your petitioner prays that your honor will relieve her of all the disabilities of coverture, to the end that she may sue and be sued as a *feme sole*, mortgage, convey, and otherwise dispose of her separate estate as fully and freely as if a *feme sole*." The expression of petitioner's desire to incumber or mortgage her property to raise money, and of the ends to the effectuation of which she prayed relief from the disabilities of coverture, was considered by this court on the former appeal as operating a limitation upon that part of the prayer which sought the removal of all disabilities to contract incident to the marital relation of the petitioner; so that, taking the petition as a whole, it asked for relief only in so far as was necessary to enable Mrs. Powell to sue and be sued, and mortgage, convey, and otherwise dispose of her separate estate, as a *feme sole*. If this construction be the correct one, the petition was, of course, insufficient to authorize any decree, since it did not ask for the relief which the statute offers, and which must be prayed and granted as an entirety, as held in numerous decisions of this court. It is now strenuously insisted for appellant that this construction is unsound, and that the true meaning of the petition is that the petitioner be relieved of all the disabilities of coverture,—nothing more or less; and that what is stated therein as to the petitioner's desire to incumber or mortgage her property, and to the effect that she prays the removal of all the disabilities of coverture, "to the end that she may sue and be sued as a *feme sole*," etc., is but the "garrulous disclosure of the immediate uses to be made of the liberty to be obtained under the prayer to relieve her of all the disabilities of coverture," and that all this should be disregarded as the merest surplusage. This position of the appellant may be fully granted and conceded—for my own part, I consider it eminently sound—without disturbing the conclusion reached when the case was here before,—that the petition was insufficient, and the decree void. Applying the proposition of appellant to the proceeding, we have, as a result, a petition which prays relief, not to the extent

that relief is afforded by the statute, but from all the disabilities of coverture,—a measure of relief far in excess of that provided for by the statute,—and a decree which undertakes to grant this entire and unauthorized emancipation from the law's limitations upon the contracting capacity of the *feme covert*. With respect to the decree, the further concession may be made that, though too broad, it would be good to the extent the statute authorizes relief, and its operation would be confined to such relief if the petition was sufficient. But is there any basis for a like concession in respect of the petition? We think not. It is, of course, not to be doubted that, ordinarily, a pleader's right to particular relief is not prejudiced by a prayer for larger relief, including that to which he is entitled. It is equally true that, ordinarily, the pleader will not be denied all relief because he asks only for less than he is entitled to. And if an argument may be predicated on the first proposition favorable to the granting to this petitioner the relief intended to be afforded by the statute, though she asks for more, that argument is wholly parried by the legal fact, as to which no controversy exists, taken in connection with the second proposition, that the pleader in this proceeding must ask for all that she is entitled to or she gets nothing. In other words, to hold that the petitioner is entitled to no relief, because she asked for more than the law offers, is no more in the teeth of general rules of pleading than to hold, as this court has frequently done, that she cannot be awarded any relief unless she prays for all contemplated by the act. The truth is that the ordinary rules of pleading have no application to this matter, and for very cogent reasons. In actions *inter partes*, the effort always is to enforce some obligation resting on the defendant. It is always to the interest of the complaining party that his claim shall be effectuated in full, or to any less extent to which he is entitled to relief on the facts adduced. Hence the law assumes that he assents to, in fact demands, not only the full relief he prays, but any part of that relief to which he may show himself entitled; and his prayer, essentially, is for the whole relief, and for every part of it. But this is not a suit *inter partes*. No right is asserted against anybody. No relief is sought through the operation of the court's process upon any party. The effort involved is simply one to change the legal *status* of the petitioner, to give her a different attitude before the law than she before sustained, and this purely for her own benefit. Before the court can act, she must affirmatively assent to whatever change of *status* is made,—to whatever new attitude she is decreed to bear. This has been decided. Not only so, but her husband also must assent in writing to the proposed change of *status*. This the statute specifically provides; and her assent, as well as his, must be expressed. It is a jurisdictional fact. Now, there is no presumption of law that it is to the benefit of the petitioner that this change of *status* shall take place. The general policy of the law is against such change, and this on the theory that the wife's inability to contract tends to conserve her interests, and save her from the evil results which might spring from the dominant will of her husband. And the same is true in respect of the husband. The court cannot know that any change of *status* will be of benefit to him, or meet with his approval, except as may appear from the terms of his assent, or, rather, from the terms of the petition to which he does assent. There is, therefore, no basis for a presumption to be indulged by the court that either the wife or the husband has assented to any other change of *status*, or to the investiture of the wife with any other rights, than she has expressly asked, and he has expressly assented to. The court cannot say, and the law does not presume, that she desires and he has assented to the grant of any integral part of the relief which she prays. It might well be that a married woman would desire to be freed from all the disabilities of coverture, and thus put upon the vantage ground of a *feme sole* for all contractual purposes, and yet not desire to be absolved from the law's limitations only in respect of her statutory and other separate estates. Cases might be imagined in which complete emancipation would, in a sense, be necessary to the proper management of the separate estate of the wife, and in which the mere grant of power to buy, sell, hold, convey, and mortgage property, and sue and be sued, as a *feme sole*, without capacity to make all other contracts which may be made by one *sui juris*, would not be conservative, from any point of view, of the wife's welfare, or her separate property; and, similarly, there might be good reasons actuating the assent of the husband to the removal of all marital disabilities which could have no force by way of inducing him to consent that only those disabilities specified in the statute should be removed. Hence it is that we cannot say, there being no presumption and no basis for any presumption as to what the parties desire and have assented to, proceeding on the idea of their interests or the benefits to accrue to them, that the petitioner here desired any other relief than that for which she expressly prayed, or that her husband assented to the granting of any other relief than that thus expressly asked for. The relief so asked was not the relief the statute authorized the chancellor to grant. There was nothing before him to show the assent of either the petitioner or her husband to the granting of the relief offered by the statute. In the absence of such showings, he was without jurisdiction, and his decree, whether it follows the statute or not, is a nullity.

The decree being thus without efficacy, Mrs. Powell was under all the disabilities of coverture at the time she executed the mortgages under which appellant claims, and without any capacity in that behalf. The mortgages were therefore not voidable, but merely void. Granting that she might have ratified the execution of the instruments, with the assent of her

husband, after the passage of the act of 1887 above referred to, such ratification required a new and independent consideration to support it. It is not pretended that the ratification attempted to be set up by an amendment to the bill in the chancery case, and relied on in evidence in the suit at law, was supported by any consideration whatever. Each court properly ruled that the alleged ratification could avail nothing to the Mortgage Security Company. 14 Amer. & Eng. Enc. Law, 619; Hetherington v. Hixon, 46 Ala. 297. We find no error in either record; and the judgment of the circuit court and decree of the chancery court are respectively affirmed.

(95 Ala. 610)

WILLIAMS v. HARPER.

(*Supreme Court of Alabama.* Dec. 18, 1891.)

APPEAL—DISMISSAL—DEFECT OF PARTIES.

An appeal from an order of the probate court overruling a motion to set aside proceedings in which exemptions out of the estate of a decedent were allotted to his widow will be dismissed, where the record fails to show that notice of the motion was served on the widow, or any citation or notice of appeal was served on any adverse party, as required by Code, §§ 3631, 3634.

Appeal from probate court, Calhoun county; E. F. CROOK, Judge.

Motion by Jimmie T. Williams against Lodusky Harper to set aside certain probate proceedings. Motion denied. Williams appeals. Dismissed.

Savage & Coleman, for appellant.

WALKER, J. The appellant, as one of the heirs of James Harper, deceased, made a motion in the probate court of Calhoun county to have set aside and declared null and void certain proceedings had in that court at a previous term, which purported to effect an allotment of exemptions out of the estate of said decedent to his widow, Lodusky Harper. There is nothing in the record to indicate that notice of that motion was served on the widow, or that she appeared to resist it. An order was made, however, overruling the motion. The appeal is from that order. The record fails to show that any citation or notice of appeal was issued or served upon any adverse party, (Code 1886, §§ 3631, 3634;[1]) and no appearance is entered in this court by or for any one as appellee. There is not before this court any adverse party against whom judgment could be rendered in the event of a reversal. Miller v. Parker, 47 Ala. 312. The proceeding has been purely *ex parte* throughout. Under our statute, no appeal can be maintained without an appellee. The appeal must be dismissed because of the absence of a necessary party.

Appeal dismissed.

[1] Code, § 3631, provides that, upon an appeal being taken, the register, or clerk of the circuit or city court, or the judge of probate, must issue a citation to the adverse party, notifying him of the appeal, which must be served on him at least 10 days (unless otherwise provided for) before the day to which the appeal is returnable. Section 3634 provides that the register, clerk, or judge of probate must deliver to the appellant a complete transcript of the record, including the citation.

(99 Ala. 47)

JOSEPH *et al.* v. SOUTHWARK FOUNDRY & MACH. CO.

(*Supreme Court of Alabama.* Dec. 15, 1891.)

PARTNERSHIP—NOTICE OF DISSOLUTION—ACCOUNT STATED—WORK AND LABOR—ASSUMPSIT—EVIDENCE—CONTRADICTORY STATEMENTS—INSTRUCTIONS.

1. Although contradictory statements, when unexplained, may affect the credibility of the witness making them, the contradiction does not of itself render the statements incompetent as evidence.

2. Where a partnership has been dissolved, constructive or implied notice of the dissolution will be sufficient as to those who have had no previous dealings with the firm, but as to those who have had previous dealings it is requisite that actual notice be given, or that such steps be taken as to warrant the inference that notice was received.

3. Where a debtor to whom an account is rendered either admits its correctness or retains it, and makes no objection within a reasonable time, he will be bound by it as an account stated; and, where he objects to certain items only as being incorrect, this is an admission of the correctness of the other items, to which no objection is interposed.

4. Where one performs labor for another with the knowledge and consent of the latter, and the latter accepts it, it is not necessary that there should have been an express contract.

5. In an action to recover the price of four presses built by plaintiff, the material issue was as to whether the contract for the said presses was made with defendant partnership or with a corporation formed after the dissolution of the partnership. One witness testified directly that the partnership employed plaintiff to build the four presses, and another testified as to the time the contract was made. *Held*, that an instruction that the evidence proved that the contract for the last three presses was made with the corporation, and that there was no evidence as to when the said contract was made except the testimony of plaintiff, and a certain bond which had been introduced in evidence, was properly refused.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

This was an action brought by the Southwark Foundry & Machine Company against Joseph, Gaboury & Co. to recover for the making of certain presses. The defendants pleaded the general issue, payment, and that the defendants, E. B. Joseph and J. A. Gaboury, never made any contract with the plaintiff as a partnership, and that, if the presses were made by the plaintiff, they were made under a contract entered into between plaintiff and the Simplex Compress Manufacturing Company. The plaintiff replied to the plea denying the partnership, and set up as a defense that the defendants, Joseph and Gaboury, did business as a firm under the firm name of Joseph, Gaboury & Co., and it was with that firm that the contract for the presses was made. The evidence tended to show that in April, 1886, Joseph, Gaboury & Co. contracted with the plaintiff to build for them a trial press. This press was built and completed in June, 1886, and was accepted and paid for by the defendants. The plaintiff's testimony tended to show that in June, 1886, Joseph and Gaboury made another contract with the plaintiff to build for them three more presses. This contract, it is contended by the defendants, was made, not by them as a partnership, but with the Simplex Com-

press Company, a corporation. It is not shown in the evidence when the partnership of Joseph, Gaboury & Co. was dissolved, if ever dissolved, or that the plaintiff corporation was ever informed that said partnership was dissolved. For answer to the ninth interrogatory propounded by plaintiff to one Mirkil, Cornelius, and Creager, as to how many presses the defendants employed the plaintiff to build for them, and how many were built, the witness Mirkil answered: "There appeared orders on the shop-book for four presses,—one original press and three subsequent. We built the original press complete before the other presses were ordered. Then we built and shipped two of the other three. * * * But the fourth press ordered is still in the yard, in an incompleted state." To this same ninth interrogatory the witness Cornelius answered: "The defendants employed the plaintiff to build four presses for them, three of which presses were completed, and the fourth press was about three-fourths completed, and is in this present unfinished state now at the Southwark Foundry & Machine Company. The presses were built in the summer of 1886." The court charged, as requested by the plaintiff, "(8) that a contract may be implied as well as expressed, and that, if the plaintiff did work and labor for the defendants with the knowledge and assent of the defendants, and they accepted it, it was not necessary that there should have been an express contract." The court refused to charge, as requested by the defendants, that "(1) there is no evidence before the jury as to when the contract for the last three compresses was made except the testimony of the witness Joseph Gaboury and the bond introduced in evidence, and, if the jury believe the evidence, it proves that the contract for the last three compresses was made with the Simplex Compress Manufacturing Company." There was judgment for plaintiff, and defendants appeal. Affirmed.

Jones & Falkner, for appellants. *Arrington & Graham*, for appellee.

COLEMAN, J. The suit is in *assumpsit* against appellants as a partnership. The material issues of fact presented by the pleadings were whether the contract, the foundation of the suit, was made with the defendant partnership, or made with the Simplex Compress Manufacturing Company, a corporation formed after the dissolution of the partnership, and which succeeded it, and, if made after the dissolution of the partnership, whether plaintiff had notice that the partnership had been dissolved. There was evidence which tended to sustain the special plea of defendants, and there was evidence which tended to support plaintiff's replication to the plea. There was no error in overruling the motion to exclude the answer of the witness Cornelius to the ninth interrogatory. Contradictory statements made by a witness, unexplained, may affect his credibility, but do not render the statements incompetent as evidence. In the case of Mauldin v. Bank, 2 Ala. 502, it was held that "a dissolution of a partnership may take place *inter partes*, and yet the connection continue as it respects the rest of the world. In respect to all persons who have had no previous dealings with the concern, a constructive or implied notice of its dissolution will be sufficient; but, as to persons who have had dealings with the firm during its continuance, it is requisite that actual notice be given, or that such steps have been taken as to warrant the inference that it was received by the creditor." The rule rests upon the principle that, the partnership being once known to exist, its continuance will be presumed in favor of third persons, who have had dealings with it as a partnership, until notice of its dissolution has been brought home to them. In the case of Burns v. Campbell, 71 Ala. 286, it is held that "if a debtor to whom an account is rendered either admits its correctness, or retains it, and makes no objection within a reasonable time, he will be bound by it as an account stated, his silence, in the latter case, being presumptively construed into an acquiescence in its justness;" citing Langdon v. Roane, 6 Ala. 518. It is further held in the same opinion that if one item only is objected to, this is an admission of the correctness of the other items, to which no objection is interposed. These principles of law sustain the first seven charges given for plaintiff. The eighth charge needs no citation of authority to sustain it. In reply to the ninth interrogatory the witness Cornelius testified directly that the defendants employed the plaintiff to build four presses for them, and the witness Mirkil testifies as to the time the contract was made. The first charge asked for by defendants was therefore properly refused. We find no evidence in the record which would have authorized the giving of either of the charges requested by defendants. The judgment of the lower court is affirmed.

(94 Ala. 125)

MOBILE SAV. BANK *et al.* v. BURKE *et al.*

(*Supreme Court of Alabama.* Dec. 17, 1891.)

MORTGAGES—FORECLOSURE—AMENDMENT OF BILL—DISTINCT CAUSES OF ACTION—PARTIES.

1. Complainants filed a bill to foreclose a mortgage, and restrain a sale of the property to satisfy a judgment obtained against it by another. The holder of the judgment thereupon filed an answer and cross-bill alleging that the mortgage had been withheld from record in fraud of creditors, and praying that the property be sold to satisfy the judgment. The complainants filed an amendment alleging that, previous to the recovery of the said judgment, they themselves had recovered a judgment upon an indebtedness separate and distinct from the mortgage indebtedness, and that if their mortgage was invalid they had a prior lien under their judgment. *Held*, that the bill was demurrable for multifariousness.

2. The fact that a cross-bill in foreclosure makes the trustee a party in his individual capacity as well as in his capacity of trustee does not render the bill demurrable.

Appeal from chancery court, Mobile county; W. H. TAYLOE, Chancellor.

This was a bill by the Mobile Savings Bank and William J. Hearin for the foreclosure of a mortgage. From a decree sustaining demurrers to the original bill

as amended, and overruling demurrers to the cross-bill, complainants appeal. Affirmed.

Hamilton & Gaillard and *Overall & Beston*, for appellants.

CLOPTON, J. The appeal being taken from a decree sustaining demurrers to parts of the original bill as amended, and overruling demurrers to the cross-bill, a proper understanding of the questions raised calls for a brief statement of the character, purposes, and substantial allegations of the original bill and amendment and of the cross-bill. The Mobile Savings Bank and William J. Hearin filed the original bill, for the foreclosure of a mortgage on real estate in the city of Mobile, executed June 15, 1885, by Peter Burke and wife to Hearin, as trustee, to secure the payment of a note for $14,000 made by them to the bank. It having been ascertained that a part of the property was the statutory separate estate of Mrs. Burke, complainants abandoned any claim to subject that portion to the mortgage. After making appropriate allegations in respect to the mortgage, the bill avers that P. J. Lyons, one of the defendants, recovered, July 10, 1889, a judgment against Burke for over $15,000, upon which he had caused execution to be issued and levied upon the mortgaged property, and was threatening to sell it, claiming that the purchaser at the execution sale would be entitled to hold the property against complainants and any person purchasing at a sale of foreclosure. One purpose of the bill is to restrain Lyons from selling under his execution. His demurrer to the original bill having been overruled, Lyons fileid an answer, which he made a cross-bill. It avers that Burke, being indebted to the bank in a large sum,—$100,000,—was induced to execute, in October, 1884, a mortgage on the most valuable piece of his real estate to Hearin as trustee to secure the indebtedness, upon an agreement or understanding that it should not be recorded, but kept secret, and renewed at short intervals, until his indebtedness was paid, or until some complication in his affairs should arise which necessitated making the transaction public. The cross-bill further avers that this course of dealing was continued, and new notes and mortgages made, from time to time, every 60 or 90 days, the present mortgage being the last renewal, until the failure of Burke, July 25, 1885, on which day he made a deed of assignment; whereupon, and on the second day thereafter, the bank and Hearin caused the mortgage to be recorded. Also that the divers mortgages were withheld from record, and the indebtedness concealed for the purpose of enabling Burke to maintain his credit, and to obtain the indorsements of his friends upon paper, which, by pre-arrangement, was afterwards given to the bank as security for part of his indebtedness. The cross-bill prays that the mortgage be declared fraudulent and void, and that the property be condemned and sold, and the proceeds applied to the payment of his judgment. Upon the filing of the answer and cross-bill, complainants amended the original bill. The amendment avers that Burke owed the bank an indebtedness separate and distinct from the mortgage debt, on which it instituted suit, and recovered, July 29, 1887, a judgment against him for over $10,000, and that the judgment was filed in the office of the judge of probate in pursuance of "an act to provide for the registration and lien of judgments and decrees for the payment of money," approved February 28, 1887. It further avers that Little, Wilkinson & Co. recovered a judgment against Burke, July 10, 1889, for a large sum of money, upon which it is claimed there is still due and unpaid about $2,000, with interest; and that Little, as surviving partner, had filed the judgment in the office of the judge of probate in accordance with the provisions of the act above mentioned; and had also filed a bill in the chancery court, seeking to have the mortgage declared fraudulent and void as to him. It also avers that, even if the mortgage could be held for any cause invalid as against Lyons and Little, as surviving partner, or either of them, still the lien of their respective judgments is inferior to the lien of the recorded judgment of the bank. The amendment prays that the lien of the judgment in favor of the bank be decreed and declared superior to the lien of the judgments in favor of Lyons and Little, Wilkinson & Co., and that the mortgaged property be sold and the proceeds applied to the payment of the liens on the same according to the principles of law and equity. Lyons and Little each demurred to so much of the amended bill as sets up the existence of any lien arising upon the judgment of the bank, and as prays for any relief based upon such lien. The grounds of demurrer are (1) that the allegations and prayer of the amendment are inconsistent with and repugnant to the allegations and prayer of the original bill; (2) that the amendment constitutes a radical departure from the case made by the original bill; (3) that complainants are estopped by its averments from contending that Burke had any interest in the mortgaged property to which the lien of the judgment could attach.

A bill may be amended so as to present the case of the complainant in the alternative, provided the rule that the same defense must be applicable to each alternative, and must entitle the complainant to the same relief or relief of the same character, is observed. The purpose of the rule allowing a bill to be framed in a double aspect, is to enable the complainant, where his title to relief depends on the truth of one or another state of facts, to state them in the alternative, thus adapting the relief to the premises, so that, if the court should decide against him on one state of facts, it may yet grant him relief on another. The introduction of new matter or a new cause of action is not the office of an amendment. When the alternative allegations are introduced, they must relate to the cause of action and subject-matter presented in the original bill. Inconsistent titles or claims to relief cannot be introduced, nor a new and different right preferred, which would

vary the relief, if granted, essentially in character from the relief which could have been obtained on the original bill, nor can separate and distinct causes of action be blended, by amendment. Rapier v. Paper Co., 69 Ala. 476; Ward v. Patton, 75 Ala. 207. The cause of action and subject-matter of the original bill are the mortgage and its foreclosure; of the amendment, the judgment and enforcement of its lien. By the bill as amended complainants seek—*First*, special relief based on the validity of the mortgage,—a foreclosure and sale of the property for its satisfaction; and, *second*, relief based on the invalidity of the mortgage,—the enforcement of the lien of the judgment, and a sale of the property for its satisfaction, in the event the mortgage is held invalid for any cause. It is manifest the amendment introduces a new and distinct cause of action, and prefers a new and different right, on which, if relief were granted, it would be substantially different from, and inconsistent with, the only relief which could be obtained on the original bill, and constitutes a radical departure from the case made by it. The amended bill reduces itself to a disjunctive statement of distinct causes of action. This is not regarded as good pleading in law or in equity, because calculated to impart uncertainty, to embarrass the defendant in making defense, and to produce inextricable confusion. In one aspect of the bill, complainants sue in the character of a mortgagee, and in the other, of a judgment creditor; attempting, in the first aspect to make a case in which the mortgage, and in the second a case in which the judgment, will be held superior to any claim or lien of the other judgment creditors. Complainants sue on distinct causes of action in different characters and rights, and the kind of relief in the respective aspects is dissimilar. Corrugating Co. v. Thacher, 87 Ala. 458, 6 South. Rep. 366.

The contention that the amendment setting up the judgment is consistent with the claim to foreclose the mortgage presented by the original bill is rested on the proposition that the amended bill makes the case where the same party, holding two lien securities, both created by the contract of the defendant Burke, and not alleged to be superior to the lien of either of the defendants Lyons and Little, is seeking to have them enforced on the same property. It may be that several liens, created by contracts, express or implied, dealing with or relating to specific property, can be consistently set up in one bill, and relief granted as to both; but in such case both must be sought to be enforced conjunctively on the particular property as valid liens; not the enforcement of one contingent on the other being held invalid; not of one or the other. But the case made by the bill is not a case where both liens are created by contract. The lien of a judgment is not the subject of, and has none of the properties of, a contract. It is the creature of legislation, and may be taken away without impairing the obligation of contracts,—a statutory lien. Curry v. Landers, 35 Ala. 280; Martin v. Hewitt, 44 Ala. 418. The general rule is that equity will not lend its aid to enforce a statutory lien, unless there exists some special or controlling equity which justifies the interposition of the court, such as the necessity of removing a fraudulent conveyance or other impediment to the full execution of the judgment. Machine Co. v. Miner, 28 Kan. 441; 13 Amer. & Eng. Enc. Law, 613. The statutes fix the priorities of liens of judgments and executions, and the mode of collection. The remedy at law is adequate and complete. The amendment does not show any legal obstacle to the enforcement of the lien at law. Besides, if it were permissible to adopt the form of pleading resorted to, when a bill sets forth alternatively or disjunctively distinct causes of action, no relief can be granted unless each branch presents a case of equitable cognizance, by analogy to the well-settled rule that alternative averments are insufficient unless each alternative shows a good cause of action. Lucas v. Oliver, 34 Ala. 626. So much of the amended bill as seeks to enforce the judgment lien contains no equity. Neither do the complainants jointly hold both liens. Hearin had no connection with or interest in the judgment, or right to the enforcement of its lien. In respect to the judgment, there is no community of interest in the complainants. The bill as amended seeks to enforce rights unconnected, and having no relation to each other; such a bill is multifarious. Bean v. Bean, 37 Ala. 17. Hearin, being trustee, is a necessary party to a bill to foreclose the mortgage, but is not even a proper party to a bill to enforce the lien of the judgment, and cannot recover on that branch of the bill. The complainants having joined, unless they are both entitled to relief, neither can recover. The demurrer was properly sustained. The only objection assigned as ground of demurrer to the cross-bill of Lyons is that Hearin is made a party as an individual. The legal title to the premises is vested in him by the mortgage, and he may properly be made a party defendant individually as well as trustee. Another and different person is not brought in, but the same person in different characters. There is nothing in this objection. Affirmed.

(94 Ala. 429)

BOGACKI *et al.* v. WELCH.

(*Supreme Court of Alabama.* Dec. 17, 1891.)

DISSOLUTION OF INJUNCTION — LIMITING DAMAGES — JURISDICTION.

Where, on dissolving an injunction, the chancellor limits the damages defendant is entitled to recover on the injunction bond, there was nothing in the decree injurious to defendant, as the question of the measure of damages was without the chancellor's jurisdiction.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Bill by Theodore Welch against C. T. Bogacki and others for injunction. Granted. From the decree of the chancellor subsequently dissolving the injunction, and limiting defendants' recovery on the injunction bond, defendants appeal. Affirmed

Tompkins & Troy, for appellants. *Jones & Falkner*, for appellee.

STONE, C. J. The appellee, Welch, filed the bill in this case, and obtained an injunction. There were answers denying some of the averments of the bill on which relief was prayed, and also a demurrer to the bill for want of equity. The cause was submitted to the chancellor on two motions: *First.* To dissolve the injunction for want of equity in the bill and on the denials of the answers. The answers were sworn to. *Second.* To dismiss the bill for want of equity and on the demurrers. Bogacki, a contractor, was constructing a dwelling on a lot adjoining that on which Welch resided. Welch's child was dangerously sick,—so sick that continuing work on Coleman's house, it was charged, would endanger its life. To prevent such continuance, and the noise incident to it, were the purpose of the suit and of the injunction. Following are extracts from the chancellor's decree: "It is clear, taking their [defendants'] answers to be true, as we must on the motion to dissolve the injunction, the bill was filed under a misapprehension of the intention of the defendants. The injunction must therefore be dissolved; but it is apparent that complainant should not be required to pay more as damages for the suing out of the injunction than the amount of such damages the defendant may have incurred by reason of holding the injunction in force after the recovery of the child, when work on the building could have been resumed. In their answers defendants allege that, in any event, they would not have continued the work while it was hurtful and dangerous to the child's life or health, and consequently defendants should not recover damages during the time they would have voluntarily desisted from work. * * * The injunction must therefore be regarded as partially dissolved, to take effect as hereinabove stated. The necessity of the bill having passed away, and there being no further necessity for it, it is ordered that the bill be, and the same is hereby, dismissed out of this court, at the costs of complainant." We have copied all of the decree which is necessary to a proper understanding of the questions we propose to discuss.

There was no testimony taken in this case, and the chancellor made no decree, stating to what extent, if any, the injunction was retained. On the contrary, he stated the bill was filed under a "misapprehension of the intention of the defendants." This was equivalent to saying that the bill and injunction were unnecessary, and therefore wrongful. Unless there is some order of the court continuing in force an interlocutory injunction, either in whole or in part, a decree dismissing the bill dissolves it *ipso facto*. 2 High, Inj. §§ 1476. There being no such order in this case, when the bill was dismissed the injunction was dissolved absolutely. It may be an axiomatic truth that an injunction restraining Bogacki from doing what he had no intention of doing could have done him no injury, other than the expense it put him to in defending the suit. But this was a question not at all involved in the inquiry whether the injunction should be retained or dissolved. Nor was the chancellor's declaration in any sense a decree on the merits of the injunction, or in any manner affecting its restraining force. It was not raised by the pleadings, and could not be, for it was outside of the chancellor's jurisdiction. When he dissolved the injunction by a general dismissal of the bill, his jurisdiction and power in the premises ceased. The question of the measure of damages pertains to another forum; and what he said is in no sense a decree of which error can be predicated. Id. § 1657; 1 High, Inj. § 88; Zeigler v. David, 23 Ala. 127. Nothing was decreed injurious to appellants. Affirmed.

(94 Ala. 192)

MITCHELL *et al.* v. DUNCAN.

(*Supreme Court of Alabama.* Dec. 17, 1891.)

ADMINISTRATION OF ESTATE — PROBATE PRACTICE — ORDER UPON APPLICATION TO ADMINISTER — APPEAL.

Two persons, one of whom belonged to the class entitled to priority in the grant of administration according to Code 1886, § 2014, and the other did not, applied for administration, which was granted,—the latter, while the application of the former was still pending. The former subsequently filed another petition, praying that the said administration be revoked, and that letters be granted to him as before prayed for; which petition the court overruled. *Held*, that this was an order on an application to administer, within the meaning of section 2841, and an appeal should have been taken therefrom within the time limited by such section.

Appeal from probate court, Madison county; THOMAS J. TAYLOR, Judge.

This is a motion by William T. Duncan to dismiss an appeal taken by Ralph Mitchell and others from an order appointing the said Duncan administrator of the estate of Charles E. Harris, deceased. Appeal dismissed.

Wm. Richardson and *Robt. E. Sprugins*, for appellant. *D. D. Shelby* and *Wm. L. Clay*, for appellees.

WALKER, J. Charles E. Harris died on the 5th day of December, 1889, leaving property in Madison county, in this state. On the 13th day of the same month, certain persons, describing themselves as heirs at law of said decedent, filed a petition in the probate court of said county praying that letters of administration upon the estate of the decedent be issued to Ralph Mitchell, who was one of the petitioners. So far as the record discloses, it does not appear that any order was made upon that petition. On the 15th day of March, 1890, Sallie W. Carroll, who had joined in the first petition, filed another petition in her own name alone, asking that William P. Duncan be appointed administrator of the estate of said decedent. On the 4th of April, 1890, Duncan was appointed administrator. On the 19th day of June thereafter, Ralph Mitchell and others, describing themselves as heirs at law, filed another petition, praying that the letters of administration issued to Duncan be revoked and recalled, and that letters of administration be granted to Ralph Mitchell, in accordance with the application of December 13, 1889,

to this effect. On July 8, 1890, an order was made overruling and denying this last petition. The appeal from that order was taken January 9, 1891. A motion has been made in behalf of the appellees to dismiss the appeal because it was not taken within 30 days after the date of the order or decree sought to be reviewed.

The contention of the appellants is that Duncan, who did not belong to either of the classes of persons entitled to priority in the grant of administration, should not have been appointed administrator while the application for the appointment of Mitchell, who is an heir at law of the decedent, was pending in that court, and had not been disposed of; that application having been made within 40 days after the death of the intestate. Code 1886, §§ 2014, 2016. The claim is that the right of preference asserted by that application had not been abandoned, but was duly maintained, and that it should not have been ignored. The purpose in seeking the revocation of the letters issued to Duncan was to get rid of an obstacle in the way of the application for Mitchell's appointment. The claim that Mitchell was entitled to be appointed administrator in preference to Duncan was the substantial matter of controversy. The relief sought was the recognition and enforcement of that claim. The contest was between the conflicting claims to the administration. The disposition of the matter depended entirely upon the recognition of the one or the other of those claims. In making the order appealed from, the probate court was passing upon an application to administer on an estate. The appeal from a decree or order made on such an application must be taken within 30 days from the hearing and decision of the same, unless the application was denied because of the unfitness of the applicant, in which case the appeal must be taken in 10 days. Code 1886, § 3641, subd. 2. The appeal in this case not having been taken within the time limited by the statute, the motion to dismiss must be granted. Appeal dismissed.

(94 Ala. 35)

HENDERSON v. STATE.

(*Supreme Court of Alabama.* Dec. 17, 1891.)

ENACTMENT OF STATUTES—AMENDMENT—CONSTITUTIONAL LAW.

Const. art. 4, § 19, providing that no bill on its passage shall be so altered or amended as to change its original purpose, is not violated by increasing by amendment the localities where a local bill shall take effect. Hall v. Steele, 2 South. Rep. 650, 82 Ala. 564, followed.

Appeal from circuit court, Chambers county; JAMES R. DOWDELL, Judge.

Indictment against John W. Henderson for violating the liquor prohibition law. There was judgment of conviction, and defendant appeals. Affirmed.

W. D. Denson and *Watts & Son*, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

COLEMAN, J. The defendant was indicted and convicted for a violation of the liquor prohibition law found in the acts of 1890–91, p. 85, which prohibits the selling or giving of spirituous, vinous, or malt liquors at various designated places, and also "within five miles of La Fayette College, in La Fayette, Chambers county, Alabama." It is contended that an inspection of the senate and house journal discloses the fact that the act was not passed in accordance with the constitutional requirements, and is therefore null and void. It is well settled that courts can and will, if deemed necessary, examine the legislative records to see whether a printed statute has a legal existence. Jones v. Hutchinson, 43 Ala. 723. The act in question originated in the senate, and is denominated "Senate Bill No. 27." The bill was referred to a committee, and by the committee reported with an amendment. On page 85, senate journal, it is shown that the bill and pending amendment was adopted by a vote of yeas and nays, and the note duly recorded. In the house journal, page 236, it is shown that a substitute for the senate bill was adopted by yeas and nays, and the vote duly recorded. The substitute was a mere extension of the purpose of the original bill so as to include other places. On page 240 the vote by which the substituted bill was adopted was reconsidered, and the vote ordering the bill to a third reading reconsidered. The bill was then further amended by inserting in the title and body of the bill other places not mentioned in the substituted bill, and as thus amended was read the third time at length, and passed by a yea and nay vote, and the vote duly recorded. The senate did not agree to the bill as passed by the house, and a committee of conference was appointed by both houses. The committee further amended the bill by adding other places, and also by providing: "And, as to La Fayette College, it shall not take effect until January 1, 1891." As thus amended, the bill as passed by the house was adopted by the senate by yeas and nays, and the vote duly recorded, (see senate journal, pp. 216, 217;) and the conference report was also concurred in by the house by a yea and nay vote, and the vote duly recorded, (see house journal, p. 286.) The journals show that the bill was duly signed by the president of the senate and speaker of the house, and approved by the governor. We have cited the pages of the senate and house journals only on the points raised in argument, but have carefully examined both journals as to the respective and successive action of the senate and house upon the bill until its approval by the governor. We fail to discover that any constitutional requirement which should affirmatively appear upon the legislative records was not fully complied with. As to matters which are not required to be affirmatively shown, this court will indulge all reasonable presumptions in favor of the legality of the law. In the case of Stein v. Leeper, 78 Ala. 517, it was declared "that the original purpose of the bill, being local prohibition, was not altered or changed by increasing by amendment the localities in which the act should have operation; that such were extensions and not changes of the purpose." The rule was reaffirmed in the case of Hall v. Steele, 82 Ala. 564, 2

South. Rep. 650. We are satisfied with the rule of construction declared in these decisions. By the written agreement of the appellant filed with the record the court is asked to determine only the constitutionality of the law, and not to consider any objection which might be urged against the sufficiency of the indictment. We pronounce the law to have been legally enacted, and to be valid. Affirmed.

(95 Ala. 159)

DUNTON *et al.* v. KEEL.

(*Supreme Court of Alabama.* Dec. 18, 1891.)

APPEAL—PRESUMPTIONS—EJECTMENT — EVIDENCE —PLEADING AND PROOF.

1. It will be presumed on appeal that a deed, offered in an action for the recovery of land, by defendant, as a link in his chain of title, was inadmissible, where the record fails to reveal its contents, or the ground of its exclusion.

2. Where a deed forming a necessary link in the title of a defendant in an action for the recovery of land has been properly excluded, the exclusion of a mortgage, forming a prior link, to a person not in privity with him, if erroneous, is harmless.

3. Where the complaint in an action for the recovery of land describes the land sued for only by section, township, and range, and the proof only shows that plaintiff is entitled to the possession of "the upper place," and "the lower place," the variance is fatal.

Appeal from circuit court, Jackson county; JOHN B. TALLY, Judge.

Action for the recovery of land, by Moses B. Keel against F. W. Dunton and others. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

Martin & Bouldin, for appellants. *J. E. Brown*, for appellee.

WALKER, J. This is a statutory action, in the nature of ejectment, for the recovery of the possession of land, and damages for the detention thereof. The plaintiff undertook to sustain his case by proof of prior actual possession under a claim of ownership. The defendant offered in evidence the record of a deed to himself from the American Mortgage Company of Scotland, Limited, and also the record of a mortgage from the plaintiff and his wife to that company. In offering the record of the mortgage the defendant's counsel stated that he claimed through said mortgage under the deed which had been already offered in evidence. On objection interposed by the plaintiff, the court excluded the records of both the deed and the mortgage. The record of the deed which was excluded is not copied in the bill of exceptions. We are not informed in any way of its contents, nor does the record disclose upon what ground it was excluded. In the absence of any showing to the contrary we must presume that it was properly excluded. Hutcheson v. Powell, (Ala.) 9 South. Rep. 170; Beadle v. Davidson, 75 Ala. 494.

The exclusion of the deed left the defendant in the position of failing to connect himself with the title under which he claimed. The deed was the link connecting him with the title conveyed by the mortgage. The defendant could not set up the outstanding title of the mortgage without connecting himself with it, (Allen v. Kellam, 69 Ala. 442;) and could not be injured by the exclusion of a mortgage to a third party standing in no relation of privity with him. His privity with the mortgagee, or the title conveyed by the mortgage, was proposed to be shown only by the deed, the proof of which had already been rejected, and properly so, we must presume. The mortgage without the deed would not tend to show the record title under which defendant proposed to hold the land, and no injury could result to him from the exclusion of the mortgage alone, as he failed in the proof of the deed. For this reason there cannot be a reversal because of that ruling, however insufficient may have been the grounds suggested in support of it.

The complaint describes the lands sued for only by the numbers of section, township, and range. The plaintiff offered evidence only as to his prior possession of "the upper place," and "the lower place," and as to the rental value thereof. All the evidence is set out in the bill of exceptions, and we find nothing at all in the record tending to show that the lands referred to by the witnesses are the identical lands described in the complaint. The witnesses do not, in any way, locate the lands of which they speak. It is not made to appear that there is any correspondence between the proof and the plaintiff's pleading. For aught that appears the testimony may have referred to other lands than those sued for. It certainly cannot be affirmed that the proof clearly showed that the plaintiff was entitled to or had had prior possession of the lands described in the complaint. The circuit court erred in giving the general charge in favor of the plaintiff. To say the least of it, the evidence was not sufficiently clear and free from doubt to warrant that charge. Tabler v. Coal Co., 87 Ala. 305, 6 South. Rep. 196; Alabama Gold Life Ins. Co. v. Mobile Mutual Ins. Co., 81 Ala. 329, 1 South. Rep. 561. Reversed and remanded.

(94 Ala. 626)

REED LUMBER CO. *et al.* v. LEWIS.

(*Supreme Court of Alabama.* Dec. 18, 1891.)

DAMAGES—REMOTE CAUSE—COVERTURE—EXEMPTIONS—PARTNERSHIP.

1. A plea in recoupment alleged that the notes sued on were given for mill machinery which plaintiff, knowing the purpose for which it was intended, failed to deliver until two months after the agreed time, and that the delay caused idleness of defendants' mill, and prevented the fulfillment of certain contracts, resulting in a loss of profits to defendants. *Held*, that the alleged loss was too remote and speculative to constitute recoverable damages.

2. It is in the discretion of the judge of the city court of Anniston to allow or to refuse to allow a special plea of coverture to be filed after the expiration of the 30 days limited for filing pleas by the act creating such court; and his ruling refusing to allow such a plea cannot be reviewed or controlled on appeal.

3. In an action on promissory notes against a partnership and the members thereof the complaint charged "that in each of said notes defendant waived all homestead exemptions as against this debt." *Held*, that there was no allegation of a waiver of exemption of personalty.

4. When a partner executing a firm note

waives exemptions, and signs the firm name, the waiver is confined to the partner signing.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Action by E. M. Lewis against the Reed Lumber Company as a firm, and its individual members. Judgment for plaintiff. Defendants appeal. Reversed.

The action was brought on three notes, in which were waived all homestead exemptions. In addition to the plea of the general issue filed by the defendants, they also filed a special plea of recoupment in which all of the defendants joined except Emily Farrar, the wife of W. T. Farrar. The plaintiff demurred to this plea of recoupment on the ground, among others, that the damages claimed by way of recoupment were too remote. The court overruled this ground of demurrer. The defendant Emily Farrar, after the ruling upon the other defendants' pleas, offered to file her plea of coverture, but the court refused to allow it done. Upon the hearing of the evidence the court rendered judgment for the plaintiff, and in said judgment declared that the defendants were entitled to no exemptions of personal property.

Gordon McDonald and *Caldwell & Johnston*, for appellants. *Matthews & Whiteside*, for appellee.

MCCLELLAN, J. This action is on promissory notes executed by the Reed Lumber Company, which is alleged to be a partnership composed of W. T. Farrar, Emily Farrar, the wife of W. T. Farrar, and C. W. Burrows. The suit is against the company and the individuals composing it. The company, W. T. Farrar, and Burrows pleaded in recoupment that the notes were given for the price of certain machinery to be presently delivered; that it was not delivered for two months afterwards; that the machinery was a part of a saw-mill, without which the mill could not be run; that plaintiff knew the uses to which it was to be applied, and that the mill was stopped in consequence of its non-delivery; and that as a result of this enforced idleness of the mill defendants were unable to fill certain contracts for lumber which they had with various parties, and lost the profits they would have made had they been able to supply the lumber, and that these profits amounted to $500. There is no averment that plaintiff contracted to deliver the machinery in contemplation of these contracts on the part of defendants to supply lumber to others, or that he knew of their existence.

The plea is bad upon two grounds, if not more. The plaintiff was not liable for the profits defendants would have made out of these contracts unless such damages, manifestly not being the natural consequences of plaintiff's mere failure to deliver the machinery, but depending on the contractual relations between defendants and others, could be said to have been in the contemplation of the parties without knowledge on the part of plaintiff of those relations, and hence, without his engagement, having any reference to them. Devlin v. Mayor, etc., 63 N. Y. 26; Daughtery v. Telegraph Co., 75 Ala. 168; Telegraph Co. v. Way, 83 Ala. 542, 4 South. Rep. 844; Griffin v. Colver, 16 N. Y. 489, 69 Amer. Dec. 718, and notes. Moreover, the profits which might have been realized by the defendants but for plaintiff's dereliction are, as alleged in this plea, entirely too speculative and conjectural, incapable of that clear and satisfactory proof which the law requires, to constitute recoverable damages. Authorities supra; Bell v. Reynolds, 78 Ala. 511; Street v. Sinclair, 71 Ala. 110. The action being prosecuted not only against the partnership, but also against each of its members, including Mrs. Farrar, individually, and judgment sought which would not only go against the partnership property, but against the property of each individual, Mrs. Farrar had the right to make any defense which would protect her from individual liability and save her individual property from subjection to the debt, without denying the partnership or in any way attempting to defeat the collection of the notes out of her interest in the partnership property. To this end she had a right to plead coverture; and we are of opinion that the court below erred in refusing to allow her to do so. Le Grand v. Bank, 81 Ala. 123, 1 South. Rep. 460. It is not claimed in the complaint that either of the defendants waived their exemptions of personal property as against the notes sued on. The averment is "that in each of said notes defendants waived all homestead exemptions as against this debt." Manifestly, upon such a waiver, there could be no judgment declaration of a waiver of exemption of personalty; and, even were this otherwise, the declaration in this judgment should have been confined to W. T. Farrar, who, it is alleged, signed the partnership name to the notes. Terrell v. Hurst, 76 Ala. 588. The judgment is reversed, and the cause remanded.

ON REHEARING.

Upon further consideration, in response to the application for rehearing, we are of opinion that it was within the discretion of the trial judge to allow or refuse to allow the plea of coverture to be filed when it was offered, the 30 days prescribed by the act creating the city court of Anniston for the filing of pleas having elapsed; and that his discretion in that regard cannot be reviewed or controlled on appeal. It results that the only error in the judgment below lies in the declaration of a waiver of exemptions which is embodied in it. That error will be corrected here, and the judgment modified by striking out the declaration in question. As thus modified, the judgment of the city court is affirmed.

(94 Ala. 394)

SMITH *et al.* v. COLLINS *et al.*

(*Supreme Court of Alabama.* Dec. 1, 1891.)

WRONGFUL LEVY — LIABILITIES OF SHERIFF — FRAUDULENT CONVEYANCES—BURDEN OF PROOF —WHAT CONSTITUTES INSOLVENCY — EVIDENCE OF FRAUD—INSTRUCTIONS—DEPOSITIONS.

1. In an action against a sheriff and the sureties on his bond for the wrongful levy of attach-

ments against C. & Co. on goods which, at the time of the levy, were claimed by plaintiffs, plaintiffs alleged that they had bought the goods from C. & Co. Defendants' testimony tended to show that the sale was fraudulent. The court charged that, after plaintiffs showed a *prima facie* title to the property, it devolved on defendants to show that plaintiffs' vendors were in failing circumstances, and notice of that fact to plaintiffs, when they became the purchasers; and that then plaintiffs must show that they bought those goods for a valuable consideration. *Held*, that such charge was erroneous, because, when it was proven that the attaching creditor's debts existed prior to the sale, the burden was on plaintiffs to prove the payment of the consideration, and, when this was done, then the burden would have been shifted to defendants to show plaintiffs had knowledge of the fraudulent intent or the insolvency of the vendor.

2. Such charge is wrong also because it impliedly asserts that the purchase would be valid, if an adequate consideration was paid, even if the purchasers had notice of the fraudulent intent or insolvency of the vendors.

3. Where the vendors in such case were closely related to the vendees, the court properly charged that the jury were the sole judges of the weight to be given to such relationship, and that fraud could not be presumed therefrom.

4. Where the consideration was in part the cancellation of a note signed by the vendors, it was error for the court to charge that, unless the vendors were insolvent at the time of the sale, and plaintiffs had notice thereof, the payment of such note would not render the sale fraudulent, since it ignores the fact that a solvent debtor may be guilty of fraud in the sale of his goods, and since it ignores a want of notice of facts, if such were proven on the trial, which would have put a reasonable man on inquiry, and which, if followed up, would have led to the discovery of fraud or insolvency.

5. It was proper to charge that all the assets belonging to C. & Co. (the vendors) "were liable to the payment of the firm debts, and, as against creditors of the firm, neither of the parties could claim any of the property as exempt from the payment of debts."

6. It was proper to charge that "insolvency" means an insufficiency of assets to pay debts, and if the jury believe from the evidence that the assets of the vendors in such case liable to the payment of their debts, at the time of the sale to plaintiffs, exceeded in value the amount of the claims against them, then they were not insolvent.

7. The charge that fraud must be proven, and that evidence merely showing a suspicion of its existence was insufficient to prove its existence, was properly given.

8. The court properly charged that before the jury find plaintiffs guilty of fraud in the purchase from C. & Co. defendants must show facts which are not fairly and reasonably reconcilable with honesty of purpose.

9. The court charged that if the jury believed that plaintiffs bought the goods and paid therefor a reasonable price, and that defendant, as sheriff, seized the goods under attachment, then defendants were liable for the goods so seized, unless defendants show that at the time of the sale C. & Co. were insolvent, and that plaintiffs had notice thereof. The court further charged that the burden of proving these facts was on defendants. *Held*, that such charge was erroneous, because, when it was proven that the attaching creditor's claim existed prior to the sale, the burden was on plaintiffs to prove the payment of the consideration, and, when this was done, then the burden would have been shifted to defendants to show that plaintiffs had knowledge of the fraudulent intent or insolvency of the vendor.

10. The court properly refused to charge that if C. & Co. were insolvent, and plaintiffs had notice thereof, the burden of proof was on plaintiffs to show that their purchase of the goods was *bona fide* and for valuable consideration, and, if the purchase was in part antecedent debts due one of plaintiffs from C. & Co., plaintiffs must clearly establish the existence of such debts; and, there being a close relationship between C. & Co. and plaintiffs, more vigilant and jealous scrutiny should be made, and clearer and more convincing proof required, than if the transaction was between strangers.

11. Defendants requested the court to charge that if the jury believed that the trade was gotten up in haste and completed at night; that the firm of C. & Co. ceased to exist by a sweeping sale of all the stock in the night; that there was near relationship between one of plaintiffs and C. & Co.; that the inventory was taken in the absence of plaintiffs, who never examined the goods with a view of purchasing,—these facts are to be considered in determining whether inquiry should have been made into C. & Co.'s financial condition; and, if the jury found that such inquiry should have been made, and which, if fairly conducted, would have disclosed the insolvency of C. & Co., and that C. & Co. were insolvent, and plaintiffs, having notice thereof, paid money to C. & Co., thereby enabling them to get their property out of reach of creditors, the sale was void, and plaintiffs cannot recover. *Held*, that such charge was properly refused, because argumentative.

12. The court properly refused to charge that if C. & Co., at the time of the sale to plaintiffs, "were unable to pay their debts in money in the ordinary course of trade, then they were insolvent," since a debtor cannot be said to be insolvent merely because he has not money enough on hand to meet his liabilities as they fall due in the course of trade.

13. It was proper for the court to refuse to charge that partnership assets of a falling firm cannot be applied to the debts and expenses of the individual partners until the partnership debts have been provided for; and if, at the time of the sale to plaintiffs, C. & Co. were in failing circumstances, and they received money in part payment for the goods sold, and without providing for the partnership debts one of the firm used part of the money to defray his family expenses, then this was a fraud on the creditors of C. & Co. whose claims were not provided for, since the validity of such sale would not be affected by the use made by the vendors of the purchase money, apart from facts connecting the purchasers with fraud.

14. The court properly refused to charge that, if the sale to plaintiffs was made when C. & Co. were insolvent, "for the purpose of putting their property beyond the reach of creditors, or was made to hinder, delay, or defraud their creditors, which preference was to be exercised after proceeds of sale had come into their hands," then the jury, in determining whether plaintiffs had knowledge of facts sufficient to put them on inquiry as to the insolvency of C. & Co., might consider the character, relationship, and intimacy of the parties, etc., since such charge was confused and uncertain.

15. Defendant's testimony tended to show that the sale was fraudulent, and he requested the court to charge that if C. & Co., at the time of the sale to plaintiffs, were insolvent, then, in determining if the sale was made with intent to defraud creditors, the jury could consider any unusual circumstances connected therewith, if such are shown to exist, such as great haste in completing the sale; the fact that it was made at night; that all the stock was sold; that it would result in C. & Co. going out of business, etc.; and that the jury might also consider these circumstances, if they exist, in determining whether plaintiffs had knowledge of such fraudulent intent, or had knowledge of facts that should have put them on inquiry; and, if such inquiry was excited, then it was not enough to direct such inquiry to the sale, but they should have gone further, with the view of learning C. & Co.'s

real intent in making the sale. *Held*, that such charge was properly refused, because it is altogether improper for the court to weigh the facts and draw inferences for the jury.

16. The court properly refused to charge that at the time of the sale to plaintiffs C. & Co. were insolvent or in embarrassed circumstances, as these were questions of fact for the jury.

17. The court properly refused to charge that the jury, in considering the *bona fides* of the sale, must take into consideration the fact that one of the firm of C. & Co. was not introduced by plaintiffs as a witness in this case, as it was predicated on nothing to render it legal.

18. It was proper to refuse to charge that if the jury believed the evidence in the case they should find for defendants, as the question of the sufficiency of the evidence was entirely for the jury.

19. The court properly refused in such case to charge that, if the jury believed that C. & Co. were insolvent at the time of the sale, plaintiffs had notice of such insolvency, and that the four hogs (part of the property sold) mentioned in the inventory, under a private agreement between C. & Co. and plaintiffs, were not to pass under the bill of sale, then this was a fraud on the creditors of C. & Co., and rendered the sale void as to them, and the jury should find for defendants, since, if plaintiffs had notice of the insolvency, the sale would be invalid, without reference to the hogs, and, if they had no such notice, the question growing out of the sale of the hogs did not render the sale void.

20. The writ of attachment under which the levy was made was not evidence of the firm's indebtedness.

21. The court properly refused to charge that plaintiffs at the time of the sale had knowledge of facts calculated to arouse their suspicion, and to stimulate inquiry as to C. & Co.'s financial condition, as this was a question of fact for the jury.

22. An incomplete charge, from which the intention of the pleader can only be conjectured, will not be considered.

23. The circuit court cannot compel the production of a deposition in the hands of a commissioner taken by him under a commission from the chancery court, without an order authorizing it from the court from which the commission issued.

24. Defendants sought to show the insolvency of C. & Co. at the time of the sale, and had given legal notice to produce the books of the firm. They were not produced, and defendants then sought to introduce evidence of their contents. *Held*, that such evidence was admissible.

25. Testimony which is competent against one party cannot be excluded by the trial court because not competent against another party to the suit.

26. Plaintiffs in an action have a right to be present during the trial, notwithstanding their examination as witnesses.

27. Continuances are in the discretion of the trial court.

28. Where plaintiffs alleged that they had bought the goods from C. & Co., and defendant sought to prove that the sale was fraudulent, it was competent for him to show, as bearing on the question of fraud, that C. & Co., just before the sale to plaintiffs, ceased to make deposits of the proceeds of sales of goods, and that one of the firm withdrew all cash on deposit.

29. It was also competent to show, as explanatory thereof, the circumstances which induced the cessation and withdrawal of the deposits.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Action by Collins & Griffith against J. S. Smith and others. Judgment for plaintiffs. Defendants appeal. Reversed.

This was an action of trespass brought by the appellees, Collins & Griffith, against the appellant J. S. Smith, as sheriff, and his bondsmen, and sought to recover damages for the alleged wrongful and unlawful levy of certain attachments against J. D. Collins & Co. upon property which was, at the time of the levy, claimed by plaintiffs. The defendants pleaded the general issue and justification under the authority of said attachments which were placed in the hands of the sheriff for execution. On the trial of the cause, after the plaintiffs had announced ready for trial, two of defendant's witnesses, upon whom a *subpœna duces tecum* had been served, asked the court not to compel them to produce certain depositions and account-books thereto annexed, which depositions had been taken in another cause pending in the chancery court. The court refused to compel the production of said depositions and books, and to this ruling the defendants duly excepted. The defendants then offered, in support of the motion to require the production of said books and depositions, to show the materiality and importance of the same as testimony in this case; but the court refused to allow this evidence, and defendants duly excepted. The court also overruled the defendants' separate motion to compel the production of the books, and the defendants duly excepted. The defendants then asked the court that the case be continued so as to allow them the opportunity to get the benefit of the testimony, but the court refused to grant the continuance, and the defendants duly excepted to said refusal. The plaintiffs then introduced evidence to show that the said J. S. Smith, at the time of the grievance complained of, was sheriff of Jefferson county, Ala., and that his co-defendants were sureties on his official bond; that said Smith, as such sheriff, by his deputy, took charge of the goods involved in this suit on the evening of December 27, 1889; that he came to the store in Warrior, Ala., which had been occupied by J. D. Collins & Co., but was, at that time, occupied by plaintiffs, and levied upon the goods in said store as the property of J. D. Collins & Co. under two attachment writs in his hands in favor of Carter Bros. & Co. and Henry Bernstein; that said sheriff sold the goods so levied upon, and satisfied those attachment writs and other writs of attachment which were in his hands against J. D. Collins & Co. The testimony for the plaintiffs further tended to show that the goods so levied upon and removed by the sheriff had previously to such levy been sold by J. D. Collins & Co. to the plaintiffs for $4,800, which purchase price was the fair market value of the goods bought, less the value of a safe at $75, which had been charged twice in the inventory, and the value of hogs, $60, which were included in the bill of sale, but which were redelivered to J. D. Collins & Co.,—it having been agreed that the hogs should not be included in the bill of sale. Robert Collins, of the plaintiff firm, on being introduced as a witness, testified that on December 23, 1889, after some negotiations with J. D. Collins, of the firm of J. D. Collins & Co., he and one Griffith

agreed upon the purchase of the stock of goods from J. D. Collins & Co., agreeing to pay him the purchase price above stated; that said sale was made according to the invoice which J. D. Collins had with him at the time of the agreement to purchase, and which was attached to the bill of sale made by J. D. Collins & Co. to the plaintiffs; that at the time of the consummation of the sale said Robert Collins paid to J. D. Collins & Co. in checks $601, and on the next day, said Collins & Griffith having gone to Warrior, the bill of sale was signed by J. A. Collins, and $1,043 of the purchase price of the goods was paid by the plaintiffs to him. The evidence for the plaintiffs further tended to show that the purchase price was paid by the cancellation of an antecedent indebtedness by J. D. Collins & Co. to Robert Collins, by cash in hand paid, by checks on certain banks, and by promissory notes; and that the transaction was in every respect *bona fide*, and free from collusion. The testimony for the defendants tended to controvert the *bona fides* of the contract between Collins & Griffith and J. D. Collins & Co., by which they pretended to purchase the latter's stock of goods. Among other evidence, the defendants introduced the president of the bank at Warrior, Ala., who testified that J. D. Collins & Co. had for a long time been customers of his bank, and deposited therein about $1,500 per month, until about the middle of October, 1889, when they ceased to make any deposits; and that said witness Davidson asked J. D. Collins why he ceased to make deposits with him, to which Collins replied "that they were getting very little money, and were putting what they got in cotton." The plaintiffs objected to this conversation with J. D. Collins, and moved to exclude it from the jury. The court sustained the motion, excluded the testimony, and the defendants duly excepted. There was much testimony introduced on the part of both plaintiffs and defendants, but it is not deemed necessary to set it out in detail.

The defendants excepted to the following part of the court's oral charge to the jury: "To render a conveyance made with intent to hinder, delay, or defraud creditors void, it is necessary that bad intent must exist on the part of the purchaser as well as the seller. It is not sufficient that property be sold with the intent on the part of the seller to injure his creditors, but, in order to render it void, both parties to the conveyance must participate in the bad intent, so that a purchaser who, without any knowledge of the intent on the part of the seller, buys property and pays for it, or pays a part and gives his notes for the remainder, is protected. The sale cannot be rendered void even at the instance of creditors who may be prejudiced thereby." The court, at the request of the plaintiffs, gave the following charges in writing: (1) "The jury are sole judges of what weight shall be given to the relationship of the parties in determining the question involved in the case. No presumption of fraud is drawn from relationship." (2) "Unless J. D. Collins & Co. were insolvent at the time of the sale, and Collins & Griffith had notice thereof, the payment of the note signed by J. D. and J. A. Collins would not render the sale fraudulent." (3) "I charge the jury that all the assets belonging to the firm of J. D. Collins & Co. were liable to the payment of the firm debts, and, as against creditors of the firm, neither of the partners could claim any of the property as exempt from the payment of debts." (4) "I charge the jury that insolvency means an insufficiency of assets to pay debts; and if the jury believe from the evidence that the assets of J. D. Collins and J. A. Collins liable to the payment of their debts on the 23d and 24th of December, 1889, exceeded in value the amount of the claims against them, then they were not insolvent at the time." (5) "Fraud must be proven like any other fact. Evidence which merely shows a suspicion of its existence is not sufficient to show its existence." (6) "Before the jury find that the plaintiffs, Collins & Griffith, were guilty of fraud in the purchase from J. D. Collins & Co., defendants must show facts and circumstances which not only cast a suspicion on the transaction, but they must show a state of facts which are not fairly and reasonably reconcilable with fair dealing and honesty of purpose; and until this is done the jury cannot find that plaintiffs were guilty of fraud." (7) "If the jury believe from the evidence that the plaintiffs, Collins & Griffith, on or about the 23d day of December, 1889, bought of J. D. Collins & Co. the stock of goods in controversy, and paid therefor the agreed price, with cash, and by the transfer of a mortgage on one's self, and in the satisfaction and payment of *bona fide* indebtedness of J. D. and J. A. Collins, and of J. D. Collins & Co., and by a resale of the hogs described in the bill of sale, and by executing their notes for the balance; and if the jury further believe that the amount so paid in this way was a reasonable value of such goods; and that afterwards Joseph S. Smith, as sheriff, by his deputy, seized and took possession of such goods under the writs of attachment given in evidence,—then the defendants are liable to the plaintiffs for the stock of goods so seized, unless the defendants have satisfied the jury by the evidence—*First*, that at the time the purchase was made and closed J. D. Collins & Co. were insolvent or in embarrassed circumstances; and, *second*, that the plaintiffs, Collins & Griffith, at that time had actual or constructive notice that J. D. Collins & Co. were insolvent or in embarrassed circumstances. The burden of proving each of these last-named facts is upon the defendants, and the plaintiffs are entitled to a verdict, unless these facts are proven."

The defendants separately and severally excepted to each of said charges as given, and separately excepted to the court's refusal to give each of the following written charges requested by them: (1) "If the jury believe from the evidence that J. D. Collins & Co. were insolvent or in a failing condition, and that Collins & Griffith

knew this, or were in possession of facts sufficient to put them on inquiry as to the financial condition of J. D. Collins & Co., the burden of proof is on the plaintiffs to show that the purchase of the stock of goods from J. D. Collins & Co. was not only *bona fide*, but that they paid a valuable consideration for the goods; and the purchase price consisting, according to their claim, in part of debts due to Robert A. Collins, one of the purchasers, from said J. D. Collins & Co., the plaintiffs must establish the existence of such debt due to Robert Collins by clear and satisfactory evidence; and it being undisputed that near relationship exists between the purchasers and sellers, more vigilant and jealous scrutiny will be exacted, and clearer and more convincing proof required, than if the transaction was between strangers." (2) "The jury should look to all the facts and circumstances surrounding the transaction in deciding upon the *bona fides* of the sale from J. D. Collins & Co. to Collins & Griffith. If the jury believe the trade was gotten up in haste; that the trade was consummated at night; that the mercantile firm of J. D. Collins & Co. ceased to exist by a sweeping sale of the entire merchandise in the night-time; that there was a near relationship between one of the plaintiffs and the sellers; that the inventory was taken in the absence of the purchasers, and that the plaintiffs had never examined the stock of goods with a view of purchasing the same,—these are facts to be considered by the jury, in connection with all the other evidence in the case, in determining whether or not inquiry into the financial condition of J. D. Collins & Co. should have been made. And if the jury find, from the foregoing facts, viewed in the light of the other evidence in the case, that inquiry should have been made, which, if fairly and honestly conducted, would have disclosed the existence of debts due from J. D. Collins & Co. and unprovided for; and if the jury further find that J. D. Collins & Co. were in failing circumstances at the time of the trade, and that the plaintiffs, knowing this fact, or having good reason to believe it, paid money to J. D. Collins & Co., and thereby enabled them to shuffle their property out of sight of creditors,—the sale was void, and plaintiffs cannot recover." (3) "The court charges the jury that if they believe from the evidence in this case that J. D. Collins & Co., at the time of the sale by them to Collins & Griffith, were unable to pay their debts in money in the ordinary course of trade, then they were insolvent." (4) "The court charges the jury that partnership assets of a failing concern cannot legally be applied to the debts and expenses of the individual members until the partnership debts have been provided for; and if the jury believe, at the time of the alleged sale of goods from J. D. Collins & Co. to Collins & Griffith, that the former was in failing circumstances, and they received money in part payment for said goods; and that, without paying or providing for the partnership debts, Julius A. Collins used a part of said money to defray his family expenses,—then this was a fraud upon those creditors of J. D. Collins & Co. who were unpaid or unprovided for, if there were such creditors." (5) "The court charges the jury that if J. D. Collins & Co. were insolvent or in an embarrassed financial condition at the time of the sale to Collins & Griffith, and that the said sale was made by them for the purpose of putting their property beyond the reach of their creditors, or was made to hinder, delay, or defraud their creditors, which preference was to be exercised at their election after proceeds of sale had come into their hands, then the jury, in determining whether Collins & Griffith, or either of them, had sufficient information to stimulate inquiry into the transaction and embarrassed financial condition of J. D. Collins & Co., they may consider the character, surroundings, and relationship of the parties to the transaction, their intimacy, if any is shown, their connection with that particular transaction, and their facilities for obtaining correct information." (6) "The court charges the jury that, if J. D. Collins & Co. at the time of the sale to Collins & Griffith were insolvent or in a failing condition, then, in determining if said sale was made with the intent of placing their property beyond the reach of creditors, or to hinder, delay, or defraud their creditors, the jury are authorized to consider any unusual circumstances outside of the ordinary routine commercial or mercantile business, if such are shown to exist, such as great haste in consummating the sale, the unusual time, to-wit, night-time, the fact that the sale embraced the entire stock of goods, and the further fact that it would result in the firm of J. D. Collins & Co. going out of the commercial business, and also the fact that they conveyed their store-house and lot at the same time to Imogene Collins; and the jury may also consider these circumstances, if they exist, in determining whether or not said Collins & Griffith, or either of them, had knowledge of such fraudulent intent or such purpose to place the property beyond the reach of creditors, or whether they had notice or knowledge of such facts as would stimulate inquiry on their part into the validity of the sale; and, if such inquiry was excited, then it was not enough that said inquiry should have been directed simply to the sale, but they should have gone further, with the view of ascertaining the real intent on the part of J. D. Collins & Co. in making such sale." (7) "The court charges the jury that if J. D. Collins & Co. were unable at the time of the sale to Collins & Griffith to pay their debts in money as they fell due in the ordinary course of trade, then they were insolvent." (8) "The court charges the jury that the evidence in the case shows that J. D. Collins & Co. were insolvent at the time of the sale to Collins & Griffith." (9) "The court charges the jury that the evidence in the case shows that J. D. Collins & Co. at the time of the sale to Collins & Griffith were in embarrassed financial circumstances." (10) "The court charges the jury that, in considering the fairness

and *bona fides* of the sale of J. D. Collins & Co. to Collins & Griffith, they must take into consideration the fact that J. D. Collins, of the firm of J. D. Collins & Co., was not introduced by the plaintiffs as a witness in this case." (11) "The court charges the jury that if they believe the evidence in this case they will find for the defendants." (12) "The court charges the jury that if they believe from the evidence in this case that, when the sale of J. D. Collins & Co. was made to Collins & Griffith, that J. D. Collins & Co. were insolvent, or in an embarrassed financial condition, and that Collins & Griffith, or either of them, knew of such insolvency, or had notice or knowledge of facts which would put a reasonably prudent man on inquiry in relation thereto, which, if honestly and faithfully pursued, would have disclosed their insolvent condition; and if the jury further believe that the four hogs mentioned in the inventory, under a private agreement between J. D. Collins & Co. and Collins & Griffith, were not to pass under said bill of sale to Collins & Griffith, but were to remain the property of J. D. Collins,—then this was a fraud on the existing creditors of J. D. Collins & Co., and rendered the sale void as to them, and the jury will find for the defendants." (13) "The jury may look to the attachment writs produced in evidence on the trial, and the returns of the sheriff thereon, and consider the same, in connection with the other evidence in the case, in determining whether or not J. D. Collins & Co. had property liable to be levied upon to satisfy the debts of said J. D. Collins & Co." (14) "The court charges the jury that the evidence in this case shows that Collins & Griffith, at the time of the sale of the goods by J. D. Collins & Co. to them, had notice or knowledge of facts or circumstances which were calculated to arouse suspicion or stimulate inquiry as to the real financial condition of J. D. Collins & Co." (15) "The court charges the jury that if they believe from the evidence in this case that J. D. Collins & Co., at the time of the sale by them to Collins & Griffith, were unable to pay their debts as they matured and became due in the ordinary course of business, as persons carrying on such business usually do, in that currency which is made by the United States government legal tender." (16) "The court charges the jury that the evidence in this case shows that Collins & Griffith had notice of facts or circumstances at the time of the purchase of the goods by them from J. D. Collins & Co. which were calculated to arouse suspicion as to the insolvency or failing financial condition of J. D. Collins & Co." (17) "The court charges the jury that the evidence in this case shows that Collins & Griffith at the time of the sale of the goods by J. D. Collins & Co. to Collins & Griffith had notice or knowledge of facts or circumstances which were calculated to arouse suspicion or to stimulate inquiry as to the intent or purpose of J. D. Collins & Co. in selling their goods to them." (18) "The court charges the jury that if they believe from the evidence that the four hogs mentioned in the inventory were not intended to be sold to and passed to Collins & Griffith, but were, under the arrangement or agreement between said J. D. Collins & Co. and Collins & Griffith, to remain the property of J. D. Collins & Co., then this rendered the sale fraudulent and void as to creditors of J. D. Collins & Co., and the jury will find for the defendants."

There was verdict for the plaintiffs, assessing their damages at $3,466.93, and the defendants made a motion for a new trial, and to have the verdict set aside, assigning as ground thereof the ruling of the court on the evidence, and the charges given and refused. The court overruled this motion; and, upon judgment being rendered for the plaintiffs, the defendants prosecute this appeal, and assign as error the various rulings of the lower court.

Lane & White, for appellants. *Gillespy & Meyer* and *Smith & Lowe*, for appellees.

COLEMAN, J. Creditors of J. D. Collins & Co. sued out certain attachments against the firm, which were levied by the sheriff upon a stock of goods as the property of the defendants in attachment. The plaintiffs in this suit, Collins & Griffith, brought the present action against the sheriff and his sureties in trespass, claiming the goods as their property under a purchase from J. D. Collins & Co., made prior to the suing out of the attachments. The *bona fides* and validity of the sale to plaintiffs by J. D. Collins & Co. was the issue in the trial court. Robert A. Collins, of the firm of Collins & Griffith, is a brother of J. D. Collins, and son of J. A. Collins, composing the firm of J. D. Collins & Co. There seems to be no contest as to the validity of the debts of the plaintiffs in attachment and of their existence at the time and prior to the sale of the goods. The evidence tends to show that the consideration paid by plaintiffs principally consisted in cash and a debt due Robert A. Collins from J. D. Collins and J. A. Collins jointly, but not as partners. There was one item of four hogs, valued at $60, in the inventory. These hogs were returned to the vendors, and the agreed price for the whole purchase was credited with the amount of the $60. There are some general principles of law applying in such cases which have been repeatedly declared by this court, but, as they seem not to be fully apprehended, we venture to repeat some of them again. When a creditor attacks a sale of property made by his debtor as fraudulent, and proves the existence of his debt prior to the sale thereon, the burden devolves upon the purchaser to show that he paid a fair and adequate consideration. After the purchaser makes this proof, then the burden shifts back upon the creditor to show that the sale was made with a fraudulent intent, and that the purchaser knew of and participated in this intent. The law declares that an insolvent vendor, or one in embarrassed circumstances financially, who disposes of his property which is liable for his debts, and places it beyond the reach of legal process, and withholds the purchase money from his creditor, is guilty of fraud;

and a purchaser for a cash or present consideration of substantially all his property, who knows that his vendor is insolvent or financially embarrassed, or who has knowledge of such facts as would put a reasonable man upon inquiry, and which, if followed up, would lead to a discovery of his insolvency or financial embarrassment, is a guilty participator in the fraud, and acquires nothing by his purchase available against the creditors of his vendor. The general charge of the court is not consistent with itself, and not in accord with these principles in several particulars. We specify only one. The court, after correctly instructing the jury as to the effect a knowledge of the insolvency of the vendor on the part of the vendee would have upon the purchase, in another part of the charge instructed the jury that, after plaintiffs showed a *prima facie* title to the property, "it devolves upon the defendants to show that plaintiffs' vendors were in failing circumstances or insolvent, and to show notice of that fact to the plaintiffs when they became the purchasers. When they have done that it devolves upon the plaintiffs to show that they bought these goods for a valuable consideration; to show to the reasonable satisfaction of the jury what they have paid for them." This is error in two respects. First, in requiring the defendants to show that plaintiffs had knowledge of the insolvency of their vendors before the plaintiffs were required to prove the payment of a valid consideration. The rule is that, when the proof shows that the attaching creditors' debts existed prior to the sale, the burden of proving the payment of the consideration devolves upon the purchaser, and, after this proof is made, then the burden is shifted back upon the attaching creditors to prove that the purchaser had knowledge of the fraudulent intent or insolvency of the vendor, or of his failing condition.

The charge is also radically wrong in principle, in this: that impliedly it asserts that the purchase would be valid, if an adequate consideration was paid, although the purchasers had notice of the insolvent condition or fraudulent intent of their vendors.

The court holds that there is no reversible error in the charge to the jury in reference to the fact of relationship of the parties, and in giving charge No. 1 at the request of plaintiffs, in which it was declared that the jury are the sole judges of the weight to be given to the fact of relationship. The charge asserts no incorrect proposition of law, and if deemed misleading as falling short of the entire rule, the court holds that it was the duty of the complaining party to have asked for an explanatory charge. In the case of Reeves v. Skipper, 10 South. Rep. 309, (at present term,) this question was considered at length, and the rule which governs in such cases settled.

That J. D. Collins & Co. were largely indebted at the time of the sale to plaintiffs, and that the sale tended to hinder and delay their creditors in the collection of their debts, is not seriously controverted. A debtor possessed of ample means to satisfy all demands against him, as well as an insolvent debtor, may be guilty of a fraudulent intent in the sale of his property. He may convert his property into money for the express purpose of putting it beyond the reach of his creditors, and a vendee who purchases with a knowledge of such fraudulent purpose, for a cash consideration, in law is a participator in the fraud. Charge 2 given for plaintiffs ignores this contention, and is further objectionable, in that it does not hypothesize a want of knowledge or notice of facts, if such were proven on the trial to the satisfaction of the jury, calculated to put a reasonable man on inquiry, and which, if followed up, would have led to a discovery of either a fraudulent intent, or insolvency or failing condition of their vendors.

Charge No. 7 is subject to the first objection pointed out to charge No. 2. Furthermore, it fixes the burden of proving knowledge or notice of insolvency upon defendants absolutely, without reference to the fact that the jury must be satisfied that plaintiffs paid a fair and adequate consideration before this burden is shifted on defendants.

We find no error in charges 3, 4, 5, and 6. Charge 6 is substantially the same as that approved in Keller v. Taylor, 90 Ala. 290, 7 South. Rep. 907. Charge 4 may have called for an explanatory charge, but there is no error in the proposition asserted.

Charge No. 1, requested by defendants, was properly refused.

Charge No. 2 went too far, and was also argumentative, and there is no reversible error in its refusal. If the jury believed the facts predicated in this charge, they were suggestive of fraud, and should have led to inquiry on the part of the purchasers, and, if the charge had stopped here, it ought to have been given. Near the conclusion of the charge it becomes argumentative.

Charges Nos. 3 and 7 were properly refused. A debtor who has a sufficiency of property acceptable to legal process to satisfy all legal demands cannot be said to be insolvent, although he may not have money in hand to meet his liabilities as they fall due in the course of trade.

Charge 4 was misleading, and properly refused. The validity of the transaction in this case is not affected by the use made of a part of the purchase money by the vendor after the consummation of the sale, disconnected from any other facts implicating the purchasers in a fraudulent intent.

The following statement in charge 5, "which preference was to be exercised at their election after proceeds of sale came into their hands," renders the charge confused and uncertain. We fail to perceive its connection and bearing to the remainder of the charge.

Charge 6 was properly refused. It is entirely legitimate for counsel to group facts and press them with reasonable inference in argument upon the jury, but altogether improper for the court to

weigh the facts and draw the inference for the jury. The charge is argumentative and objectionable in other respects.

Charges Nos. 8, 9, 11, 14, 16, and 17 involved disputed questions of fact, to be determined by the jury, and not the court.

Charge 10 was properly refused. It was predicated on nothing to render it legal.

Charges 12 and 18 were properly refused. The latter declares the sale to have been fraudulent and void, without reference to the financial condition or fraudulent intent of the vendors, or any knowledge or notice of their intent or condition on the part of plaintiffs. The charge, to be correct, necessarily involves the assumption that the purchasers were chargeable with notice of these facts. We do not see the importance which has been attached to the matter of the hogs, except as argument for the jury. If the purchasers knew of a fraudulent intent on the part of their vendors, or were chargeable with knowledge or notice that they were insolvent or in failing circumstances, or if culpably negligent in not making inquiry and following it up, the greater part of the consideration paid being a present consideration, and not the satisfaction of an antecedent debt of J. D. Collins & Co., the sale would be invalid as to the injured creditors, independent of and without reference to the sale of the hogs. On the other hand, if the purchasers were not thus chargeable, the question growing out of the sale of the hogs, as a matter of law, did not render the sale void. It was for the jury to say whether the explanation given was consistent with fair dealing, when considered in connection with the other evidence.

Charge 13 asserts the proposition that the writ of attachment may be considered by the jury as evidence tending to show the financial condition of the defendant debtor, in other words, that the writ of attachment was evidence of their indebtedness. The rule which prevails in this respect in a trial of the right of property rests upon different principles and practice than when the suit is in trespass by a vendee of the defendants in attachment. The issue is not the same. Pulliam v. Newberry, 41 Ala. 174.

Charge No. 15 is incomplete, and we are left to conjecture as to the intention of the pleader. Many of the charges give evidence of hasty preparation.

There is no power in the circuit court to compel the production of a deposition which is in the hands of a commissioner, taken by him under a commission from the chancery court, without an order authorizing it from the court from which issued the commission. We do not decide that a court of law has any authority to compel a party at any time to produce his books in court, that they may be used in evidence against him. The rule is different in a court of equity.

A failure, after legal notice, to produce books or other written documents in a court of law which may furnish legal evidence in proper cases, authorizes the introduction of proof of their contents. In testing the *bona fides* of a sale made by a partnership, it is competent for an attaching creditor to show the insolvency or embarrassed condition financially of the partnership debtor. For this purpose the books of the partnership may contain competent evidence, and, if furnished to him, may be introduced in evidence, or, upon a proper showing, the creditor may introduce evidence of the contents of the books. Whenever the financial condition of the debtor is material, whatever throws light on this question is admissible. To make such testimony available as against the purchaser, there must be additional proof, such as knowledge or notice of the condition of the vendor, (debtor,) or of facts suggesting further inquiry, and which, if honestly followed up, would lead to a knowledge of his condition.

The court should not exclude testimony which is competent against one party because not competent against another party to the suit. The testimony should be received, and its bearing limited and explained to the jury.

The plaintiffs had the right to be present during the trial, notwithstanding their examination as witnesses.

Continuances are in the discretion of the trial court.

It was competent, as bearing on the questions of a contemplated fraud, to show that J. D. Collins & Co., just before the sale to plaintiffs, ceased to make deposits of proceeds of sales of merchandise, and that J. D. Collins withdrew all cash on deposit.

It was also competent, in a legitimate way, as explanatory thereof, to show the circumstances which induced the cessation and withdrawal of the deposits. The record is unduly incumbered with merely cumulative exceptions, and many which involve merely elementary questions. There are 54 assignments of error. Less than half the number may be selected, which raise every material question reserved by them all. Reversed and remanded.

(95 Ala. 156)

MATHIS v. CARPENTER, Sheriff, *et al.*

(*Supreme Court of Alabama.* Jan. 6, 1892.)

SHERIFFS — DEPUTY — PROOF OF AUTHORITY — LIABILITY ON BOND — EVIDENCE.

1. Evidence that a person acted as deputy-sheriff in the presence of the sheriff; that he was in the habit of receiving all kinds of process; that he receipted for executions in the name of the sheriff as his deputy; that he collected money on executions; that he was generally understood to be the deputy-sheriff,—is sufficient to show that such person was recognized by the sheriff as his deputy.

2. Under Crim. Code, § 3951, imposing a penalty on an officer required by law to take an oath of office, who enters on the duties of his office without taking and filing such oath in the proper office, a sheriff is not relieved of his liability for the acts of a deputy because such deputy filed his oath of office with the clerk of court instead of the probate office.

3. Where a sheriff's bond has been replaced, because insufficient, by a second bond, and defendant's pleas in an action against the sheriff and the sureties on his bonds are framed jointly for all defendants, the first bond was improp-

erly excluded, although some of defendants were sureties on one bond, and not on the other.

4. Where it appears, in an action against a sheriff for failure to levy an attachment, that the attachment issued, and property in possession of defendant in attachment *prima facie* proven to be subject to levy was pointed out and an indemnifying bond given, testimony by the sheriff that the property was not subject to attachment is properly admitted.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Action by C. H. Mathis against L. P. Carpenter, sheriff, and others. Judgment for defendants. Plaintiff appeals. Reversed.

Plaintiff demurred to defendants' second plea, on the ground that it presented no material issue, and that in the execution of a writ of attachment it is immaterial whether defendants are solvent or insolvent. This demurrer was overruled. The principal part of the controversy, as is shown in the opinion, is whether or not Porter was a duly-appointed deputy-sheriff. Plaintiff offered to introduce in evidence what purported to be an oath of office as deputy-sheriff taken by Porter before the clerk of the city court and filed with him. On defendants' objection, the court refused to allow the oath to be introduced in evidence, to which ruling plaintiff duly excepted. Plaintiff also offered to introduce in evidence two bonds of the sheriff, the first of which had been replaced by the second, as it had been declared insufficient; but, on defendants' objection to the introduction of the first of said bonds, the court refused to allow it to be introduced in evidence, and plaintiff duly excepted. On the examination of defendant in attachment, C. Roberts, as a witness for defendants in this suit, Roberts was asked the following question: "Did you have any property at the time subject to the levy of said attachment?" Plaintiff objected to this question, and duly excepted to the court's overruling his objection. The witness said that he had no property at the time subject to the attachment, as the household furniture which was in the house rented by him belonged to his wife. The cause was submitted to the court, without the intervention of a jury.

Matthews & Whiteside, for appellant. *Caldwell & Johnston*, for appellees.

COLEMAN, J. Appellant, as plaintiff, moved for a summary judgment against the defendant Carpenter, as sheriff, and his sureties, for failing to levy an attachment. The averments of the motion are that the writ of attachment was placed in the hands of the sheriff, property pointed out to him as belonging to the defendant in attachment, and that the sheriff was duly indemnified to make the levy. The defendants' pleas were three in number: (1) That the writ was not received by him or any one authorized to receive it; (2) that defendant had no property subject to levy under the attachment; and (3) the same could not have been executed by the exercise of due diligence.

The proof is ample to show that the sheriff, Carpenter, was liable for the acts of C. F. Porter as his deputy. The testimony of the clerk of the court showed that Porter acted as the deputy-sheriff, in the presence of the sheriff; that he was in the habit of receiving all kinds of process; that in fact he receipted for executions in the name of the sheriff, by him as deputy, collected money on execution, made due return of the collections in the name of the sheriff, and was generally understood to be the deputy-sheriff. To the same effect is the testimony of certain attorneys who practiced in the court; and in regard to the particular writ of attachment, upon inquiry being made of Caldwell, whom the sheriff acknowledges to have been his regular deputy-sheriff, was referred by him to Porter as the officer who had the writ for execution. There is other evidence, also sufficient to satisfactorily show that Porter was recognized by the sheriff as his deputy.

The pleas are framed jointly for all the defendants, and there is no plea which justified the exclusion of either bond executed by the sheriff, although some of the defendants were sureties upon one bond who were not sureties upon the other.

Section 3951 of the Criminal Code imposes a penalty upon any officer required by law to file an oath of office who enters upon the duties of his office without first taking and filing such oath in the proper office. The fact that Porter filed his oath of office with the clerk of the court, instead of the probate office, did not relieve the sheriff of his liability for the acts of Porter as his deputy if the evidence otherwise satisfactorily showed that he (Porter) represented himself as a deputy-sheriff, and acted as such with the knowledge and consent and approbation of the sheriff, and, if the evidence is credible, there can be but little question of the existence of these facts. Joseph v. Cawthorn, 74 Ala. 414.

That property in the possession of the defendant, apparently subject to levy, was pointed out, and an indemnifying bond executed to the sheriff, is fully proven. The witness Roberts, the defendant in the attachment suit, testified that in fact the attachment was levied by the deputy-sheriff so far as to take control of the property, and for a consideration of $25 paid to the deputy by him the possession was released, but there was no entry of any levy entered on the writ of attachment or elsewhere.

The second and third pleas presented a good defense to the action. An indemnifying bond is intended for the protection of the officer. Under our statute, no additional duty is imposed upon the officer because he has been indemnified. A bond of indemnity does not devolve upon a sheriff to commit a trespass or do an illegal act. In no event can it do more than shift the burden on him to show that the property was not subject to levy. The evidence showed that the debt upon which the attachment issued was for rent of a dwelling; the property pointed out was furniture in the rented house, apparently in the possession of the tenant. *Prima facie* the officer was liable for not making

the levy, but he was not absolutely liable. If the property did not belong to the tenant, if it was not subject to levy by attachment, the plaintiff suffered no injury, and sustained no damage. Under the facts proven by the plaintiff, *prima facie* the property was liable, and the burden rested upon the sheriff to prove his defense, by showing that the property was not subject to levy under the attachment. Mason v. Watts, 7 Ala. 705; Leavitt v. Smith, Id. 181; Minter v. Bigelow, 9 Port. (Ala.) 483; Smith v. Castellow, 88 Ala. 355, 6 South. Rep. 750; Abbott v. Gillespy, 75 Ala. 184; Wilson v. Strobach, 59 Ala. 493; Governor, etc., v. Campbell, 17 Ala. 569. There was no error in admitting such testimony. Section 12 of the act establishing the city court of Anniston (Acts 1888–89, p. 569) provides that, in cases of appeal, if there be error, the supreme court shall render such judgment as the court below should have rendered, or reverse and remand the same for further proceedings, as shall be deemed right. Although there is proof tending to show that the property pointed out to the sheriff may not have been subject to levy under the attachment, the real contest seems to have been rested upon other grounds. The rulings of the trial court were not in accord with the principle here declared, and we are of opinion that the ends of justice would be better promoted by a reversal of the case. Reversed and remanded.

(95 Ala. 200)

MOORE *et al.* v. PENN *et al.*

(*Supreme Court of Alabama.* Dec. 18, 1891.)

BILL OF EXCEPTIONS—FRAUDULENT CONVEYANCES.

1. Where a bill of exceptions is signed by the judge, leaving blank spaces in which certain papers used in evidence are to be copied by the clerk, the clerk cannot incorporate papers of which there is no description in the bill, or of which the description is general and indefinite.

2. When a creditor purchases from an insolvent debtor his entire stock of goods, the consideration being the extinguishment of a pre-existing debt materially less in amount than the value of the goods, the sale is fraudulent as against attaching creditors.

Appeal from circuit court, Tallapoosa county; JOHN MOORE, Judge.

Action by Moore, Marsh & Co. against Penn & Co. on an attachment of plaintiffs against Spinks Bros. Judgment for plaintiffs. Defendants appeal. Affirmed.

W. D. Bulger, for appellants. *J. M. Chilton*, for appellees.

CLOPTON, J. Under an order for a *certiorari*, the clerk of the circuit court returned a transcript of the bill of exceptions as signed by the presiding judge, from which it appears that blank spaces were left, in which some papers used in evidence were to be copied by the clerk. Appellees thereupon moved to strike from the bill of exceptions returned in the original transcript two notes and a deed of assignment copied in two of the blank spaces, on the ground that they were not incorporated when the bill of exceptions was signed by the judge, and are not so identified as to authorize their insertion by the clerk in making up the record. The rule is well settled that the incorporation of any paper read, or offered to be read, in evidence in the bill of exceptions before it is signed, or such description by identifying features as to leave no room for mistake by the transcribing officer, is indispensable. Pearce v. Clements, 73 Ala. 256. It being conceded that there is not even a pretended description of the notes, and that the description of the deed of assignment is general and indefinite, the motion to strike them from the bill of exceptions is granted. The present proceeding is a statutory trial of the right of property to a stock of goods, levied on by an attachment sued out by the appellees against the estate of Spinks Bros., to which appellants interposed a claim. On the evidence, the court gave the affirmative charge in favor of plaintiffs.

The first objection urged to the charge is that the bill of exceptions, which purports to set out substantially all the evidence, does not show any proof that plaintiffs were creditors of Spinks Bros. at the time of the sale of the goods to claimants or at any other time. The objection is based on the fact that a blank space was left in the bill of exceptions signed by the judge, which is filled in the first transcript by the insertion of copies of an affidavit and attachment. On the settled rule that the corrected transcript returned in obedience to an order for *certiorari* must be regarded as the true and correct record, so far as there is any repugnance between the contents of the first and second records, it is insisted that the principle on which the notes and deed of assignment were stricken out should be extended so as to prevent the attachment from being considered, on this appeal, as a part of the evidence set out in the bill of exceptions; and that if the attachment be excluded there is no evidence that Spinks Bros. were indebted to plaintiffs. Whether there is any repugnancy between the contents of the two bills of exceptions depends on the question whether the description in the bill signed by the judge sufficiently identifies the affidavit and attachment to justify their insertion in the blank space. The proper issue on the trial of the right of property is an affirmative one on the part of plaintiffs, that the goods levied on are subject to the attachment, and a denial by the claimants. There was but one attachment issued and levied on the goods, the same attachment mentioned in the affidavit and claim-bond made by the claimants, which is the foundation of the trial of the right of property and of the issue joined,—a part of the record. We are unable to see how any mistake could have been made by the transcribing officer. This is the certainty of identification required by the rule. If the attachment be regarded as a part of the bill of exceptions, it is sufficient evidence, on the trial of the right of property and for the purposes of such trial, of the indebtedness of the defendants in the attachment to plaintiffs, which cannot be questioned by the claimants. Pulliam v. Newberry, 41 Ala.

163. While the bill of exceptions states, "the foregoing is substantially all the evidence in the case," it also states the attachment as a part of the foregoing evidence. If, then, the contention of appellants be conceded, and the attachment regarded as stricken out, we have a bill of exceptions showing that the attachment was in evidence, and not furnishing the document itself or a statement of its contents. In this state of the record we are bound to presume, not being informed to the contrary, in favor of the ruling of the circuit court that the attachment evidenced a debt due from the defendants therein to the plaintiffs. Glass v. Pinckard, 56 Ala. 592; Hosea v. Talbert, 65 Ala. 173. The consideration paid for the goods by the claimants was the payment of two notes which they alleged had been made by Spinks Bros. A transaction by which an embarrassed or insolvent debtor sells his property to a creditor, the payment of an antecedent debt being the sole consideration, is without the scope of the usual inquiries, in cases of fraudulent conveyances on a present consideration in whole or in part, as to the existence of badges of fraud, or the intent of the debtor to hinder, delay, or defraud his other creditors, and participation therein or knowledge thereof on the part of the purchasing creditor. As we have repeatedly said, the material inquiries, when such transactions are assailed as fraudulent, are directed to the existence and validity of the debt, the sufficiency of the consideration, and the reservation of a benefit to the debtor. Hodges v. Coleman, 76 Ala. 103; Knowles v. Street, 87 Ala. 357, 6 South. Rep. 273; Harmon v. McRae, 91 Ala. 401, 8 South. Rep. 548. This limitation upon the general rule is rested on the principle that a debtor, devoting his property to the payment of an honest debt, performs a lawful act which can cause no legal injury to another creditor. In order, however, that the purchaser may bring himself within the protection thus afforded to a preferred creditor, he must satisfactorily prove the existence, amount, and *bona fides* of the debt, and the adequacy of the consideration, and also show that no benefit was reserved to the debtor. If he fails to establish, either the existence and validity of his debt, or that its amount is not materially less than the fair and reasonable value of the property, the law stamps the transaction as fraudulent as against other creditors. This repetition of principles, so repeatedly and uniformly declared, is made because of their applicability to the evidence, shown by the bill of exceptions, as constituting a basis of the affirmative charge. The evidence shows that the goods purchased were worth, as testified by two witnesses, 60 cents, and by another 80 cents, on the dollar of the invoice price, which was about $4,300. Taking the lowest estimate as most favorable to claimants, the value of the goods was about $2,580. Perryman, a member of the firm of Moore, Marsh & Co., testified, without objection, that Spinks Bros. were indebted to claimants "in the sum of $2,938.40, as shown by two promissory notes made by them," and that the consideration of the note calling for $1,369.25 was money loaned by the claimants to Spinks Bros. The bill of exceptions recites that the notes were read in evidence against the objection of plaintiffs, but, as the notes appearing in the original transcript are stricken out, neither the notes nor statement of their contents are given, otherwise than that the amount of one is incidentally mentioned as above stated. It further appears that the note last mentioned and all the witness said as to its consideration were subsequently excluded. As this ruling constitutes an assignment of error, we may remark that there was no error in excluding the evidence, the witness having testified, on cross-examination, that he knew nothing about the loan of the money except as informed by his partners. It was not permissible for the witness to testify to the amount and consideration of the indebtedness from what his partners told him; they should have been examined. The exclusion of the note and the testimony as to its consideration leaves no evidence of the consideration and *bona fides* of any part of the indebtedness. But, if the existence and validity of the balance of the indebtedness testified to by Perryman, after deducting the amount of the excluded note, were conceded, and the inferences most favorable to the claimants as to the value of the property allowed, the bill of exceptions presents the case where a creditor purchases from an insolvent debtor his entire stock of goods, the sole consideration being the extinguishment of a debt materially less in amount than the reasonable value of the goods. The claimants having failed to produce evidence tending to show the existence and validity of a large part of the indebtedness, which it is alleged constituted the consideration paid for the goods, it must be regarded as, in fact, simulated, at least to the extent of the indebtedness. Such a sale is fraudulent in fact as against the existing and subsequent creditors of Spinks Bros. Gordon v. McIlwain, 82 Ala. 247, 2 South. Rep. 671. In the state of evidence shown by the bill of exceptions, the court was justified in giving the affirmative charge for plaintiffs. This dispenses with consideration of the other rulings of the court. We are not prepared, however, to say there is error in any of them, but, if erroneous, they worked no injury to appellants. Affirmed.

(94 Ala. 521)

McKINNON v. PIKE COUNTY GUANO CO.

(*Supreme Court of Alabama.* Dec. 8, 1891.)

EQUITY JURISDICTION.

A bill in equity, averring that complainant shipped goods to defendant; that defendant was to deliver to complainant as collateral security therefor the notes he took from his customers in payment for the goods; that defendant delivered to complainant certain notes, which were turned over to defendant for collection; that he collected some of them, and failed to pay over to complainant the proceeds thereof; and that defendant 's insolvent; and asking for a receiver, and that the notes in defendant's hands be turned over to him,—states a clear case for equitable interposition.

Appeal from chancery court, Bullock county; JOHN A. FOSTER, Chancellor.

Action by the Pike County Guano Company against Edward T. McKinnon. Judgment for plaintiff. Defendant appeals. Affirmed.

The bill in this case was filed by the appellee, the Pike County Guano Company, against the appellant, Edward T. McKinnon, and prayed to have a discovery of the assets in the hands of defendant for the payment of a debt due by him to complainant, and that defendant be required to account for certain sums collected by him on collaterals which he held in trust for complainant. It was further averred in the bill that, under a written contract between complainant and defendant, complainant had shipped to defendant a large quantity of guano and other fertilizers; that by said agreement defendant was to deliver over to complainant as collateral security for the payment of said goods the notes he took from his customers in payment of the fertilizers sold; that, according to the agreement, he had transferred to complainant certain notes as collateral security, and that these notes had been delivered to him for collection, and that he had collected some of said notes, but had failed to pay over the proceeds therefrom to complainant. The bill also averred the insolvency of defendant. Defendant interposed a plea to the bill of complaint, in which he alleged that the said commercial fertilizers were not properly tagged, as required by the statute of this state. The principal part of the contention of the present case was on the issue as made by him in this plea.

Tompkins & Troy and *D. S. Bethune*, for appellant. *Gardner & Wiley*, for appellee.

STONE, C. J. During the season of 1887-88 the Pike County Guano Company, a corporation located at Troy, Ala., sold and shipped to McKinnon, in Bullock county, between two and three hundred tons of fertilizers. The disputed question in this case is whether or not the fertilizers, when sold and shipped, had tags attached to the sacks or packages, as required by section 141 of the Code of 1886. Of the quantity sold and shipped, as we understand the testimony, about five-ninths was of the brand known as "Pike County Guano." The residue was made up of four different brands. The weight of the testimony leaves but little room for doubt that a considerable part of the entire bulk of the sale was properly tagged, although some of the witnesses go so far as to state that none of the sacks had tags attached to them when unloaded from the cars. There is great conflict in the testimony,—irreconcilable conflict,—and we must be pardoned for doubting the truth of a good deal of it. Courts, like juries, ought to look, and will look, at attendant facts, and will give more credit to some witnesses than to others. There is no mathematical rule for determining the credibility of human testimony. Henderson was the shipping agent, and testified that he shipped all the guano and other fertilizers which gave rise to this suit. He testifies with great positiveness that every package, when shipped, had the proper tag attached to it. McKinnon and the railroad agent at the depot of delivery testify that none of the Pike County guano was tagged when unloaded at the point of destination. Five witnesses—Lewis, Sellers, Braswell, Brooks, and Boyd—each give testimony more or less corroborative of Henderson's version. Several of them testify to seeing tags on Pike County guano after it had passed from McKinnon's custody. There are two other circumstances tending to corroborate Henderson. McKinnon resold all the fertilizers save a lot retained and used by himself, and we hear of no complaint from his customers that the packages were not properly tagged. The other corroborating circumstance is that during the altercations attending the efforts of the Pike County Guano Company to obtain a settlement from McKinnon we hear of no complaint from him that the fertilizers had been sold to him without proper tags attached. We concur with the chancellor in holding that this line of defense has failed in the proof. The original, written agreement entered into by McKinnon in reference to the notes, accounts, property, etc., received by him in the resale of the fertilizers, made him the agent and trustee thereof for the benefit of the Pike County Guano Company to the extent of the unpaid purchase money he owed the corporation. This, supplemented by his insolvency, makes a clear case for equitable interposition. There was no legal remedy adapted to the merits of the demand, because the company's claim was at most only a right to have the collaterals, then held by McKinnon as agent, placed in the hands of a receiver, and applied to the payment of McKinnon's debts. Affirmed.

(95 Ala. 529)

JONES v. HAGLER.

(*Supreme Court of Alabama.* Dec. 17, 1891.)

BEST AND SECONDARY EVIDENCE—ATTESTATION OF DEED—SALE UNDER TRUST-DEED—SUFFICIENCY OF DEED—PLEADING.

1. Where plaintiff in ejectment claimed title through a sale made by a trustee, and testified that the deed had never been in his possession or under his control, and that he was not the legal custodian of it, it was proper to allow in evidence the original record-book in which the deed was recorded.

2. Under Code, § 1789, which provides that a conveyance of land made by one who can write shall be acknowledged or attested by one witness, who must write his name as a witness, an indorsement on a deed as follows: "I, B., acting as justice of the peace, * * * hereby certify that the above-named person signed this conveyance,"—signed by the justice, was sufficient as an attestation, though not good as an acknowledgment.

3. Where a deed of trust was given in consideration of the beneficiaries' indorsement of notes of the grantor, and authorized sale of the land to indemnify such beneficiaries for payment of any bill or note, but did not require that demand be first made by them for such sale, it was not necessary that they should demand of the trustee that he make sale.

4. Where taking possession of the land by the trustee was not a condition precedent to his right to sell, it was not necessary that he have possession at the time the sale was made.

5. Where the sale was made in pursuance of the power in the trust-deed, it was not necessary for the trustee to recite in his deed the exact date of such sale.

6. Though the trustee's name was not mentioned in the body of his deed, yet it was sufficient where it recited the date of the trust-deed, named the beneficiaries therein, gave a description of the premises, and named the book and page where the trust-deed was recorded, an inspection of which record would have shown that he was the trustee.

7. Though the trust-deed required the sale to be for cash, and a beneficiary was the nominal bidder, and no cash passed, yet, where the grantor in the trust-deed obtained credit for the amount bid in pursuance of the contract of indemnity expressed in such trust-deed, defendant, not being a beneficiary under the deed, could not object that the sale was not for cash.

8. Though such sale was made in 1866, and the deed thereon was not executed until 1878, yet, where defendant was not a party to the sale, and did not show that he had any interest in the matter, his objection that the delay in making the deed was a badge of fraud was not well taken.

9. In the absence of fraud it was no objection that one of the beneficiaries bid off the land and afterwards directed that the deed be made to plaintiff.

10. Where judgment was entered against one of the beneficiaries as indorser for the grantor in the trust-deed, and under execution thereon his property was sold, the record of such judgment and execution and the returns thereon was properly admitted in evidence as tending to show such a breach of the trust-deed as would entitle such beneficiary to the execution of the power of sale for his indemnity.

11. By joining issue on defendant's pleas to the statute of frauds without questioning their sufficiency plaintiff assumed the burden of showing that at such sale he received from the trustee a note or memorandum signed and expressing the consideration, or that the purchase money, or some part thereof, was paid, or that he was put in possession by the trustee; and, having failed to make such proof, the court should have instructed the jury to find for defendant.

12. The benefit of such pleas not being available to defendant, on remandment of the case plaintiff may move the court below for a repleader as to such pleas.

Appeal from circuit court, Tuscaloosa county; S. H. SPROTT, Judge.

Ejectment by Edward I. Hagler against John W. Jones. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

The parties to this cause derive title from the same source,—from David G. Jones. Upon the trial the plaintiff introduced in evidence a deed of trust by said David G. Jones, executed on August 2, 1858, to Moses McGuire as trustee, and John W. Prewitt and John H. Spain as beneficiaries. The consideration of this deed of trust, as expressed therein, was the indorsement by said beneficiaries of certain notes and bills of said Jones, and the further agreement of said beneficiaries to indorse, for the purpose of extending them, certain bills and notes drawn by said Jones on himself, and accepted by him. Among the number there was one bill of exchange for $3,000, payable to R. K. Hargrove. On February 28, 1861, suit was begun by said Hargrove against said Prewitt as indorser for said Jones on said bill of exchange, and judgment was rendered in said suit against Prewitt for the amount of the bill and costs. The execution issued on this judgment was levied on real and personal property of Prewitt, which was sold in part satisfaction, the money arising from the sale being paid to Hargrove. In December, 1866, Moses McGuire, as trustee, sold the land in controversy under the power in the deed of trust to reimburse Prewitt. Prewitt nominally bought the lands at said sale, and directed the auctioneer to have a deed executed to the plaintiff in this suit, Edward I. Hagler. D. G. Jones, the grantor in said deed of trust, was present at said sale, and acquiesced therein. The said D. G. Jones died about the year 1873. The deed was not made by Moses McGuire to the purchaser at said mortgage sale until March 2, 1878, which recited that the sale of said land was made "about or on the 1st day of December, 1866." Upon the plaintiff's offering to introduce in evidence this deed to him from Moses McGuire as trustee, the defendant objected: (1) Because the deed was not acknowledged and attested as provided by law. The only thing which purports to be an acknowledgment is as follows: "I, J. W. Bagwell, acting as justice of the peace in and for said county, hereby certify that the above-named person signed this conveyance;" and is signed by said Bagwell as justice of the peace. The plaintiff introduced said Bagwell as a witness, who testified that said Moses McGuire signed said deed in his presence, and that that which professed to be an acknowledgment of McGuire was made by him, and his signature was attached thereto. The defendant objected to this testimony on the part of Bagwell. The court then overruled the plaintiff's objection to the introduction of said deed on the grounds that it was not properly acknowledged and attested. The defendant then interposed several other objections to the introduction in evidence of said deed, as follows: (2) Because it was shown by said deed that the said sale under the deed of trust had been made at the request of only one of the beneficiaries thereunder. (3) Because it was not shown that said trustee had taken possession of the land upon default being made, and at the time the same was sold. (4) Because it sets forth that the sale under said deed of trust was made on or about the 1st day of December, 1866. (5) Because the name of the grantor was not named in the body of the deed as conveying in the capacity of trustee and otherwise. (6) Because the consideration of the purchase of said property under said deed of trust was not paid in cash. (7) Because said delay in signing the deed was such a badge of fraud as devolved upon the plaintiff the duty to explain the delay before it could be introduced in evidence. The court overruled each one of these separate exceptions. The plaintiff introduced in evidence the record of the circuit court, which showed a judgment and execution, with the returns thereon, in the case of R. K. Hargrove v. John W. Prewitt. The plaintiff further introduced testimony tending to show that the sale under the deed of trust was regular in every respect. The defendant introduced testimony tending to show that D. G. Jones had remained on these lands up to the time of his death, claiming and holding them as his own,

and that shortly thereafter a fire raged over the premises, and destroyed the improvements thereon, and from that time the lands "remained out" and unoccupied for a few years. The defendant was the son of said D. G. Jones, and claimed the lands for himself and the other heirs of said Jones; but it was shown by the testimony of the defendant that on several occasions he had, through his agent, cut timber upon said land, and had exercised other acts of ownership over said property. There was no evidence that at the said sale the auctioneer made any note or memorandum of the sale, nor that the purchase money was ever paid, or that the purchaser was ever put in possession of the premises. The evidence on the part of the defendant also showed that Moses McGuire, trustee, when he executed the deed to the plaintiff, was *non compos mentis*. Upon the introduction of all the evidence the defendant requested the court to give the following written charge: "If the jury believe the evidence, they must find for the defendant." But the court refused to give this charge, and the defendant duly excepted.

Wood & Wood and *J. J. Mayfield*, for appellant. *Foster & Oliver*, for appellee.

WALKER, J. The plaintiff claimed title through a sale and conveyance made by Moses McGuire as the trustee in a deed of trust in which David G. Jones was the grantor. To prove the deed of trust the plaintiff offered the original record thereof, as contained in one of the record-books of deeds kept in the office of the probate judge of Tuscaloosa county. Objection was made to this evidence on the grounds that the defendant had made demand on the plaintiff to produce the original of said deed of trust, and that a certified copy should have been offered, instead of the original record. The plaintiff testified, without contradiction, that the original of the deed of trust had never been in his possession or custody or under his control. He was not the legal custodian of the instrument. That being the case, it was not incumbent upon him to produce it or to account for its absence. The instrument could as well be proved by the original record as by a certified copy therefrom. Stevenson v. Moody, 85 Ala. 33, 4 South. Rep. 595; Miller v. Boykin, 70 Ala. 469. The objection to this evidence was properly overruled.

The several grounds of objection to the admission in evidence of the deed by Moses McGuire as trustee to the plaintiff will be considered in detail.

1. The plaintiff did not claim that the statement written upon the deed and signed by the justice of the peace was sufficient as a certificate of acknowledgment. It was relied upon as an attestation, and the justice of the peace was called as a witness to prove the deed. The statement certifies "that the above-named person signed this conveyance." This language fairly imports that the justice of the peace had knowledge of the fact to which he certifies,—that he was a witness to the signing. The execution of a conveyance for the alienation of land, when made by a person who is able to write, must be acknowledged or attested by one witness, who must write his name as a witness. Code 1886, § 1789. A proper attestation may be made by the mere signature of the witness. It is sufficient that the signature appears to be made for the purpose of attesting the execution of the conveyance. It has been decided that a defective acknowledgment may operate as a substitute for the attestation of a witness, and in such case the officer is treated as an attesting witness. Rogers v. Adams, 66 Ala. 600; Sharpe v. Orme, 61 Ala. 263; Carlisle v. Carlisle, 78 Ala. 544. The signature of the justice of the peace to the statement above referred to was sufficient as an attestation, and there was no error in overruling the objection to the introduction of the deed on the ground that it was not properly attested.

2. Objection was made to the introduction of the deed to the plaintiff on the ground that it was shown and provided by the deed of trust that John W. Prewitt and John H. Spain were joint beneficiaries thereunder, and that the deed to the plaintiff shows that the sale under the deed of trust was made at the request of only one of the beneficiaries. By the power of sale contained in the deed of trust the trustee is authorized to sell in the mode prescribed, and to "pay off any of the bills indorsed by them, [Prewitt and Spain,] and pay all and whatever may be necessary to indemnify said John W. and John H., or either of them, and save them harmless in the premises." This language authorizes the execution of the power of sale for the indemnification of either Prewitt or Spain for any loss sustained in consequence of any indorsement made in pursuance of the provisions of the deed of trust. There is no provision that one or both of the beneficiaries shall request the trustee to execute the power of sale. If Prewitt alone had sustained losses in consequence of the indorsements mentioned in the deed of trust, the power of sale could be executed for his benefit alone. The recitals of the deed to the plaintiff do not show a disregard of the terms of the power in the particular specified in the objection.

3. Taking possession of the land by the trustee was not, by the terms of the deed of trust, made a condition precedent to the exercise of the power of sale. The trustee was authorized, but not required, to take possession of the land before making a sale thereof. 2 Jones, Mortg. § 1782; Vaughan v. Powell, (Miss.) 4 South. Rep. 257; Kiley v. Brewster, 44 Ill. 186. The terms of the instrument which was construed in the case of Foster v. Boston, 133 Mass. 143, indicated that the execution of the power in the mode provided made it necessary for the trustee to acquire possession of the property before making a sale. In such a case possession by the trustee is properly regarded as a condition precedent. It does not seem that such a condition could be satisfied by a mere demand for possession, as was intimated in the case of Roarty v. Mitchell, 7 Gray, 243.

4. The deed to the plaintiff recites that the grantor therein, "after giving the notice required by said deed of trust, did, on

or about the 1st day of December, 1866, at the court-house in said county, expose to sale," etc. If a sale had been made pursuant to the terms of the power, it was not material for the trustee to recite in his deed the exact date of such sale. After the sale was duly made he could with propriety execute a deed to the purchaser, though he was unable to state therein the exact date of the sale. If the defendant was entitled to require the plaintiff to prove a compliance with the provisions of the power as to the notice of the time and place of sale, on the ground that the recitals in that regard of the deed made by the trustee were not binding on a stranger, (Wood v. Lake, 62 Ala. 489; 1 Devl. Deeds, § 425; 2 Jones, Mortg. §§ 1830, 1895,) the consideration that the burden was on the plaintiff to make such additional proof would not justify the rejection of his deed as a link in his chain of proof.

5. The name of the trustee is not mentioned in the body of his deed; but the recitals thereof furnish the means of clearly identifying Moses McGuire as the grantor. The deed recites: "Whereas, on the second day of August, 1858, David G. Jones executed to me, as trustee for the benefit of John W. Prewitt et al., a deed of trust to the following described lands, to-wit, [here follows a description of the lands;] which deed is recorded in Book 5, page 138, of the records of deeds in the office of the judge of probate of Tuscaloosa county, Alabama." An inspection of the deed of trust, which is thus fully described, discloses that Moses McGuire is the trustee therein, and makes it manifest that he is the grantor in the deed to the plaintiff. This is a sufficient description and identification of the grantor. Madden v. Floyd, 69 Ala. 221.

6. The power in the deed of trust authorized the trustee to sell for cash. The payment of the plaintiff's bid was a matter between him and the beneficiary of the sale, and with which the defendant in this case had no concern. By the arrangement recited in the deed to plaintiff the grantor in the deed of trust obtained the credit and benefit of the amount bid. When this was done, neither he nor any other person who was not a beneficiary under the deed of trust could complain because the payment was not made in cash. Mewburn's Heirs v. Bass, 82 Ala. 622, 2 South. Rep. 520; Cooper v. Hornsby, 71 Ala. 62.

7. It was not incumbent upon the plaintiff, in offering the deed to himself, to explain the delay in its execution. The execution of the deed by the trustee in 1878 shows upon its face his recognition of the sale made by him in 1866, and that the purchaser at that sale had all along been entitled to a conveyance of the land sold. The defendant was not a party to that sale, and in making the objection that the delay was a badge of fraud he did not suggest any fact to show that he had any interest in the matter which would entitle him to complain of the delay. Broughton v. Atchison, 52 Ala. 62. None of the grounds of objection to the introduction of the deed to the plaintiff were well taken.

There was evidence tending to show that at the sale under the power, John W. Prewitt, one of the beneficiaries under the deed of trust, bid off the lands, and afterwards directed the deed to be made to the plaintiff. It often happens that one who bids at an auction sale is acting for another person, or transfers his bid to another. In the absence of fraud, there is no objection to such a transaction. If the ostensible purchaser directs the deed to be made to another, a stranger to the sale cannot complain that the real purchaser did not make his bid in person. 2 Jones, Mortg. § 1896. The motion to exclude the deed because it was not made to the purchaser at the sale by the trustee was properly overruled.

The record of the judgment and executions with the returns thereon in the case of R. K. Hargrove v. John W. Prewitt was admissible as evidence tending to show a breach of the condition of the deed of trust, and that Prewitt was entitled to the execution of the power of sale for his indemnity to the extent of the amount realized in proceedings against him on one of the bills of exchange which he indorsed for David G. Jones, as was recited in the deed of trust.

The plaintiff did not demur to any of the seven pleas interposed by the defendant, but joined issue on all of them. The question of the sufficiency of the sixth and seventh pleas as answers to the complaint was not raised in any manner. By joining issue upon them the plaintiff admitted that each of them stated a defense which, if sustained by the evidence, would defeat the action. A case must be tried on the issues developed by the pleadings. If a false issue is made up in consequence of a neglect to resort to the means provided by law for its elimination, the question thereby presented is one of fact for the determination of the jury, and, if the proof sustains such issue, the party setting it up is entitled to a verdict and judgment on it. Railway Co. v. Propst, 90 Ala. 1, 7 South. Rep. 635; Allison v. Little, (Ala.) 9 South. Rep. 388; Masterson v. Gibson, 56 Ala. 56. The sixth and seventh pleas are pleas of the statute of frauds. In joining issue thereon the plaintiff assumed the burden of showing facts which avoid the effect of the pleas. He put himself in the attitude of affirming that at the time of the sale by Moses McGuire to him a note or memorandum thereof was made, expressing the consideration in writing, and subscribed by the party to be charged therewith, or by some person thereto by him lawfully authorized in writing; and that the purchase money, or some part thereof, was paid; or that the purchaser was put in possession of the land by the seller. Jonas v. Field, 83 Ala. 445, 3 South. Rep. 893. The provisions of the statute of frauds which were referred to in the pleas were applicable to the sale made by McGuire. The objection that the benefit of those provisions was not available to the defendant (Lewis v. Wells, 50 Ala. 198; Cooper v. Hornsby, 71 Ala. 62; Mewburn's Heirs v. Bass, 82 Ala. 622, 2 South. Rep. 520) could have been raised by demurrers or replications to the pleas. No such objection having been interposed, and the

plaintiff having failed to offer any proof that in the sale by McGuire there was a compliance with the statutory requirements referred to in the pleas, he failed to sustain the burden assumed by his joinder of issue thereon; and the result was that on those issues the defendant was entitled to a verdict and judgment. The charge in writing, requested by the defendant, should have been given.

On the remandment of the cause, the plaintiff may move in the court below for a repleader as to pleas presenting false or immaterial issues. Railway Co. v. Propst, 90 Ala. 1, 7 South. Rep. 635; Mudge v. Treat, 57 Ala. 1.

In the foregoing opinion we have considered such questions presented by the rulings of the circuit court on the admission and rejection of evidence as are likely to arise on another trial. Reversed and remanded.

(94 Ala. 529)

JONES *et al.* v. BALL.

(*Supreme Court of Alabama.* Dec. 18, 1891.)

VENDOR'S LIEN.

In a suit to enforce a vendor's lien, the answer alleged that the consideration named in the deed was a gross price for the land and for certain personal property. The deed did not mention any personalty, and the vendor and one of the vendees testified that none passed, while they were contradicted by the testimony of the other vendee, by certain of his declarations, and by the testimony of a witness who swore to a declaration of the vendor that the transaction involved personalty. *Held*, that a lien for the price named in the deed would be enforced.

Appeal from circuit court, Crenshaw county; JOHN A. FOSTER, Judge.

Bill in equity by John Ball against R. M. Jones and Ratcliff Ball to enforce a vendor's lien. Decree for complainant. Defendants appeal. Affirmed.

Gamble & Bricken, for appellants. *I. H. Parks*, for appellee.

MCCLELLAN, J. The main, if not indeed the only, question in this case is one of fact, namely, whether there was other property than land embraced in the sale by John Ball to Ratcliff Ball and R. M. Jones for the consideration of $1,600, which the bill seeks to charge on the land described therein as purchase money secured by a vendor's lien in complainant's favor. The deed executed by John Ball and his wife, and which is exhibited in the bill, recites the consideration for the land alone as being $1,600. John Ball himself testifies positively that he sold nothing but the land. Ratcliff Ball, one of the defendants, with equal emphasis, testifies that he and Jones bought nothing but the land, and that they agreed to pay 1,600 for the land only. On the other hand, Jones' testimony is that he and Ratcliff purchased, not only the land, but also several items of personal property, which he specifies, for the consideration in gross of $1,600. One other witness swears that he heard John Ball say the personalty was included in the sale. Two or three others testify that Ratcliff Ball and Jones took possession of certain property which was on the place, and to declarations of Jones that it was embraced in the sale. And yet another says that the personalty was embraced in the sale, and that he knows this from having read the written contract of sale, wherein the personalty was specified. But this witness' testimony is utterly deprived of weight by the thoroughly established fact that there was no writing at all, except the deed, which not only does not mention personalty, but goes in preclusion of the idea that anything but realty constituted the consideration for the admitted indebtedness. This was all the evidence. We have, then, the deed; the testimony in interest of John Ball, and the testimony against interest of Ratcliff Ball, that there was no sale of personal property; while, on the other hand, we have the testimony in interest of Jones, certain declarations in interest of Jones, and one witness who deposes to a declaration on the part of John Ball that the transaction involved personal property as well as the land. On this state of case we see no alternative but to affirm the conclusion reached by the chancellor, that defendants have not shown that the $1,600 sought to be charged as a vendor's lien on the land was a price in gross agreed to be paid for the land and for the personalty. It is too clear for discussion that the complainant had no interest whatever in, or connection with, or relation to, the partnership existing between the defendants, and that the cross-bill of Jones exhibited against complainant and the other defendant, which sought a settlement of this partnership, was properly dismissed. Affirmed.

(101 Ala. 178)

MULLOY v. COOK.

(*Supreme Court of Alabama.* Dec. 18, 1891.)

PUBLIC LANDS—CONTRACTS—PUBLIC POLICY.

Where C. makes a homestead entry on public land, pays the entrance fee, and then abandons the entry, but an act of congress permits him to purchase the land at $1.25 per acre, less the entrance fee, a contract whereby M. agrees to furnish the money, and C. agrees to purchase the land and convey it to M., does not violate any statute or the public policy of the federal government.

Appeal from chancery court, Cleburne county; S. K. MCSPADDEN, Chancellor.

Bill in equity by Hiram Mulloy against Duncan Cook to enjoin an action of ejectment and to enforce a contract to convey the land. Decree for respondent. Complainant appeals. Reversed.

The bill averred that on January 23, 1874, the said Duncan Cook entered upon 80 acres of government land, paying the entrance fee therefor, and obtained the receiver's receipt, and that afterwards said Duncan Cook abandoned his homestead entry; that under the provisions of an act of congress the said Cook was allowed to purchase said land at $1.25 per acre, less the amount of the entrance fee; that on September 20, 1888, under an agreement between said Cook and the complainant, by the terms of which said Cook was to purchase the land, taking title in his own name, but was to convey to the complainant the title to said land as soon as he received the patent from the govern-

ment, the complainant furnished said Cook with the money necessary to purchase the said land from the government; that said Cook used said money in the purchase of said land, and received the certificate and receipt of said purchase from the United States government, which he delivered to the complainant, who thereupon entered into possession of said land; and that complainant afterwards secured a patent to be regularly issued to the said Cook. The bill further avers that the complainant was in quiet possession of the land on December 29, 1889, when the said Cook instituted the action of ejectment to recover possession of said land. The bill then prays to have the statutory action of ejectment enjoined, and that the chancellor decree a trust in said land for the complainant. The defendant demurred to the said bill, on the ground that it seeks to enforce a contract contrary to public policy, and therefore void. Upon the submission of the cause on the demurrer, the chancellor sustained it.

James Savage, for appellant. *Kelly & Smith*, for appellee.

MCCLELLAN, J. We do not think the present bill is open to the objection urged against it by the demurrers. It cannot be said that the contract sought to be specifically enforced is violative of the public policy of the United States. We know of no statute, nor of any general policy deducible from the statutes of the federal government, which would authorize or admit of a distinction being made in favor or against the right of any citizen to purchase public land. Had nothing been done by the respondent looking to the entry of the land in controversy as a home, the complainant could have purchased it under section 2357 of the Revised Statutes for $1.25 per acre. The effort to homestead it having failed, the land again became public in every sense, and purchasable by the complainant under that section. The government had no interest and no policy to be subserved in securing to the would-be homesteader a prior right to purchase, as against the complainant or any other citizen. No pre-emption or homestead right of the individual or policy of the government is involved at all. The land, once purchased by and patented to either the person who made the entry or to another, may be alienated in all respects as any other real property. Since the purchaser is not charged with any of the duties as to occupancy, cultivation, and the like which would have been imposed upon him as a homesteader, and since the land itself has none of the exemptions from incumbrances and prior personal obligations which would attach to it as a homestead, it is a matter of no consequence to the government or its policy that, even before the purchase, a contract had been entered into on the part of the purchaser to convey it to another upon patent issuing. Every governmental purpose would be equally conserved, whether the purchaser intended, and did in fact continue, to hold the land, or intended to convey, and had made a contract to convey, and did in fact convey, it to another. The only change in existing law effected by section 2 of the act of June 15, 1880, was to allow any purchaser who had made the payment or homestead entry required by Rev. St. § 2290, or any person to whom he had by written instrument attempted to transfer the rights conferred on him by such entry, a credit on the sum otherwise payable in purchase of the land, to the amount paid on the entry. If no such transfer is executed by the entryman, none but he is entitled to this credit, though any other person may purchase, paying the full price. If such instrument has been executed, the nominal transferee alone is entitled to the credit. In either event, the government not being interested in the uses to which the land is devoted, nor in respect of the persons who shall own it, no previous contract to convey it, or subsequent conveyance, whether in consonance with a previous contract or not, can in any degree be said to violate any statute or the public policy of the United States. In the case at bar it may be true that the complainant will ultimately get the benefit of the credit in amount equal to the sum originally paid by the respondent, but that is a matter between the parties to this suit, and having, we conceive, no bearing upon the question of public policy presented by the demurrers. The decree sustaining the demurrers is reversed, and a decree here rendered overruling them. The cause is remanded.

(95 Ala. 543)

CROFFORD *et al.* v. VASSAR.

(*Supreme Court of Alabama.* Dec. 18, 1891.)

ATTACHMENT—ACTION ON BOND—PLEADING—DAMAGES.

1. Where the complaint, in an action on a bond in attachment sued out for the collection of rent, claims damages of $100, in that plaintiff was put to expense of employing counsel to defend the suit, but does not deny that the rent was due, and fails to show the determinaion of the attachment suit, but does not show what sum was paid or promised for counsel fee, it is insufficient on demurrer.

2. In such action, the allegation that "said attachment was wrongfully, vexatiously, and maliciously sued out, in that no statutory ground existed either for the enforcement of any existing lien or for the purpose of creating a lien," was sufficient to support a recovery of actual damages, but did not authorize vindictive damages.

3. In such action, where the complaint was not for the recovery of exemplary damages, it was error to allow plaintiff's witness to testify that defendant had stated that he "intended to get everything plaintiff made on the plantation that year for nothing."

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Action on an attachment bond by Robert Vassar against H. S. Crofford, as principal, and others, as sureties. Plaintiff had judgment, and defendants appeal. Reversed.

The complaint as amended, after stating the claim of the plaintiff, assigned the following breaches: (1) Said attachment was wrongfully and vexatiously sued out, and without the existence of any of the statutory grounds for the issuance thereof, as the facts alleged in said affidavit

for said attachment were entirely untrue. (2) Said attachment was wrongfully, vexatiously, and maliciously sued out, in that no statutory grounds existed either for the enforcement of any existing lien, or for the purpose of creating a lien, and the alleged facts in the affidavit for said attachment are untrue. (3) Said attachment was wrongfully, vexatiously, and maliciously sued out, in that the facts alleged in the affidavit for said attachment, that the defendant in attachment (plaintiff in this suit) had removed a part of the crop grown on the rented premises without the consent of the landlord, and without paying the rent, shows that it was a special attachment, or one issued for the enforcement of a landlord's lien for rent, and was levied in part on certain cotton, the property of the plaintiff in this suit, on which the landlord, the plaintiff in attachment, had no lien whatever. (4) The plaintiff claims special damages in the sum of $100, in that by the levy of said attachment he was put to the expense of employing counsel to defend him in said suit. (5) The plaintiff claims further special damages because said attachment was wrongfully levied on plaintiff's cotton, on which defendant had no lien, and which was therefore not subject to the attachment. The defendants demurred to the amended complaint, and assigned as grounds therefor: (1) That said complaint fails to allege whether the attachment was sued out to enforce a landlord's lien for rent or for advances, and in assigning the first breach of the bond fails to set out that there was no statutory ground for the issuance of an attachment to enforce a landlord's lien for rent, and fails to state that plaintiff was not a tenant of the defendant, and fails to set out the contents of the affidavit, or show wherein the facts alleged are untrue; and the allegations that the facts alleged in the affidavit are untrue is too vague, uncertain, and indefinite. (2) The complaint fails to allege whether the attachment was sued out to enforce a lien or to create a lien, and fails to state the allegations of the affidavit which are alleged to be untrue. (3) In assigning the third breach of the bond, the complaint is insufficient, in that it purports to set out the facts in part as shown by the affidavit, but fails to deny the truth of the statements of the affidavit, and simply avers that the attachment writ was levied upon cotton upon which the landlord had no lien. (4) That said amended complaint fails to allege what would be a reasonable attorney's fee for defending the attachment suit, or whether there was a contract for a certain sum, or whether the plaintiff paid or agreed to pay a reasonable fee. (5) That said complaint, as amended, sets out two separate and distinct causes of action, one for the wrongful issuance of the attachment, and the other for a tortious act of the sheriff. (6) That part of the complaint which claims damages specially for the wrongful levy of the attachment fails to aver that the attachment was levied on property not subject to an attachment for rent, and that it was levied upon property not grown on the rented premises. The court, upon considering the demurrers, sustained the 5th ground, and overruled the 2d, 3d, 4th, and 6th grounds of demurrer. Issue was then joined on the plea of the general issue, and that the facts which were set out in the affidavit for said attachment were untrue. The rulings upon the evidence to which exception was taken are sufficiently stated in the opinion. The cause was tried without the intervention of a jury. Upon the hearing of all the evidence, the court rendered judgment for the plaintiff, assessing his damages at $75.

E. H. Hunna, for appellants. *Matthews & Whiteside*, for appellee.

STONE, C. J. The present suit was for wrongfully and vexatiously suing out an attachment for rent. Code 1886, § 3060 et seq. The suit is on the attachment bond. We will first determine the pleadings and issues on which the suit was tried. There was a demurrer to the original complaint, which was sustained to such extent that it appears to have been abandoned. An amended complaint was then filed, setting forth the substance of the attachment bond, and assigning breaches, some five in number. The fifth breach assigned was and is that the attachment was levied on cotton not grown on the rented premises. This assignment of breach was abandoned, and rightly so. Bank v. Jeffries, 73 Ala. 183; Jackson v. Smith, 75 Ala. 97. The sureties on the attachment bond were not liable for such abuse of the process, if it was perpetrated. It was not within the purview of their bond. The defendants demurred to the amended complaint, assigning six grounds of demurrer. The complaint was then amended a second time, and the court overruled the first four grounds of demurrer, and sustained the fifth. We need not consider the sixth ground, for the plaintiff, as we have seen, struck out the assignment of breach, against which that was leveled. The plaintiff sought to recover damages for attorney's fees incurred and expended in defending the attachment suit. The assignment of breach in reference to this claim is in the following language: "Plaintiff claims special damages in the sum of $100, in that by the said attachment he was put to the expense of employing counsel to defend said attachment suit." This was demurred to, being the fourth ground of the demurrer to the amended complaint. The court overruled this ground of demurrer, and the claim therein set forth became one of the issues on the trial. It is nowhere denied in the amended complaint that Vassar owed the rent for which the attachment was sued out, nor is it anywhere shown that the attachment suit has been determined, or, if determined, what that determination was. Nor does the assignment of breach show or state any sum as paid or promised for defending the attachment suit. Assignment of breach No. 4 is scarcely sufficient. Possibly it should have stated some amount incurred or promised as attorney's fee for defending the suit. Flournoy v. Lyon, 70 Ala. 308. Each of the assigned breaches 1 and 2 avers that none of the statutory grounds for attachment ex-

isted. This was a sufficient assignment of breach to authorize a recovery of actual damages. The demurrers to these assignments were rightly overruled. McLane v. McTighe, 89 Ala. 411, 8 South. Rep. 70. The averments of breach in the several assignments 1 and 2 are as follows: (1) "Said attachment was wrongfully and vexatiously sued out, and so sued out without the existence of any of the statutory grounds for the issuance of such attachment." (2) "Said attachment was wrongfully, vexatiously, and maliciously sued out, in that no statutory grounds existed either for the enforcement of any existing lien or for the purpose of creating a lien." Now, each of these breaches, properly interpreted, simply negatives the existence of a cause for suing out the attachment. In Durr v. Jackson, 59 Ala. 203, it is said an action like the present one, "so far as the nature and character of the evidence necessary to sustain it is to be considered, bears a closer resemblance to an action for malicious prosecution than to any other action at common law." In Bank v. Jeffries, 73 Ala. 183, speaking of the different counts of the complaint in that case, we said that, "as claims for exemplary damages, they are further faulty in not averring that the attachment was sued out without probable cause for believing the alleged ground to be true." McLane v. McTighe, 89 Ala. 411, 8 South. Rep. 70. The first and second assignments of breach, though sufficient for the recovery of actual damages, did not authorize the recovery of vindictive damages. The third ground of demurrer ought to have been sustained. Bank v. Jeffries, supra. It would seem, however, that this error was cured by the act of plaintiff in "striking out claim for special damages on account of wrongful levy." The witness Brownlee, against objection of defendants, was permitted to testify "that in the spring, and before the crop was planted, he heard Crofford say, after some difficulty between Crofford and Vassar, that he intended to get everything that Vassar made on the plantation that year for nothing." We think, under appropriate pleadings, this testimony would be competent on the inquiry of exemplary damages. We have shown, however, that the complaint does not claim such damages. The city court erred in receiving this evidence. There was no error in allowing proof that the cotton was damaged by being allowed to remain in the field. If true, that was actual damage resulting from the attachment and its levy.

Reversed and remanded.

(94 Ala. 486)

DREWRY v. LEINKAUFF *et al.*

(*Supreme Court of Alabama.* Dec. 18, 1891.)

ATTACHMENT—LEVY BY CONSTABLE—INDORSEMENT OF WRIT.

Under Code, § 2956, which provides: "When an attachment is issued by a justice of the peace, if the amount of the debt does not exceed the penalty of the constable's bond, the justice may, by indorsement on the process, direct it to be executed by the constable of the precinct," etc., a writ addressed to the sheriff "or constable of beat 8," etc., was sufficiently indorsed by the justice, and the levy by such constable was valid.

Appeal from circuit court, Henry county; J. M. CARMICHAEL, Judge.

Action in attachment by Leinkauff & Strauss against O. W. Pearce. Plaintiffs had judgment and sale of the property. From an order to turn the proceeds of the sale over to plaintiffs, J. W. Drewry, as intervener, appeals. Reversed

On December 15, 1890, J. W. Drewry sued out an attachment before a justice of the peace in Henry county against one O. W. Pearce. The said writ of attachment was headed, "to any sheriff or constable of beat 3," and, under the direction of said writ, the constable of beat 3 of said county levied the said attachment upon the personal property of said Pearce. This writ was returned to the circuit court of Henry county, to which court it was made returnable by the justice of the peace who issued it. On December 15, 1890, but subsequent to the issuance of Drewry's attachment, Leinkauff & Strauss also sued out an attachment against said Pearce, which was levied on the same property the said Drewry attachment was levied upon. The property levied upon was sold by the sheriff, and the proceeds of said sale were held in his hands for distribution. On February 25, 1891, said Leinkauff & Strauss spread a motion upon the motion docket of Henry county to have the court issue an order requiring the sheriff to pay over to them, as plaintiffs in the case of Leinkauff & Strauss against O. W. Pearce, the proceeds from the sale of the personal property levied upon and sold under the attachment. In support of said motion the said plaintiffs, Leinkauff & Strauss, read in evidence the paper in their said attachment suit against said Pearce, showing the affidavit and bond for attachment, and the issuance and levy of the writ upon the goods of the defendant, and the record of the judgment recovered by them against said Pearce. The said Drewry introduced in evidence the papers in his attachment suit against the defendant Pearce, which showed the facts as stated above. Upon the consideration of the motion and the evidence, the court rendered judgment in favor of the plaintiffs, Leinkauff & Strauss, and said J. W. Drewry duly excepted to said judgment, and on this appeal assigns said ruling as error.

G. L. Comer, for appellant.

MCCLELLAN, J. The Code of 1876 (section 3279) provided that a constable might, by the direction of a justice issuing an attachment returnable to the circuit court, execute the writ, when the amount involved was not in excess of the constable's bond, upon an affidavit of necessity therefor being made by or on behalf of the plaintiff. This section was amended by the act of January 22, 1885, (Acts 1884–85, p. 95,) so as to authorize the justice to have such attachment levied by a constable without the affidavit of necessity. In the codification of 1886 this statute was again changed, so as to provide that in such case the justice "may, by indorsement on the process, direct it to be executed by the constable of the precinct, who shall return the same to the court in

which it is returnable." Code, § 2956. It seems clear that the only purpose of this last amendment was to afford a more certain and definite method of proof of the fact, essential to the constable's authority, that the justice had directed the levy to be made by the constable. We take it that no set phrase or form of words, no particular expression of the direction to the exclusion of all others, is essential to constitute the statutory indorsement. Any writing signed by the justice, we apprehend, which clearly indicates the intent of the justice to have the writ executed by the constable, and evidences that he so directs, will fill the statutory requirement. Nor do we conceive it to be material on what particular part of the paper the written direction is inscribed. Like indorsements of bills and notes, it may as well be on the face of the writ as upon the back of it. In either case it is an "indorsement on the process." The process issued at the suit of the appellant here is directed to any sheriff of the state of Alabama, or to the constable of beat 3, Henry county, and commands the officers to whom it is so directed to levy the same upon the property of the defendant in attachment. It is signed by the justice. Now, the only proper direction of the writ was, "To any sheriff of the state of Alabama." Code, § 2941. The addition to this direction of the words, "or constable of beat 3" of said county, was unauthorized, so far as constituting a part of the address of the process, and in that connection may be considered as surplusage. But still these words are on the paper; they are signed by the justice; they import a command to the constable to levy the attachment; and they, in our opinion, applying to the statute the rule of liberal construction enjoined upon us by section 2998 of the Code, amount to the indorsement by the justice of the direction to the constable to execute the process required by section 2956 of the Code. It follows that, in our view of the law, the levy of appellant's attachment was a valid levy, and that the circuit court erred in directing the sheriff to pay over the proceeds of the property levied upon to the plaintiffs in a junior attachment, on the theory of its invalidity. Reversed and remanded.

(94 Ala. 233)

CHANDLER v. VANDEGRIFT SHOE CO.

(*Supreme Court of Alabama.* Jan. 5, 1892.)

SHERIFF—FAILURE TO PAY MONEYS COLLECTED—SUMMARY JUDGMENT.

1. A constable, under a judgment recovered before a justice of the peace, levied execution on personal property subject to two attachments in the hands of a sheriff. The constable did not take possession of the property, the sheriff agreeing that the execution held by the constable should be third in point of levy. The property was sold for more than enough to pay the three claims, but the sheriff levied other attachments from the circuit court thereon. *Held*, that the court had no authority by statute, on motion of the owner of the judgment recovered before the justice, to order the sheriff to pay over the amount of such judgment.

2. Independently of the statutes, such order was improperly made, as the motion was not made in any cause pending in court.

Appeal from circuit court, Etowah county; JOHN B. TALLY, Judge.

Application by the Francis Vandegrift Shoe Company for an order compelling William Chandler, sheriff, to pay over certain moneys. Granted. William Chandler appeals. Reversed.

Abercrombie, Bilbro & Whatley, for appellant. *James L. Tanner*, for appellee.

WALKER, J. An execution was issued on a judgment recovered by the appellee before a justice of the peace against Gamble & Bro., and was placed in the hands of a constable, who made a return thereon stating that it had been levied on certain personal property, subject to two attachments in the hands of the sheriff. The constable did not take possession of the property claimed to have been levied on, but it was retained by the sheriff, and was sold by him for more than enough to pay off both the prior attachment claims and the judgment of the justice of the peace. The sheriff agreed with the constable that the execution held by him should be third in point of levy; but thereafter, on the same day, the sheriff levied other writs of attachment from the circuit court upon the same property. Appellee entered a motion in the circuit court against the sheriff alone for an order to require him to pay over the amount of the judgment of the justice of the peace, which, including the costs, was more than $100. The circuit court made the order moved for, notwithstanding the objections interposed by the defendant. The statutes authorize the circuit court to render summary judgments against a sheriff for certain specified defaults. Code 1886, §§ 3095–3113. Justices of the peace may also, on motion, render judgments, not exceeding $100, against a sheriff for certain like defaults. Id. §§ 3325–3329. These summary remedies are applicable only in the particular cases specified by the statutes, are not to be extended by construction, are grantable only in strict conformity to the statute, and the record must disclose every fact necessary to entitle the party to such remedy, and that it has been pursued according to the statute. 2 Brick. Dig. p. 464, §§ 1, 6; 3 Brick. Dig. 751; Warwick v. Brooks, 70 Ala. 412. There is no statutory authority for a summary judgment against the sheriff in a case like this one. The statutes above referred to authorize such judgments against sheriffs for certain acts of negligence or misfeasance in failing to do what is required of them by process coming to their hands. They are intended to afford prompt redress for certain delinquences in the discharge of particular ministerial functions. In each of the cases mentioned by the statutes the default authorizing a summary judgment consists in a failure to perform a duty imposed by process the execution of which has been intrusted to the officer proceeded against. Those statutes do not extend to the case of a breach of duty in regard to process in the hands of another officer. No case was made for a statutory summary judgment.

Nor did the court have authority, independent of statute, to entertain or grant such a motion. The application was not

addressed to the inherent power of the court to control its own process, for the execution under which the money was claimed was issued, not from the circuit court, but by a justice of the peace. The motion was not made in any cause pending in the circuit court. There is no authority to proceed on such a state of facts by a motion against the sheriff. If the facts alleged give a cause of action in favor of the appellee against the sheriff, it should be asserted by suit in some regularly authorized mode. Furthermore, the other parties interested in the disposition of the money realized by the sheriff from the sale of the property levied on by him were not in any way made parties to the motion. In their absence, the matter sought to be presented could not be finally disposed of. Gusdorf v. Ikelheimer, 75 Ala. 148; Henderson v. Richardson, 5 Ala. 349. The circuit court was without jurisdiction to entertain the motion, and the defendant's objection on that ground should have been sustained. It is not decided that the constable could make a valid levy on goods, the possession of which was retained by the sheriff, or that what was done amounted to a levy, or that the agreement made by the sheriff was binding on him. If those questions shall be presented in a proper manner, the following authorities may be consulted: 1 Freem. Ex'ns, (2d Ed.) § 135; 2 Freem. Ex'ns, § 267; 7 Amer. & Eng. Enc. Law, 126; Townsend v. Corning, 40 Ohio St. 335; Penland v. Leatherwood, (N. C.) 8 S. E. Rep. 284; Goode v. Longmire, 35 Ala. 668; Abrams v. Johnson, 65 Ala. 466; Ex parte Tilman, (Ala.) 9 South. Rep. 527. The judgment is reversed, and the motion is hereby dismissed in this court, at the cost of the appellee.

(95 Ala. 328)

HANSON v. TODD.

(*Supreme Court of Alabama.* Jan. 5, 1892.)

TENDER—PAYMENT INTO COURT—LIABILITY FOR COSTS.

Where plaintiff elects to take and receives money paid into court by defendant on a plea of tender, judgment should be rendered against plaintiff for costs.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Action by George R. Todd against Fred Hanson for money. From the overruling of his motion to dismiss the suit at plaintiff's costs, defendant appeals. Reversed.

Kelly & Smith and *McLeod & Dunstall*, for appellant. *Blackwell & Keith*, for appellee.

CLOPTON, J. The suit is for money due plaintiff for materials furnished and labor done in repairing the dwelling-house of defendant and an outhouse, and erecting a fence around his lot. The only disputed question of fact is the amount due. In answer to the suit, which was commenced August 18, 1890, defendant filed a plea of tender of the amount claimed by him to be due, accompanied by the delivery of the money into court. Plaintiff, without demurring to the plea, or taking issue thereon, received, February 2, 1891, the money from the clerk, under the order of the court, and struck from the complaint the amount so received. Thereupon defendant moved to dismiss the suit at the cost of plaintiff, which said motion was overruled. What is the legal consequence, when the plaintiff elects to take, and receives, the money brought into court upon a plea of tender before suit commenced? is the controlling question presented by the record, and the only one necessary to be considered. As a general rule, a debtor has no right to insist that his creditor shall, by the reception of the amount tendered, be precluded from claiming that a greater sum is due, and suing to recover the same. A tender on such conditions that its acceptance would constitute or clearly imply an admission by the creditor that it was in full of his claim is invalid, and may be refused. The only effect of a tender refused, if pleaded, and the truth of the plea established, is to stop the interest, and exempt the defendant from the costs of a subsequent suit. While a mere tender, though of the whole amount due, when unaccepted, does not operate to extinguish or satisfy the claim, yet, when made in full of the amount due, and accepted without protest as to its sufficiency, the debt becomes extinguished. The creditor may reject a tender on condition that he receive it in full of his claim, but if he accepts it he is bound by the condition, and will not be allowed to keep the money and repudiate the condition. Miller v. Holden, 18 Vt. 337. A tender, if accepted, is accepted as made. The statute (section 2685, Code) requiring a plea of the tender of money to be accompanied by a delivery of the money to the clerk of the court is declaratory of the general rule. A plea of tender, if in proper form, contains substantially the averment that the sum tendered and brought into court is the entire amount due plaintiff. The plea is in bar of, and, if proved, defeats, any recovery. Bringing the money into court on such plea has all the effect of a tender on condition that the plaintiff receive the amount in full satisfaction of his claim. It is disembarrassed of the principle that a tender cannot be made in such manner that the reception of the money satisfies the creditor's demand. The object of the statute in requiring a plea of tender to be accompanied by a delivery of the money to the clerk of the court is that it shall be placed in the custody of the court, so that it may be paid to plaintiff whenever willing to accept it, and put an end to the litigation, or may be awarded to the party to whom it is ascertained to belong rightfully. Frank v. Pickens, 69 Ala. 369. Though the money is produced and placed in the custody of the court, it remains the property of the defendant, until either the plaintiff accepts it or the truth of the plea is established. In either event the court may order it paid to the plaintiff. Foster v. Napier, 74 Ala. 393. So, also, where the plaintiff voluntarily accepts the money paid into court, without contesting the sufficiency or truth of the plea, it thereby becomes his property; but its acceptance is upon the terms of the plea,—that is, in full satisfaction and extinguishment of his claim. When the benefit of

the tender is claimed in court, the plaintiff may elect to receive it, and put an end to the litigation; or he may take issue on the plea, and contest the fact, validity, and sufficiency of the tender. The voluntary reception of the money by plaintiff is tantamount to a confession or admission of the truth of the plea, equivalent to an acceptance of the money in satisfaction of his entire demand. He cannot afterwards say that it was accepted only as a payment *pro tanto*. Under the common-law rule, if the plaintiff take the money which has been brought into court on a plea of tender before suit, the proper judgment is *eat inde sine die*. 9 Bac. Abr. 339. The same result logically follows when the plaintiff withdraws the money brought into court under the statute. In such case, if the plaintiff elects to take the money, the proper practice is for the court to order it paid to him, and render judgment against him for costs. Haeussler v. Duross, 14 Mo. App. 103; Monroe v. Chaldeck, 78 Ill. 429. The motion of defendant should have been granted. We have not considered whether the proof shows a valid tender, as no such question is raised by the record. Reversed, and judgment rendered dismissing the suit at the costs of plaintiff.

(95 Ala. 77)

CAPITAL CITY INS. CO. v. CALDWELL *et al.*

(*Supreme Court of Alabama.* Jan. 5, 1892.)

FIRE INSURANCE—TITLE TO PREMISES—AUTHORITY OF AGENT—EVIDENCE—NOTICE AND PROOF OF LOSS—WAIVER—FIXTURES.

1. Where an applicant for insurance represented that he owned the premises in fee, his recovery will not be defeated by proof that he has no written evidence of title, since an equitable title is a sufficient stimulus to the preservation of the property.

2. A finding by the jury that the insurance was effected by a duly authorized agent of the insurer will not be disturbed, where there was evidence tending to show his agency and the insurer's ratification of the policy.

3. Evidence of an agent's acts in receiving and forwarding an application for insurance was admissible to show his authority.

4. Objections to the timeliness and sufficiency of the notice and proof of loss were waived, where they were not raised by an adjuster, who visited the premises and made and submitted an estimate of the cost of rebuilding.

5. Counters and shelves were included in an application for insurance on a store-house, if they could not be removed without injuring the building, which was a question for the jury.

Appeal from circuit court, Madison county; H. C. SPEAKE, Judge.

Action on a policy of fire insurance by Caldwell Bros. against the Capital City Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Lawrence Cooper, for appellant. *Humes, Walker & Sheffey*, for appellees.

STONE, C. J. All men know that, in cities and towns, business houses generally, and residences frequently, are constructed in such close proximity that the loss of one by fire endangers others. It is on this account that fire insurance companies, in placing their risks, take into the estimate what are called the "exposures," and regulate the premiums they charge for insurance in reference thereto. So, if the building proposed to be insured be very valuable, and the sum to be insured be large, it is not customary to place the entire risk in one company, but in several. This because, if loss is suffered, (and losses will be suffered,) the burden will be distributed among many companies, and not left entirely to one, which it might crush. And when many buildings are so nearly connected, one with the others, as that the burning of one of them would be likely to set fire to the others, it is neither customary, nor in accordance with business principles, to insure them all in one company. And this, at least, is but carrying into practical operation the economic philosophy of insurance,—the helpful participation and aid of the many in sharing the loss which casualty casts on one. A loss of $10,000 might bankrupt one trader, while, if it were distributed among a hundred or more, it would scarcely be felt. In theory, all the premium payers contribute their several contingents, which collectively make up the sum to be paid. This is the rationale of insurance. The Home Protection Insurance Company had its business office in Huntsville, Ala. The Capital City Insurance Company had its habitation in Montgomery, Ala. The former was the Huntsville agent of the latter. This is not uncommon. It furnishes to insurance companies the opportunity, when large insurance is sought, or when application is made for insurance of two or more buildings, or their contents, which are situated in one block, or in dangerous proximity to each other, to distribute the risk, and thus escape an individual heavy loss, which, if it fell on one company, might be very disastrous to its business aims. The foregoing reflections are common knowledge. We have given expression to them because, in our opinion, they shed light on several questions which the record before us presents for our decision. They tend to explain why it was that the store-house, the subject of insurance in this case, was insured in the Capital City Insurance Company, and why it was that the agent of the Home Protection Company was the agent or person through whom the insurance was obtained. The Home Protection Insurance Company, being a corporation, could not act as the agent of the Capital City Company, otherwise than through its officers or agents. Corporations cannot act in any other way. Caldwell Bros. were merchants, having their place of business in Scottsboro, Ala., not far from Huntsville. Stuart, a resident of Scottsboro, was the agent at that place of the Home Protection Insurance Company. The Capital City Company had no agent at that place. The Home Protection was the Capital City's agent at Huntsville. Caldwell Bros. had obtained insurance on their stock of merchandise, and they made application to Stuart for insurance on the store-house. We have no doubt that the preparation of the written application was largely participated in by him. Such is the usual custom. The merchandise, insured in the Home Protection, being in the store-house on which the insurance was sought,

the burning of either would be apt to involve the destruction of the other. Hence the reasonable desire that the two risks should be assumed by different companies, in order that, if loss ensued, it should not fall entirely on one company. We think we are in safe bounds when we suppose that, when Caldwell Bros. applied to Stuart for insurance on the store-house, the latter preferred the risk should be assumed by the Capital City Company, rather than that the double loss should fall on one company, in case of its destruction by fire, and that it was at his instance the policy was taken in the Capital City Company. The circumstances of this case furnish ample evidence from which the jury could infer that Stuart was the authorized agent of the Capital City Insurance Company in receiving and forwarding the application. And, if there were doubt of this, the conduct of the Capital City, through its agents, after the fire, furnishes circumstances tending to show a ratification of the issue of the policy in this case. These, however, were questions for the jury. There was no error in receiving testimony of Stuart's agency in receiving and forwarding the application for insurance in this case, nor of any other act done by him, bearing on the merits of the present controversy.

When the application was made for insurance in this case, the general questions were propounded, and answered by one of the Caldwell Bros. One question propounded was, "Have you fee-simple title?" The answer was, "Yes." One clause of the application is in the following language: "Said answers are considered the basis on which insurance is to be effected, and the same is understood as incorporated in, and forming a part and parcel of, the policy, as well as the warranty of this applicant." A question was raised on the trial as to the title held by the Caldwell Bros. in the lot on which the store-house stood, and as to the manner of proving that title. The complaint filed by plaintiffs consists of a single count, which is a substantial copy of form 13 of the Code, p. 792. The case was tried on issues raised by four pleas. The first plea is a general denial of the averments of the complaint. The others are special pleas, but neither of them specially raises the question of title. One of the plaintiffs, while on the witness stand, was asked as to the ownership of and title to the lot on which the store-house stood. He testified that the building belonged to himself and brother,—Caldwell Bros. In the cross-examination the following questions were asked and answers given: "Question. You and your brother owned it? [this store-house.] Answer. Yes; Snodgrass and I built it, and then my brother took his place. Q. Did you do it in writing? A. No. Q. From whom did you buy the lot? A. A man named Hugh Bynum. Q. Did he make you and Snodgrass a deed for it? A. I don't remember. I gave him a horse for the lot. Snodgrass sold his interest to my brother George. Q. Was that contract in writing between Snodgrass and G. B. Caldwell? A. I am not certain. I think it was. Q. Have you the paper with you? A. No. Q. Where is it? A. I reckon it is at home, or destroyed. Q. What is your best recollection about it? A. I know that, when we traded for the accounts, there was a written contract between Snodgrass and myself, but, as to the lot, I don't remember whether there was or not. Q. If there was any deed made, you do not know it? A. So far as the house and lot were concerned, I could not say whether there was a scratch of the pen." The foregoing is substantially all the evidence bearing on the question of ownership in or title to the lot on which the store-house stood. The defendant corporation asked charges based on the question of title. One of them is in the following language: "It is not shown in this case that the plaintiffs had the fee-simple title to said property so insured, and for this reason they cannot recover in this case, and the verdict of the jury must be for the defendant." There was an exception reserved to the refusal to give this charge. There had also been objection and exception to Caldwell's testimony, "that the building belonged to himself and brother."

In a suit at law founded directly on land ownership, nothing less than what the law calls a legal title will sustain the action. Either a paper title, 10 years' adverse enjoyment, or something equivalent must be shown. But this suit does not bring the title to the property directly in issue. It is not necessary that the complaint shall aver a title. That question comes up collaterally and defensively. Ownership is a material factor in assuming insurance risk on improved real estate, not because the evidence of the ownership is considered. The extent of the ownership is the important element of inquiry. This, because the law, voicing common experience, presumes that the absolute owner of property will be more watchful of its preservation than would a mere tenant, or one owning only a partial interest. And this watchfulness would be scaled, not by the form of the title, but by the extent of ownership. One owning a perfect equity in improved real estate would feel the same solicitude in preserving it as he would feel if he held the legal fee. In Insurance Co. v. Bowdre, 67 Miss. 620, 7 South. Rep. 596, the defense attempted was the same as that relied on in this case. True, there was some writing in that case, but it fell short of creating an estate in fee-simple. The court said: "What is meant by the words 'absolute fee-simple title,' in this connection? It can only mean that the assured did not have a limited interest in the property, but that he claimed and held under a deed of conveyance, or other evidence of title, purporting to invest them with an estate in fee-simple. It can only mean that the assured held under a paper title conferring on them this sort of estate, as contradistinguished from any limited and inferior one. The reason for this distinction is obvious. The insurer will not deal with, or take the great risk of indemnifying against loss and damage, a mere tenant, leaseholder, or other person claiming and having only some qualified interest

in the property; but this contract for indemnity will be made only with the person having the title,—the beneficial owner; the person having the absolute, *i. e.*, the vested, as opposed to the contingent or conditional, title."

True, in the case from which we have quoted, there was some sort of paper title, but it did not convey the fee. It did not come up to the letter of the representation made in the application. It would not have supported an action of ejectment for the property. But we cannot suppose that the court rested, or intended to rest, its judgment on the fact that there was a paper. The true ground of the decision is expressed in the declaration by the court that "it [the assertion that the assured had a fee-simple title] can only mean that the assured did not have a limited interest in the property." We fully approve the following language of the Mississippi court, found in the opinion from which we have been extracting: "By the insertion of those words [fee-simple title] in the condition of its policies, can it be successfully maintained that the insurance company meant that every loss occurring under its policies, in which the assured should be unable to show a title indefeasible and good against the world,—a title free from every defect, real or seeming, and on which not the smallest cloud rested,—should be borne by the assured? To tolerate such an opinion would be equivalent to holding that the company had deliberately set a trap to ensnare the simple-minded and unwary. * * * We cannot believe that any honestly directed and fair-dealing company will deliberately undertake the management of its business on such basis." In the case before us we cannot know what the true state of the title was. The pleadings had given no notice that any question would be raised on the title to the lot on which the store-house stood. The main issue raised by the pleadings was whether the store-house had been destroyed by fire, in such manner as to fix a liability on the insurance company therefor. As we have said, the extent of ownership held by the assured in the building was the material inquiry, because such interest stimulates solicitude and watchfulness in its preservation. The interest, not the evidence of it, is the stimulus. We find no error in the rulings of the court on the question of the ownership of the property, or the testimony by which it was established.

Questions were raised on the sufficiency of the proofs of loss. We are not informed precisely what the proofs were. After they were furnished, the adjuster visited the premises, and made and submitted an estimate of the cost of rebuilding. It is not pretended that, either at that time or before, he made any objection for the want of timely notice of the loss, or that he complained of the insufficiency of the preliminary proofs, except on a single ground, which we think was untenable. The main objection he urged, when he visited the place, had reference to the counters and shelving, to be considered further on. This, under all the authorities, must be regarded as a waiver alike of notice of loss and of the insufficiency of the preliminary proofs. Insurance Co. v. Feirath, 77 Ala. 194; Badger v. Insurance Co., 49 Wis. 389, 5 N. W. Rep. 845; 7 Amer. & Eng. Enc. Law, 1054; 11 Amer. & Eng. Enc. Law, 341; Insurance Co. v. Oates, 86 Ala. 558, 568, 569, 6 South. Rep. 83; Insurance Co. v. Allen, 80 Ala. 571, 1 South. Rep. 202.

The claim for the counters and shelving, testified to have been burned with the building, presents the only remaining question we need consider. The testimony is that they were framed and built with the building, and were not movable fixtures. They were not named separately, and were not insured, unless they constituted a part of the store-house. The primary meaning of the word "fixture" is "that which is fixed or attached to something as a permanent appendage." In law it takes a wider range. Anything fixed or attached to a building, and used in connection with it, is a fixture, whether it be a permanent appendage or not. Hence, in legal jurisprudence, there are movable fixtures and immovable fixtures. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture, and is a chattel. It is no part of the realty, and does not pass with a conveyance of the freehold. If, however, it be so connected with the building as that it cannot be severed from it without injury to the building,—a disturbance of its rounded completeness,—then it is part of the realty, and it passes with the conveyance of the soil. Of course these principles apply only when there is no agreement of parties varying these legal intendments. 8 Amer. & Eng. Enc. Law, 43, 61; Rap. & L. Law Dict.; O'Brien v. Kusterer, 27 Mich. 289; Tillman v. De Lacy, 80 Ala. 103, and authorities cited. It is manifest that in this case, if the only testimony on the question be believed, a conveyance of the freehold would have carried with it the counters and shelves. The insurance company had a printed form of application for insurance. The one made and used in this case has been sent up for our inspection. It contains many questions to applicants, so framed as to suit the various kinds of property, of which insurance against loss by fire is sought and obtained. The applicant is required to answer such of the questions as are applicable to the insurance risk he seeks. In this instance the applicants sought insurance on a store building, which they valued at $2,300. The insurance obtained was $1,500. This is the only item of property to which any answer was made, although the form contained a blank for "counters, shelves, and drawers." Neither the policy, nor the conditions annexed to it, make any reference to these fixtures; but a pen-dash indicates that that question, together with many others, was regarded as immaterial. We hold the proper inquiry for the jury was whether the counters and shelves were movable or immovable fixtures. If the former, they were not insured; if the latter, they were part of the store-house, and were covered by the policy. We need not apply these principles to the charge

given nor to the various charges refused. In none of its rulings did the circuit court err. Affirmed.

(94 Ala. 647)

CROMWELL v. HORTON.

(*Supreme Court of Alabama.* Jan. 6, 1892.)

INTERESTED WITNESS—TRANSACTIONS WITH DECEDENT—OBJECTION TO EXCLUSION OF EVIDENCE.

1. Under Code 1886, § 2765, providing that "there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that neither party shall be allowed to testify against the other as to any * * * statement by any deceased person whose estate is interested in the result," a trustee, under testatrix's will, of property, part of which is in the hands of a firm of which he is a member, who is individually indebted to testatrix's estate, is competent, in an action to which he is not a party, for rent due said estate, to testify to testatrix's statements, since he is not "interested in the issue."

2. An objection to the exclusion of such evidence was properly based upon its insufficiency to show the witness' interest.

Appeal from circuit court, Shelby county; LE ROY F. BOX, Judge.

Action by John T. Cromwell, executor, against Scott Horton to recover arrears of rent due the estate of his testatrix, Mary P. Roper. From a judgment for defendant, plaintiff appeals. Reversed.

A. P. Longhorn, for appellant. *W. B. Browne* and *Peters, Wilson & Lyman*, for appellee.

WALKER, J. This suit was brought to recover the amount alleged to be due as rent from the defendant as a tenant of the plaintiff's testatrix, Mrs. Mary P. Roper, deceased. The defendant denied that the land in question belonged to Mrs. Roper's estate, and alleged that he had never contracted to pay rent therefor to her or to the plaintiff as her personal representative. J. D. Mason, a witness for the plaintiff, stated that he made a settlement for Mrs. Roper, and that his best recollection was that the defendant was present; that Mrs. Roper then claimed of the defendant the sum of $57 for rent; that defendant did not deny that he owed rent to Mrs. Roper; that the balance due, after credits were given, was claimed by Mrs. Roper of the defendant for rent. The defendant moved to exclude that part of the conversation which was had with Mrs. Roper, on the ground that the witness was interested in the suit as a trustee under a codicil to Mrs. Roper's will, which was offered in evidence in support of the motion. The court sustained the motion, and excluded the testimony of the witness so far as it related to any transaction or conversation with the decedent. The plaintiff objected to this action of the court on the ground that the evidence did not show that the witness was interested in the result of the suit. The exception was to the action of the court in overruling this objection. The witness Mason was not a nominal party to the suit. He could not, therefore, come within the exception as to competency prescribed by the statute unless he was so beneficially interested in the result as to be within the spirit of the statutory prohibition, so that, in order to give effect to the policy of the law, he should be treated as he would have been if he had been named as a party to the cause. Code 1886, § 2765;[1] Boykin v. Smith, 65 Ala. 295; Drew v. Simmons, 58 Ala. 463; Hodges v. Denny, 86 Ala. 226, 5 South. Rep. 492; Sublett v. Hodges, 88 Ala. 491, 7 South. Rep. 296. It may be remarked that this case was tried before section 2765 of the Code was amended by the act approved February 10, 1891. Acts 1890-91, p. 557. By the codicil to the will the witness Mason was appointed trustee of certain property, which was directed to be used for the support and education of a great-grandson of the testatrix. Part of that property was money in the hands of a firm of which the witness was a member. There was also a direction in the codicil as to the disposition of the money due on a note of the witness to the testatrix. None of the property mentioned in the codicil was in any way involved in this suit. There was no evidence tending to show that the witness could have been at all affected by the result of the suit. It is suggested for the appellee that the witness was interested in the collection of all assets of the estate, so that no necessity might arise for using in the administration of the estate any of the property which he was to hold as trustee, and for the management of which, as trustee, he would be entitled to compensation so long as it was not required to pay debts of the estate. There was no proof that there were any debts against the estate, or that the assets of the estate, besides the claim involved in this suit, were not amply sufficient to meet all liabilities, if there were any, without looking to the property covered by the trust provided for by the codicil. A mere suggestion of a remote and contingent interest, of the existence of which there is no evidence, does not warrant the exclusion of a statement by one not a party to the suit. Huckaba v. Abbott, 87 Ala. 409, 6 South. Rep. 48. The evidence failed to show that the witness was pecuniarily interested in the result of the suit. It was improper to exclude his statement on a ground which was not shown to exist.

There is no merit in the criticism by appellee's counsel upon the manner of reserving the exception to the ruling of the court. The statement by the witness having been excluded on the specific ground that he was interested in the result of the suit, the plaintiff's objection to such exclusion was properly based upon the suggestion to the court that the evidence failed to show the existence of the fact of interest. If the exception had been directly to the action of the court in granting the defendant's motion to exclude, that exception would have been sustained here, because of the insufficiency of the evidence to show that the witness was interested.

[1] Code Ala. 1886, § 2765, provides that "there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that neither party shall be allowed to testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit or proceeding, * * * unless called to testify thereto by the other party."

The exception which was reserved presents the same erroneous action of the court. The specified ground of the objection correctly stated wherein the error of the ruling consisted. The action of the circuit court in excluding the statement of the witness is duly and properly presented for the consideration of this court. For the error in that ruling the judgment must be reversed. The assignments of error as to the two charges given for the defendant do not seem to be seriously insisted upon. No error is discovered therein.

Reversed and remanded.

(43 La. Ann. 1009)

STATE *ex rel.* DAVIS, Mayor, v. POLICE JURY OF BOSSIER PARISH. (No. 297.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

SELECTION OF PARISH SEAT—DECLARATION OF RESULT—MANDAMUS—REVIEW ON APPEAL.

Where, in the selection of a parish seat, the police jury is authorized to ascertain the result of the election, and it makes a mere informal statement of votes, a *mandamus* will not issue to compel them to take this informal statement as the true result of the election. This would be divesting them of a judicial discretion devolving upon them by legislative act. If, after this informal statement, the police jury compiles the vote, and declares the result, it will be presumed they did their duty. The disregarding and setting aside of the informal statement is not in itself evidence of fraud. The police jury being authorized to declare the result of the election, it is invested with the power to investigate and to eliminate fraud, and this court, in the absence of legislative authority, has no power to review the findings of the police jury.

(*Syllabus by the Court.*)

Appeal from district court, parish of Bossier; J. T. BOONE, Judge.

Mandamus on the relation of J. J. Davis, mayor of Houghton, to the police jury of Bossier parish, to compel them to take the informal statement of votes at an election as the true result of such election. Judgment for plaintiff. Defendants appeal. Reversed.

J. A. W. Lowry, Dist. Atty., *Alexander & Blanchard*, and *Joannes Smith*, for appellants.

(1) The proceedings of the police jury of the parish of Bossier of date November 27, 1888, under Act 33 of 1888, have been adjudged inoperative and without legal effect. Hence such proceedings are not conclusive on the jury, and cannot be made the basis of a *mandamus*. 42 La. Ann. 968, 8 South. Rep. 475; 43 La. Ann. 125, 9 South. Rep. 348.

(2) The police jury having ascertained and proclaimed the result of the election held under said act, and their decision having been carried into effect by the removal of the parish seat to Benton, *mandamus* will not lie to undo what has been done. High, Extr. Rem. § 49.

(3) All authority over said election was vested in the police jury by the act. The duties of the jury involved the exercise of discretion, and the courts will not interfere with its decision. 41 La. Ann. 851, 6 South. Rep. 777; 43 La. Ann. 125, 9 South. Rep. 348; High, Extr. Rem. § 57.

Watkins & Watkins and *Land & Land*, for appellee.

(1) The parish seat of a parish cannot be changed until an act of the legislature has been passed for that purpose, and this act adopted at a special election "by a majority of the votes of the parish cast at such election." Const. art. 250.

(2) Under this constitutional provision, Act 33 of 1888 was passed, granting the people of Bossier parish the right of holding a special election for the removal of their parish seat from Bellevue to one of the several designated points. By this act it was the duty of the police jury of the parish to order the election, to receive the returns, and proclaim the result of said election. Act 33 of 1888, §§ 2–6.

(3) Under this act, the duties of the police jury were specific and purely ministerial, giving them no discretion, and conferring on them no judicial powers; and hence a *mandamus* proceeding may be resorted to "to compel them to fulfill the duties attached to their office, or which may be legally required of them." Code Prac.; State v. Judge, 40 La. Ann. 393, 4 South. Rep. 50; 36 La. Ann. 828; 15 La. Ann. 334; 35 La. Ann. 637; State v. Police Jury, 41 La. Ann. 851, 6 South. Rep. 777; State v. Secretary of State, 32 La. Ann. 173, 579; 2 Dill. Mun. Corp. pp. 832–841; Cooley, Const. Lim. 623; McCrary, Elect. §§ 151, 226, 229, 350.

(4) In this act it is stated as the plain duty of the police jury to receive the returns of the commissioners of election and to proclaim the result; and, "if they have made the compilation and promulgation upon other returns than those prescribed by law, they must make them over again, in a way to conform strictly to the statute. The writ of *mandamus* lies to compel them so to do." Quoted from State v. Secretary of State, 32 La. Ann. 579; Id. 173; State v. Houston, 40 La. Ann. 393, 397, 4 South. Rep. 50; State v. Mayor, 43 La. Ann. 95, 8 South. Rep. 893.

(5) Canvassers of election "cannot go behind the returns for any purpose." McCrary, Elect. 227, 226, 229, 350; 6 Amer. & Eng. Enc. Law, p. 310; Cooley, Const. Lim. 623; 32 La. Ann. 173, 579.

MCENERY, J. Act 33 of 1888 authorized the voters of the parish of Bossier by election to select a parish site. The claims of the several towns to be recognised as the parish site, under the election held in pursuance of said act, have been frequently before this court. The facts are fully reported in the cases of State v. Police Jury, 41 La. Ann. 851, 6 South. Rep. 777; Davis v. Police Jury, 42 La. Ann. 968, 8 South. Rep. 475; Police Jury v. Judge, 43 La. Ann. 125, 9 South. Rep. 348. Under Act 33 of 1888, the police jury was vested with power to order the election, to appoint commissioners, to receive the returns, and to ascertain and proclaim the result of the election. The president of the police jury was required to issue a proclamation declaring the place which had been selected as the parish seat. On November 27, 1888, the police jury made an informal statement of the vote, but no result was ascertained, as no compilation had been made as required by Act 33 of 1888. This was so decided in the cases of Davis v. Police Jury, 42 La. Ann. 968, 8 South. Rep. 475,

and Police Jury v. Judge, 43 La. Ann. 125, 9 South. Rep. 348. The present *mandamus* proceeding is a sequel to the suit of Davis v. Police Jury, above referred to. The petition for the *mandamus* recites the proceedings of the police jury on November 27, 1888, and alleges "that the table or a list of voters, as returned to them and received by them, did show, as they, the said police jury of Bossier parish, La., declared, on the 27th day of November, 1888, and which they ascertained to be, the vote as cast at the election which was held on the 23d day of November, 1888." The relator further alleges that "said table, as made by the police jury, the result of said election, was in favor of the town of Haughton, which is legally entitled to be declared the parish seat; and it is the duty of the police jury of Bossier parish, under Act 33 of 1888, to compile the returns as sent in by the commissioners, as ascertained and as shown by their proceedings to be as above stated." The prayer of the petition is that "the police jury be required to meet on or before the 24th day of November, 1890, and then and there to compile the returns of the election held on the 23d of November, 1888, as sent in to them by the commissioners of election, as shown by their proceedings of November 27, 1888, to be as stated in the above petition, and to proclaim the result as thus compiled." There were exceptions filed to the jurisdiction, and also one of no cause of action. These were referred to the merits.

In the case of Davis v. Police Jury we held that the pretended compilation of the vote of the parish of Bossier cast for the selection of a parish seat was barren of results. "The statement of the vote was informal. The result was not declared or proclaimed by any order or vote of the police jury." 42 La. Ann. 968, 8 South. Rep. 475. And again, in Police Jury v. Judge, 43 La. Ann. 125, 9 South. Rep. 348, in referring to that case, we said that "said proceedings [meaning the statement of votes] were inoperative, and did not constitute an ascertainment or proclamation of the vote." We are therefore asked to divest the police jury of that discretion vested in them by Act 33 of 1888, and to compel them to declare the result of the election from a designated statement of votes, in no way authentic, so far as the record discloses. This case in its present aspect is similar to that of State v. Police Jury, 41 La. Ann. 851, 6 South. Rep. 777, where the police jury it was declared, had ascertained and promulgated the result of the election in favor of the town of Haughton. The town of Benton proceeded by *mandamus*, and asked that the true result of the election be ascertained by going behind the returns and eliminating the alleged frauds from them. We said in that case that "the court is not asked in this case to compel officers to discharge ministerial duties. It was asked to take from them duties involving discretion, to discharge these duties itself, and to compel them to make a formal declaration of its edict." So, in this case, the relator, taking the informal statement of votes made by the police jury on the 27th November, 1888, as the actual returns of the election, asks this court to compel the police jury of Bossier to treat them as the true and actual statement of votes, and to declare the result as ascertained by their compilation; thus depriving the police jury of that *quasi* judicial discretion invested in them by the act of 1888. The police jury of Bossier, however, has ascertained and declared the result of the election. The town of Benton, under the election by virtue of said Act 33 of 1888, is declared to be the parish seat. That they disregarded the informal statement of votes on November 27, 1888, is no evidence of fraud. In the absence of evidences of fraud, we must presume that the police jury of Bossier did its duty. They were authorized to declare the result. They had a judicial power of investigation to ascertain it, and to eliminate fraudulent votes from the returns. In the exercise of this power, we have no authority to review their finding. The legislature vested them with it, and it belongs to the legislative power of the government to rectify the wrong, if any has been inflicted upon the town of Houghton or the inhabitants of Bossier. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and it is now ordered that the relief prayed for by relator be denied, and the *mandamus* proceeding be dismissed, with costs.

(43 La. Ann. 1016)

LATTIER *et al.* v. ABNEY, President of the Police Jury, *et al.* (No. 290.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

DISSOLUTION OF INJUNCTION.

A writ of injunction having issued, the defendant filed a motion to dissolve it on bond. It being evident that the apprehended injury is compensable in money, and not irreparable, the application is granted, and the court *a qua* directed to accept bond and security dissolving the injunction.

(*Syllabus by the Court.*)

Appeal from district court, parish of Bossier; J. T. BOONE, Judge.

Suit by A. Lattier and others against W. M. Abney, president of the police jury of Bossier parish, and others, to enjoin them from executing or carrying out a contract for the construction of a certain jail. Judgment for plaintiffs. Defendants appeal. Reversed.

J. A. W. Lowry, Dist. Atty., *Land & Land*, and *Joannes Smith*, for appellants.

(1) An appeal will lie from an order refusing to dissolve an injunction on bond. 32 La. Ann. 394; 38 La. Ann. 50.

(2) An injury is not irreparable when it can be made good or repaired by money. The sworn allegation of plaintiff in injunction to the contrary is not conclusive. 32 La. Ann. 1192; 33 La. Ann. 930; 37 La. Ann. 110.

(3) Order of dissolution is proper when the injury is compensable by money, and the bond covers the sum fixed by the plaintiff as damages. 36 La. Ann. 772.

(4) Right of police jury to dissolve on bond is the same as any other litigant, and has been recognized. 32 La. Ann. 1192. Any person bound by law or a judgment

may execute a legal or judicial bond. Civil Code, art. 3064.

Watkins & Watkins, for appellees.

BREAUX, J. Plaintiffs allege that they are tax-payers of Bossier parish, in which they reside and own property, and as such have a common interest, exceeding $2,000, in preventing the illegal expenditure by the police jury of the money of the parish in building a jail. They also aver that the town of Benton is not the parish site of Bossier parish; that it is the temporary place for holding courts pending a litigation to determine where the parish site shall be; and that provision has been made for the safe-keeping of prisoners during the pendency of the suit. They also allege that under Act 33 of 1888 an election was held to determine the location of the parish seat, but that the police jury has failed to make legal compilations of the returns and to promulgate the result. They allege that the proceedings of the police jury favoring the recognition of Benton as a parish site are illegal and null, and they supplement the issues presented by a statement of the facts involved in the *mandamus* suit of State v. Police Jury, 10 South. Rep. 359, (decided during the present term of this court.) They enjoined the police jury and the Panly Jail Building & Manufacturing Company from entering into, executing, or carrying out a contract for the construction of a jail at Benton to cost $7,580. The defendants admit that the police jury has made a contract for the construction of a jail, as alleged. They allege that Benton is the parish seat. The district judge granted the order for writ of injunction to issue, as prayed for. The defendants filed a motion to dissolve the injunction on bond. An order was entered refusing motion to bond. Defendants appealed. Plaintiffs move to dismiss the appeal, on the grounds that the order of refusal to permit the defendant to bond was not signed, and that it will not cause irreparable injury. It is not needful that an interlocutory judgment be signed, to be appealed from when it causes irreparable injury. Klotz v. Macready, 35 La. Ann. 596. The court judicially notices prior decrees and evidence pertinent to the issue in a pending case. Mower v. Kemp, 42 La. Ann. 1007, 8 South. Rep. 830. The decision of the court in case of Parish of Caddo v. Parish of Bossier, 42 La. Ann. 939, 8 South. Rep. 533, shows that the latter parish has been without a jail for six or seven years. It is admitted in plaintiffs' pleadings that there is no jail in the parish at this time. The statutes of the state make it the duty of the police jury to provide a jail. Delay will occasion irreparable injury. Public order and the proper administration of justice require that a good and sufficient jail be constructed within a reasonable time. The defendants have a right to an appeal on their petition to dissolve the injunction on bond. On the merits, the question no longer presents great difficulty. Avoiding to decide the injunction on its merits, we, notwithstanding, must take notice of the fact that the parish seat of Bossier parish is definitely settled, and that the necessity of delaying the construction of a jail at Benton on the ground alleged by plaintiffs no longer exists. The issue is limited to the right to bond. The sole purpose of the injunction was to prevent the expenditure of $7,580 of parish fund to build a jail at a place not definitely settled as a parish seat. That question being decided, the injunction can be dissolved on bond. The allegations of plaintiffs and all the issues make it evident that any apprehended injury is compensable in money. Plaintiffs aver that they have a common interest exceeding $2,000. A bond will protect them from all injury. The conditions of the bond and the sureties will amply protect plaintiffs. It is ordered, adjudged, and decreed that the defendants' motion to dissolve the injunction in this case be granted, and that the judge of the district court of the second judicial district, in and for the parish of Bossier, accept a bond from the police jury, and security, to secure plaintiffs from injury; that this case be remanded at plaintiffs' costs, to be further proceeded with according to law.

(43 La. Ann. 1054)

CHAFFE *et al.* v. GILL *et al.* (No. 312.)

(*Supreme Court of Louisiana.* Oct. 28, 1891. 43 La. Ann.)

FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE—RIGHTS OF PURCHASER.

1. The property of the debtor being the common pledge of his creditors, every act done by a debtor with intent of depriving his creditor of the eventual right he has upon the property of such debtor is illegal. Civil Code, art. 1968.

2. Where one purchases property from a debtor, who he knows is insolvent, with notice that his object in selling it was to deprive his creditors of their recourse upon it, and such purchase operates to their injury, the sale will be annulled.

3. The purchaser in bad faith will not be entitled to a restitution of the consideration, unless he proves that it inured to the benefit of the creditors, by adding to the amount applicable to the payment of their debts. Civil Code, art. 1977.

(*Syllabus by the Court.*)

Appeal from district court, parish of Claiborne; ALLEN BARKSDALE, Judge.

Suit by Chaffe, Powell & West against George G. Gill and others to recover money, and to set aside as fraudulent a certain sale of goods. Judgment for plaintiffs. Defendants appeal. Modified. Rehearing denied.

Boatner & Lamkin and *McClendon & Seals*, for appellants.

In cases of fraud and simulation, the unsupported denial of the party charged will not prevail against facts and circumstances amounting to strong presumptive evidence. 34 La. Ann. 200.

Where two witnesses equally credible contradict each other, the testimony supported by corroborating circumstances and proved facts ought to prevail.

Article 1986, Civil Code, was designed to protect honest dealers in open and fair transactions, and not to furnish the means for making fraudulent sales by insolvent debtors to persons not creditors, but with knowledge of the fraudulent intent and insolvency of the vendor.

In no reported case has the supreme

court sustained a sale where the vendee was party to the fraud. 24 La. Ann. 158; 7 La. Ann. 645; 12 La. 263; 19 La. 13, 594.

Contra, it has always been held that knowledge and participation in the fraud by the vendee vitiates the sale. 11 Rob. (La.) 190 et seq; 11 La. 424; 16 La. 367; 6 La. Ann. 552; 34 La. Ann. 883, 995; 10 La. 369.

John Young, J. W. Halbert, J. A. Richardson, and *J. R. Phipps*, for appellees.

(1) The burden of proof is on the plaintiffs. All sales are presumed to be made in good faith. "Fraud is never presumed; it must be alleged and strictly proven." Civil Code, art. 1848; 18 La. Ann. 121; 24 La. Ann. 298; 34 La. Ann. 310; 39 La. Ann. 574, 2 South. Rep. 398.

(2) To annul a sale by the revocatory action, the plaintiff must prove three things: *First*, fraud on the part of vendor; *second*, knowledge on the part of the vendee; *third*, actual injury to creditors, —the debtor's insolvency. 38 La. Ann. 428; 31 La. Ann. 196; 26 La. Ann. 467; 34 La. Ann. 883.

(3) A sale for cash made to one not a creditor must be considered as one in the ordinary course of business, if made for an adequate consideration paid in cash or its equivalent; and the fact that a portion of the purchase price was subsequently applied to the discharge of the vendor's debts will not vitiate the sale as an onerous contract. 19 La. 594; 40 La. Ann. 327, 4 South. Rep. 74; 7 La. Ann. 645; 6 La. 344; 12 La. 266; 16 La. 150; and the Fudicker Case, 9 South. Rep. 742, (recently decided at Monroe.)

(4) Notwithstanding a debtor illegally and fraudulently disposes of his goods to the injury of his creditors, they cannot be reached and recovered unless the purchaser is shown to have participated in the fraudulent designs. See authorities cited under No. 3 and 35 La. Ann. 518.

(5) If a sale be made to one not a creditor, for a fair price, in the usual course of business, it should not be rescinded, even though the vendor was insolvent, and the vendee knew that fact. Civil Code, art. 1986; 24 La. Ann. 158; 7 La. Ann. 645; 12 La. 263; 19 La. 594.

(6) A sale by a merchant of his entire stock, accounts, and store-house to one not a creditor for a sound price paid in cash is a sale in the ordinary course of a party's business. See authorities cited above, and especially 40 La. Ann. 327, 4 South. Rep. 74; 7 La. Ann. 645; Fudicker's Case, 19 La. 594.

(7) "Sales of property cannot be disturbed on hypothetical valuations of property, or on the diminution of the price below what witnesses thought it ought to have brought, or below what its actual value may be supposed to be. Its actual value as a salable commodity is conclusively shown to be the sum it actually brought in open market." 31 La. Ann. 202. The value of property is what it will bring, if made for adequate consideration, paid in cash. 40 La. Ann. 330, 4 South. Rep. 74.

(8) Indorsers on unmatured paper are not creditors of the drawer, nor are they creditors until they have paid the debt. 41 La. Ann. 229, 6 South. Rep. 25; 2 La. Ann. 498; 13 La. Ann. 537; 5 Rob. (La.) 449; 3 Hen. Dig. 510; Daniel, Neg. Inst. p. 219, § 1204; Civil Code, arts. 3035, 3045; 14 La. Ann. 645, 655; 10 La. Ann. 648; 13 La. 62; 26 La. Ann. 689; 9 La. Ann. 526.

(9) No sale of property, made in the usual course of the party's business, shall be affected by virtue of any provision of the Code, treating the avoiding of contracts, although the party was in insolvent circumstances, and the person with whom he contracted knew of such insolvency. Civil Code, arts. 1986, 2658; 16 La. Ann. 402; 19 La. 594.

BREAUX, J. Chaffe, Powell & West have brought this suit to recover $17,349.21 and interest. They allege that the defendant George G. Gill, being in insolvent circumstances, with intent to defraud them, and other creditors, made fraudulent and simulated sales of all his tangible property; that under notarial act he pretended to sell to George Gill, his nephew, his store and warehouse in the town of Homer, together with the stock of merchandise contained therein, and his open accounts for the year 1891, for the nominal price of $15,000 cash. They pray that judgment be rendered against George G. Gill for the sum claimed; that the sale to George Gill be decreed fraudulent and simulated; that the property described be subjected to sale in satisfaction of the judgment prayed for; that there be personal judgment against George Gill for so much of the personal property sued for as he fails to surrender in obedience to the judgment. George G. Gill answered by a general denial of the facts alleged, and George Gill pleaded payment of the price in good faith, in due course of business. The judge *a qua* maintained the sale of the movable property, and as to the immovable property decreed its nullity. He pronounced judgment against George G. Gill for the amount due plaintiffs. The record discloses that on the 17th day of February, 1891, the defendant George G. Gill desired an extension of his indebtedness, and promised to secure it by a mortgage on his real estate in Claiborne parish. He represented himself to plaintiffs as worth $35,000 in excess of his liabilities. He delivered to plaintiffs, in New Orleans, a written statement of the *status* of his affairs, in which he valued his assets in detail. The total of the statement was $81,000 assets, and $46,000 liabilities. He said he had undervalued, rather than overvalued, his assets, and that his brick store in Homer was worth more than $10,000, and that his stock of merchandise would invoice considerably more than $15,000; that his accounts for 1891 amounted to $4,000, and were good for their face value. He promised that, immediately after his return home, he would make a statement containing a description of all the property he had promised to mortgage. He thereupon applied for an additional amount to pay certain bills he owed, and desired to pay before returning to his home. They were paid, amounting to $2,181.43, as part of a new accommodation for the season of 1891 and 1892; the defendant having promised the mortgage as be-

fore mentioned. Instead of complying, on the 23d day of February, 1891, he sold to George Gill his brick store-house, and a number of town lots, a warehouse, and other immovable property; also his stock of goods and office furniture; also all the accounts on the books dated in 1891, described in the deed of sale. The whole property was sold *en bloc* for the price of $15,000 cash in hand paid. On the 25th of February, 1891, he made a *dation en paiement* to his wife of an improved lot in satisfaction of $2,000, and within a very short time sold all his remaining immovable property. Ten thousand dollars due Chaffe & Powell were secured by a mortgage on certain lands in the parish of Richland. The lands were the property, at the time the mortgage was executed, of George Gill, who consented to this mortgage to secure an indebtedness of George G. Gill. On the 24th day of February, 1891, these lands were sold by George Gill to George G. Gill for the price of $5,000. He (G. G. Gill) was insolvent when the sales were made, and they left him without any property subject to seizure. Part of the $15,000 purchase price was applied to the payment of certain debts for which George Gill, the purchaser, was security, and part, viz., $5,000, to the payment for the Richland tract of land. George Gill was a creditor, at the time, of George G. Gill in the sum of $2,000. This amount does not figure in any of the contracts. The representations made by the defendant just prior to the sale, and the sudden transfer of all his property, can lead only to the conclusion that his object was to escape the payment of his debts, or to give an unfair preference to some of his creditors.

Having reached this conclusion, the question at once suggests itself, was the vendee, George Gill, a party to the *fraudem legis* of George G. Gill, and was he aware of his insolvency? We have no direct testimony on the subject. The facts that they were on intimate terms; that the nephew was almost daily in the uncle's office; that he knew of the arrangement to give plaintiffs a mortgage; that he must have known that he was carrying a large indebtedness; that he was a creditor, and no mention was made of the claims at the time these sales were passed; that the sale to him was not in due course of business; that part of the price was applied to the payment of debts, for which the vendee was security; that a large portion was applied to the payment for the Richland tract of land; that two disinterested witnesses testify that these lands are not worth the amount for which they are mortgaged; that the contents of the commercial house were transferred on a memorandum estimate, and not on an inventory, to be as exact as possible as to the value,—all point to an active participation on his part in a scheme to defraud certain creditors. Defendants' witnesses on the subject testify that the intimacy did not extend to a knowledge of his uncle's business; that he was informed that his assets were large in comparison to his liabilities. The vendee at the time of his purchase surely knew that the vendor would be unable to pay plaintiffs the large indebtedness for which he had promised to mortgage the property. He must have known that, if the property transferred to him was not worth more than the estimate he placed upon it, the remainder, comparatively of little value, added to that transferred to him, was considerably less than the amount due by his co-defendant. The evidence shows how much the whole property brought. The total is far less than $22,000. He was informed by the vendor that his indebtedness amounted to $47,000. We find no relief for the purchaser in article 1982 of the Revised Civil Code, as it is impossible, legally, to order a restitution to be made of any of the price paid to creditors. At most, the purchaser can be subrogated to whatever rights the creditors had against G. G. Gill. All the property described in the deed of G. G. Gill, defendant, to his co-defendant, George Gill, before Drew Ferguson, clerk of court, on the 23d day of February, 1891, not included within the terms of the judgment appealed from, shall be included, or its value accounted for. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by annulling and avoiding the said sale *in toto;* that all the property described in said deed be subjected to sale in satisfaction of the judgment. The said George Gill is subrogated to the rights the creditors paid by him may have had against George G. Gill, and the judgment appealed from is further amended by not allowing the restitution of the amount therein granted. As amended, judgment affirmed, at appellees' costs.

ON REHEARING.

Plaintiffs, in their application for a rehearing, contend that, in the event a revocatory action is sustained, the purchaser should be placed in the same position as prior to the sale or transfer; that the attacking creditor should restore to the purchaser the amount thus expended by him, and applied to the payment of G. G. Gill's creditors. The article quoted in support of these propositions had not escaped our attention, and would have been applied, had it not been that the amount is limited to "so much as he shall prove has inured to the benefit of the creditors, by adding to the amount of property applicable to the payment of the debt." Article 1982, Rev. Civil Code. We did not find that any amount inured to the benefit of the creditor, or that it is possible to give a superior or concurrent right to George Gill to recover the amount of the purchase price G. G. Gill applied to the payment of his debts. We are referred to the case of Barker v. Phillips, 11 Rob. (La.) 197. In that case the price was paid to release the two attachments, which, if not released, would have necessarily occasioned a diminution of so much of the property subsequently attached. The sum in that case inured to the benefit of the creditors, by being added to the amount of the property applicable to the payment of the debts in which all the attachments issued. In the present case no

such condition presents itself. The judgment revoking the sale precluded a claim on the part of a creditor which has not inured to the benefit of the creditor having precedence. We have carefully examined the grounds of the application of plaintiffs, but find no merit in them. Rehearing refused.

(43 La. Ann. 1041)

KATZ *et al.* v. GILL *et al.* (No. 311.)

(*Supreme Court of Louisiana.* Oct. 28, 1891. 43 La. Ann.)

REVOCATORY ACTION — APPEAL — JURISDICTIONAL AMOUNT.

1. In a revocatory action the test of jurisdiction is the amount claimed, and not the value of the property, the sale of which the plaintiff seeks to have revoked.

2. In an action *de simulation*, the value of the property is the test of jurisdiction.

3. The action being revocatory, and the amount at issue less than $2,000, the appeal is dismissed, at appellants' costs.

(*Syllabus by the Court.*)

Appeal from district court, parish of Claiborne; A. BARKSDALE, Judge.

Revocatory action by Katz & Barnett against G. G. Gill and George Gill. Judgment for defendants. Plaintiffs appeal. Dismissed.

Young & Thatcher and *J. E. Moore*, for appellants. *John Young*, *J. W. Halbert*, and *John A. Richardson*, for appellee G. G. Gill. *J. W. Halbert*, *J. R. Phipps*, and *John A. Richardson*, for appellee George Gill.

BREAUX, J. Plaintiffs' claim in this case does not exceed $2,000. Unless the transactions assailed by them are pure simulations, it is manifest that the appellate jurisdiction is tested by the amount of plaintiffs' demand, and not by the value of the property involved in the contract sought to be annulled. Our opinion in the case of Chaffe v. Gill, 10 South. Rep. 361, (just read,) shows that the contract assailed was not a mere simulation. It follows that plaintiffs must seek appellate relief in another tribunal. It is therefore ordered that the appeal herein be dismissed,—without prejudice to plaintiffs' right to appeal to the circuit court,—at appellants' costs.

(43 La. Ann. 1006)

STATE v. WEST *et al.* (No. 294.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

CRIMINAL LAW—INSTRUCTIONS—LARCENY.

1. The judge in his charge may divest the case of all irrelevant matter found in arguments or in the pleadings.

2. The charge objected to, whether correct or incorrect, had no bearing on the guilt or innocence of the accused, and did not prejudice him, and therefore offered no ground of relief from the verdict and sentence.

3. An instruction by the court in the trial of a case of larceny that the issue was not whether a verdict would be a victory for or against a corporation, but whether the accused was guilty, was not a charge upon the facts. It only cautioned the jury to direct their attention to the real issue, which the line of argument might otherwise becloud.

4. The admissibility of the statement of a witness, of information received which led to the arrest of the fugitive from justice, will not afford ground of relief, although part of the statement be hearsay.

5. A witness who has testified in chief as to the good character of the accused may, upon cross-examination, be examined as to a common report affecting his good character.

(*Syllabus by the Court.*)

Appeal from district court, parish of Sabine; D. PIERSON, Judge.

Prosecution against Robert West and Gabe Curtis for larceny. Verdict of guilty as to West, and judgment thereon. Defendant Curtis was acquitted. West appeals. Affirmed.

W. G McDonald, *Ponder & Sorelle*, and *T. C. Armstrong*, for appellant.

In charging the jury in criminal cases, the judge must limit himself to giving them a knowledge of the law applicable to the case. Rev. St. § 1963.

The jury in all criminal cases shall be the judges of the law and the facts on the question of guilt or innocence, having been charged as to the laws applicable to the case by the presiding judge. Article 168, Const. 1879.

Under these statutes, the judge should carefully avoid giving the jury any indication of his own opinion touching the facts of the case or the guilt or innocence of the prisoner. State v. Melvin, 11 La. Ann. 537.

* * * But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be; for it is found indispensable, as a test of truth and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of a cross-examination, that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. 1 Greenl. Ev. p. 134.

* * * But particular good or bad acts, or the reputation of having done them, cannot be shown in proof or rebuttal of good character. Bish. Crim. Proc.

* * * That on a trial for a particular crime the state cannot aid the proofs against the defendant by showing him to have committed another crime; even after he has put his character at issue this cannot be done. Bish. Crim. Proc. § 1120.

* * * Yet not even on cross-examination can his cause be prejudiced with the jury by testimony to any irrelevant guilt. Id. §§ 1123, 1124.

D. C. Scarborough, Dist. Atty., and *J. Henry Shepherd*, for appellee.

(1) The judge in his charge to the jury may divest the case of all irrelevant matter. State v. Chandler, 5 La. Ann. 489.

(2) Where a part of the charge of the judge to the jury is objected to, but it appears that the same has no bearing on the question of the guilt or innocence of the accused, and can in no manner prejudice him, whether correct or not, it will not be considered by the supreme court as affording any ground of relief. State v. Turner, 35 La. Ann. 1103.

An instruction by the court, in a charge to a jury upon the trial of a case of larceny, that any verdict they may render will not be a victory for or against any corporation or person, is not a charge upon the facts. If counsel argue irrelevant matters to a jury, it is the duty of the judge to enlighten their understanding, and divest the case of irrelevant matter, and draw their attention to the real issue.

(3) The whole tendency of modern practice is to enlarge the admissibility of evidence, so as to lay before the jury every fact tending to explain the main issue. State v. Denis, 19 La. Ann. 10.

Attempts or efforts to escape on the part of one accused of crime are admissible, and to be considered in connection with other evidence in determining the question of guilt or innocence. 1 Bish. Crim. Proc. 1250; Whart. Crim. Ev. 750; State v. Beatty, 30 La. Ann. 1266.

When a witness is called to testify as to good character of the defendant, he can, upon cross-examination, be examined as to any matters affecting the good character of the accused.

BREAUX, J. The defendants were tried upon a charge of larceny. West was convicted, and Curtis acquitted. West appeals, and presents three bills of exceptions. In the first bill he excepts to certain expressions in the court's charge to the jury. In the second bill he objects to certain evidence to prove flight, as hearsay. In the last bill of exception he states that there is error in the court's ruling in admitting a question to a witness who testified as to good character, propounded, on cross-examination, by the district attorney, as follows, viz.: "If it was not generally reported that the accused was an ex-convict." The language of the charge objected to in the first bill is: "Any verdict you may render will not be a victory for or against any corporation or person." The court states, as part of the bill, "that, in order that the line of argument by counsel before the jury might not prejudice the jury or obscure the real issues, the jury were admonished that they should determine the question of guilt or innocence, and should lay aside any prejudice that they might have against corporations or negroes; that corporations had the same property rights as individuals; that a negro should not be convicted upon less cogent evidence than that required to convict a white man; and that the issue was not whether a verdict would be a victory for or against a corporation, but whether the accused stood guilty of stealing the two bales of cotton with which they were charged." The charge objected to was not damagingly argumentative, nor such as to influence a jury to find an illegal verdict. The comments were fair to the accused, and not in the least such as to occasion bias on the part of the jury. They contain no reference to the evidence, and do not trench on matter of fact.

The second bill discloses that a witness had testified "that the prisoner had not only left the whereabouts of the crime and his home, but that he was informed that he had gone to Vanceville and Tyler, Tex., after leaving the scene of his crime, under an assumed name." After this evidence had been written, it was objected to as being hearsay. Granted that the objection can now be heard, the evidence is competent; the perpetrator had fled. The witness, as explanatory of his pursuit, stated what information he received at the various places, by which he was enabled to follow up and capture the accused. The flight is made evident by the action of the accused in leaving home immediately after the crime. The effect of the evidence, and not its admissibility, was a proper subject for consideration.

The third bill of exception relates to the cross-examination by the state of a witness for the defense, who had testified in chief to the good character of the accused. He was asked if it was not a general report that he was an ex-convict. The question was not propounded for the purpose of establishing a particular fact, but to test the knowledge of the witness as to what his neighbors said of the accused, and to put in evidence his bad reputation. In order to grant a new trial on the ground of the improper admission of evidence the application must establish a ground which operated to the prejudice of the accused. Steph. Dig. Ev. The witness in answer having stated that he only knew the prisoner as a servant, the question propounded does not vitiate the judgment. Judgment affirmed.

(43 La. Ann. 1019)

MARTIN v. WALKER *et al.* (No. 203.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 43 La. Ann.)

HOMESTEAD EXEMPTIONS—REPEAL—LOSS OF HOMESTEAD—ENTRIES ON PUBLIC LANDS—RES JUDICATA.

1. All homestead exemptions acquired since the adoption of the constitution of 1879 must conform to the conditions and requirements imposed by that instrument.

2. While the constitution preserved intact homestead rights acquired under prior laws before the date of its adoption, as to future homesteads it repealed those laws in so far as they were inconsistent with the requirements of the constitution.

3. The conditions of *bona fide* ownership and actual residence are essential to the creation and maintenance of any homestead exemption since the date of the constitution, and when such conditions cease to exist the exemption falls; and this applies equally to homestead entries on the public lands of the state under Act 21 of 1871 and Act 64 of 1888.

4. Denis v. Gayle, 40 La. Ann. 286, 4 South. Rep. 3, affirmed, holding that a judgment sustaining a claim of homestead exemption is no bar to subsequent action to subject the same property to execution, on allegation and proof that the essential conditions on which the judgment was based have been changed and lost.

(*Syllabus by the Court.*)

Appeal from district court, parish of Caddo; S. L. TAYLOR, Judge.

Suit by W. A. Martin against E. O. Walker and Simon Herold to have a certain judgment declared void. Judgment for plaintiff. Defendants appeal. Affirmed.

Wise & Herndon, for appellants.

(1) The action of a creditor to have a

judgment recognising a homestead in favor of his judgment debtor declared inoperative and void for the reason that the conditions which were the motives of the judgment have ceased to exist, rests on the principle that something has happened since the rendition of the judgment which destroys the effect of the judgment. Denis v. Gale, 40 La. Ann. 286, 4 South. Rep. 3.

(2) A judgment cannot be set aside and declared of no effect, when a suit is brought for that purpose, when the same conditions exist when suit is brought as when judgment was rendered, as it is *res adjudicata*. Burchard v. Parker, 24 La. Ann. 33; 32 La. Ann. 535.

(3) Prescription of one year is applicable to suits brought to have judgments declared null and void.

(4) A judgment between same parties, same cause of action, and same facts, is *res adjudicata*, and, when pleaded, should be sustained. Succession of McDonogh, 24 La. Ann. 33; Burchard v. Parker, 32 La. Ann. 535; Sewell v. Scott, 35 La. Ann. 553.

(5) State of Louisiana has a right, under the act of congress, to dispose of its public domain under any condition it may see proper, when the act of congress making the grant to the state so provides. Rev. St. 1870, p. 569, § 2.

(6) Act No. 21 of 1871, and Act 64 of 1888, to secure homestead to actual settlers on public lands of the state, and providing that said lands shall in no event be liable for any debt created previous to the issuance of a patent therefor, are valid and binding, and do not violate the constitution of the state or of the United States. Gibson v. Chouteau, 13 Wall. 92, see page 99; 21 Minn. 167; Patton v. Richmond, 28 La. Ann. 795.

J. Henry Shepherd, for appellee.

(1) The foundation of public policy is common honesty. "The fallacy lies in supposing the property to be that of the family." The property of a debtor is the common pledge of all his creditors. Nugent v. Caruth, 32 La. Ann. 444.

(2) The words "in any event" can receive no greater force than the word "permanent," and to construe these words to mean "forever" would be void on the ground of public policy. 10 Sup. Ct. Rep. 846.

Homestead laws are inoperative against prior debts, because such exemptions impair the obligations of a contract by destroying the remedy. Edwards v. Keazy, 96 U. S. 600; Martin v. Kilpatrick, 30 La. Ann. 1214; Pool v. Cook, 34 La. Ann. 332; Succession of Furniss, Id. 1013; Kinder v. Lyons, 30 La. Ann. 713; Taylor v. Saloy, 38 La. Ann. 63.

The debtor who claims must combine in him at least three conditions: He must occupy it as a residence, he must own the property, and must have a family dependent upon him for support. A judgment declaring property as his homestead, based on these conditions, will cease to have effect, and become inoperative, against judicial mortgages as soon as any one of these conditions ceases to exist. The judicial mortgage, which has been properly inscribed against the owner of property recognized as his homestead, and which was dormant, becomes executory against the property even in the hands of a third possessor by virtue of a sale from the original owner. Denis v. Gayle, 40 La. Ann. 286, 4 South. Rep. 3; Hebert v. Mayer, 42 La. Ann. 839, 8 South. Rep. 590.

It is immaterial by virtue of what law a homestead is acquired. To maintain it, the three essential conditions of ownership, occupancy, and some member of his family dependent on him for support, must co-exist continuously.

FENNER, C. J. Plaintiff is the holder of a judgment against defendant E. O. Walker, rendered and recorded as a judicial mortgage in 1885. In 1889 plaintiff issued a *fi. fa.* on his judgment, under which a tract of land belonging to Walker was seized. Walker thereupon brought an injunction suit to restrain the sale, averring in his petition that he "had acquired the property by homestead entry under the laws of Louisiana, as shown by his patent; that said land is now owned and occupied by him in good faith as a homestead, and he has a family, and has complied with all the requirements of law to obtain a homestead from the public domain of the state," etc. Issue was joined, and trial had, resulting in a judgment perpetuating the injunction, and decreeing the property "to be free from any incumbrance resulting from said judgment or debt, or from the recordation thereof." Some 15 months after the rendition of above judgment Martin instituted the present action, in which he seeks to have the said judgment decreed to be inoperative and of no effect, on the ground that facts upon which the judgment of exemption was based had ceased to exist; the said Walker having sold the property therein claimed as a homestead, and having also removed therefrom and ceased to occupy it. The alleged purchaser, Herold, was joined as a party. Herold filed an exception of misjoinder and of prematurity, based on the ground that, as a third possessor, he was entitled to the demand and notice required by law in an hypothecary action. This is not the hypothecary action. It does not invoke the seizure or sale of the property. It simply seeks to move out of the way a judgment which stands as an obstacle to any proceedings whatever for the enforcement of the creditor's right or claim of right. If plaintiff should succeed in his present action he would still be remitted to his hypothecary action, and Herold would be entitled to all his rights as a third possessor. We agree with the district judge that he has no cause to complain of being made a party, and thus allowed to contest the present suit, the claim in which vitally affects his interests. The plea of *res adjudicata*, based on the former judgment, was rightly overruled. The issues in the two cases are radically different. In the first, Walker claimed a homestead exemption based upon the allegations, among others, that he was the *bona fide* owner and occupant of the property claimed as his homestead; and

under the state of facts the judgment decreed the exemption. Now Martin alleges that he has since parted with both ownership and occupancy, and the issue is whether the homestead exemption continues or has been lost. We have so recently considered the nature and effect of such judgment that nothing more is necessary than to quote our former language: "Plaintiff does not in any manner question the correctness of the judgment in its disposition of the issues then tendered to the court for solution; hence he does not put at issue the right of Gayle to his homestead, as therein recognized, under the conditions and circumstances then existing. His contention is simply that, the reasons on which the judgment was founded, and from which it derived its vitality, having ceased to exist, the judgment itself has become extinct, without force or effect or life. The issues which he now tenders had no being or existence at the time the judgment was rendered; hence they were no elements in the consideration of the cause, and therefore the judgment could not be *res adjudicata* as to his present cause of action." Denis v. Gayle, 40 La. Ann. 288, 4 South. Rep. 8; Calvit v. Williams, 35 La. Ann. 322; Lemunier v. McCearly, 37 La. Ann. 133. The same authorities equally dispose of the plea of prescription against the action of nullity, and establish that this is in no sense an action of nullity of the former judgment.

This brings us to the issues of fact and of law. So far as the facts are concerned, we content ourselves with the statement that the evidence in the record conclusively sustains the findings of the judge *a qua*, and establishes that Walker has sold the land in controversy with a pact of redemption, and has abandoned his occupancy of and residence on the place. If the homestead exemption claimed by defendant is governed by the constitution of 1879 and the laws passed in pursuance thereof, there cannot be a shadow of question that it is lost and destroyed. We cannot express our view of the law more tersely than by quoting from a recent decision: "Under the plainest rules of construction the debtor who claims the exemption must combine in himself four indispensable conditions: (1) He must be the *bona fide* owner of the land. (2) He must occupy the premises as a residence. (3) He must have a family, or person or persons dependent on him for support. (4) The property must not exceed in value $2,000. Numerous adjudications of this court are authority for the assertion that the absence of any one of these conditions will defeat his claim for exemption, and that to entitle him to the homestead all the conditions must co-exist at the very time that the claim is propounded. Tilton v. Vignes, 33 La. Ann. 240; Galligar v. Payne, 34 La. Ann. 1057; Bossier v. Raines, 37 La. Ann. 263. Hence it follows that if, subsequently to the judgment which recognizes the exemption, any one or all of the conditions which were required to justify its rendition should cease to exist, the right to the homestead must fall." Denis v. Gayle, 40 La. Ann. 290, 4 South. Rep. 3. Defendant, however, claims that the homestead exemption claimed in this case is not governed by the constitution of 1879, but arises under and is governed by the provisions of Act 21 of 1871, and Act 64 of 1888, amending and re-enacting the former, which is entitled "An act to secure homesteads to the settlers on the public lands of the state;" and they rely on the following section, contained in both acts: "That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor." We do not find it necessary to express any opinion upon the original validity of this provision, nor on the question as to whether, upon consideration of the whole act, the exemption was to continue beyond the term of the settler's ownership and occupancy; nor as to the rights of patentees under the act of 1871, under patents issued prior to the constitution of 1879. In this case the entry, settlement, and patent were all made, and the homestead acquired, after the adoption of the constitution of 1879. We hold, with the district judge, that this fact subjected the homestead to the provisions of that instrument, and to all the conditions imposed thereby as essential to the creation and maintenance of a valid homestead exemption. We are perfectly clear that the constitution intended to make exclusive provision for the nature and extent of future homestead exemptions, and the conditions on which they should exist. This conclusively appears from the following clause of article 220: "Rights to homesteads or exemptions under laws or contracts, or for debts existing at the time of the adoption of this constitution, shall not be impaired, repealed, or affected by any provision of this constitution, or any laws passed in pursuance thereof." It could not have been necessary thus carefully to protect rights acquired under prior homestead laws, and existing at the date of the adoption of the constitution, if it had intended that such laws should continue operative for the future, and authorize the continued creation of homesteads, independent of the constitutional regulations. It is apparent that prior laws, in so far as they were inconsistent with the provisions of the constitution and as to future homestead exemptions, were repealed. If, therefore, the acts referred to of 1871 and 1888 dispense with the conditions prescribed by the constitution as to future homesteads, they are, to that extent, in conflict with the constitution, and inoperative and void. If they do not dispense with those conditions, the latter must be complied with. On either hypothesis, the defendant's case is untenable, and the district judge did not err in rejecting their pretensions. Judgment affirmed.

(43 La. Ann. 1060)

TAYLOR v. MARSHALL. (No. 317.)

(*Supreme Court of Louisiana.* Oct. 23, 1891. 43 La. Ann.)

TUTOR'S BOND — ACCOUNT — HOMOLOGATION — EXPERT EVIDENCE — MORTGAGES — IMPROVEMENTS — PRORATING VALUES.

1. The tutor's bond was recorded. He filed an account of tutorship. In the judgment of homologation the minor's mortgage was not mentioned. It was not thereby affected, but retained its force and effect.

2. The testimony of witnesses who testify as experts, being contradictory, should be weighed, and the best-supported inference adopted.

3. In prorating values between the makers of improvements on lands and claimants of a mortgage thereon, the respective values of the land and the improvements are ascertained. The seizing creditor receives the value which the land bears relatively to the amount of the sale, and the defendant the value of the improvements considered in the same way.

(*Syllabus by the Court.*)

Cross-appeals from district court, parish of Bossier; J. T. BOONE, Judge.

Action by Mary R. Taylor and husband against Emma S. Marshall to enforce a mortgage against certain lands. Judgment for plaintiffs. Both parties appeal. Affirmed.

J. R. Phipps, J. A. W. Lowry, and *John Young,* for plaintiffs.

(1) A judgment neither creates, adds to, nor detracts from the indebtedness of a party. It only decrees it to exist, fixes the amount, and secures to the suitor the means of enforcing its payment. If, under the law, the debt create a privilege or mortgage, such privilege or mortgage exists independent of the judgment rendered upon it. Gustine v. Bank, 10 Rob. (La.) 412, 418; Holmes v. Holmes, 9 Rob. (La.) 119; Drake v. Drake, 1 La. Ann. 545; Parker v. Starkweather, 7 Mart. (N. S.) 337, 340; Hill v. Bourcier, 29 La. Ann. 841, 845; Nicholson v. Bank, 27 La. Ann. 369.

(2) A third possessor, evicted by a mortgage creditor, can claim for his expenses and improvements only to the amount of the increased value which is the result of the improvements made. Linn v. Dee, 33 La. Ann. 217.

(3) The increased value is the difference between what the immovable would be worth on the day of adjudication or eviction under the seizure if the improvements had not been made and the price which it brings (or would bring) at the sale. 33 La. Ann. 217.

(4) When the expenses incurred by the third possessor are less than the increased value, he can only recover an amount equal to his expenses, and not one equal to the enhanced value. 33 La. Ann. 217.

(5) From the date of the service on the third possessor of the notification of the order of seizure, he is liable for the profits and income of the mortgaged property. Civil Code, arts. 3407, 3408.

(6) The purchaser of the estate burdened with a mortgage, when sued in an hypothecary action, can set up no defense against the judgment which his vendor could not have set up. Gallagher v. Congregation, 35 La. Ann. 829.

(7) An inscription of the minor's mortgage preserves the mortgage during the entire tutorship, though it continues for more than 10 years; but, if not reinscribed within 10 years after its termination, the mortgage will perempt. Lemee v. Thompson, 34 La. Ann. 1041; Civil Code, art. 3369.

(8) When, after the minor's mortgage has been preserved by the required legal inscription, and he has attained his majority, and a liquidation of his tutor's indebtedness to him by a judgment, the inscription of this judgment is sufficient to preserve his mortgage. Smith v. Johnson, 35 La. Ann. 943.

(9) Any act under which a party claims is evidence against him, not only as to its particular object, but as to all recitals relating thereto. Pilcher v. Prewitt, 10 La. Ann. 568.

(10) Declarations in authentic acts bind the parties, and may be used against them by third persons. Millandrue v. Jury, 8 Mart. (N. S.) 134.

(11) Notice to a former owner as to any matters connected with the property will bind one who subsequently acquires it from him. Linton v. Guillotte, 10 Rob. (La.) 357.

(12) One not charging those under whom he claims with fraud is bound by their admission. Leefe v. Walker, 18 La. 1; Brooks v. Morris, 6 Rob. (La.) 175.

(13) All the parties to a deed are bound by the recitals therein, whether privies in law, privies in blood, or privies in estate, and such recitals are conclusions against them.

(14) The legal mortgage is that which is created by operation of law, (Civil Code, art. 3287;) and, being general in its nature, it binds all the property, present and future, of the debtor, (Id. art. 3288.)

(15) The legal mortgage of the minor on the property of his tutor affects all the immovable property of the tutor from the day of his appointment, even the property which he sold before the rights of the minor against him had arisen into existence. Skipwith v. Glathathany, 34 La. Ann. 28.

(16) The constitutional convention, which provided for the registry of mortgages previously tacit, was not designed to change the established jurisprudence, but to put parties dealing with the tutor on their guard, and to protect the interest of the minor. 34 La. Ann. 33.

(17) The law is, and always has been, that minors have a legal mortgage upon the property of their tutors from the day of their appointment until the liquidation and settlement of their final account. 34 La. Ann. 28; Civil Code, art. 3314. The registry does not liquidate the amount appearing in it, but warns third persons that, on a settlement with their tutor, the minors' claim may rise to the amount stated in the registry. 34 La. Ann. 34.

(18) A third possessor of property burdened with a minor's mortgage by the amount due by his tutor, and duly liquidated, cannot be heard to say he had no notice of mortgage when the tutor's bond has been duly rendered in conformity with the requirements of law. 34 La. Ann. 34.

(19) The possessor in good faith owes

rent only from the institution of the suit, and is entitled to the value of his improvements, with legal interest from the time he made them. Duffitho v. Mayo, 27 La. Ann. 398.

(20) A possessor in bad faith owes rents. French v. Bach, 26 La. Ann. 73; Walworth v. Stevenson, 24 La. Ann. 251-253.

(21) A possessor in bad faith is liable for rents and profits, but is not entitled to compensation for improvements. Louque, Dig. p. 561, No. 13.

(22) And the possessor in bad faith is one who possesses as master, but who assumes this quality when he well knows that he has no title to the thing, or that his title is vicious and defective. Civil Code, art. 3452.

(23) The rights which are peculiar to the possessor in good faith are the rights which such a possessor has to gather for his benefit the fruits of the thing until it is claimed by the owner, without being bound to account for them except from the time of the claim for restitution. Civil Code, art. 3453, par. 1.

(24) A right which the possessor in bad faith has in common with the possessor in good faith is to be considered provisionally the owners of the thing, so long as it is not reclaimed by the true owner or person entitled to reclaim.

J. A. Snider and *Joannes Smith*, for defendant.

BREAUX, J. This is an hypothecary action to enforce a mortgage against certain lands owned by the defendant. Defendant filed an exception, in which it is alleged that in the judgment plaintiff seeks to enforce her mortgage is not recognized or maintained; that she has by *casus omissus*, or by intendment, waived or renounced her mortgage. The plaintiff was the ward of J. U. Platt. At her majority he filed an account of tutorship, showing an indebtedness,—$3,781.10. The account was homologated in the usual form, without special reference to the mortgage, by which this amount is secured as to its payment. The tutor's bond has been duly recorded, and is in evidence. The nature of the debt secures the mortgage. It exists without the necessity of its mention in the judgment homologating the tutor's account. The mortgage claimed is extant, and bears on the defendant's property. The defendant pleads in reconvention for the value of his improvements. They are alleged to be valuable, and to have greatly improved the place. Judgment was rendered in favor of the plaintiff for the sum claimed, and recognizing her mortgage. To satisfy the amount decided to be due of the demand in reconvention, it was ordered that plaintiff be allowed one-fourth of the entire proceeds of the sale, not to exceed the amount of her claim, and the defendant the remaining three-fourths of such proceeds. The plaintiff and the defendant appeal from the judgment.

A number of witnesses have testified to establish the value of the place on which the mortgage bears. The difference in the estimates is great, and varies from small amounts to considerable sums. To commence from the first, with questions of value, we note that on the 13th day of September, 1881, J. U. Platt, the mortgage debtor, sold this land for $1,000. It was sold for $3,000 in May, 1882; in 1885 for $4,960; in 1886 for $6,000; in 1887, in February, $8,000; in 1887, in July, it was sold to the defendant for $8,600. The foregoing prices can be safely consulted. As the enhancement in the value of the land is not entirely owing to the improvements, but in part to the increase in the value of land, we will consult the testimony of the witnesses to ascertain the value of each. They testify that the improvements were comparatively of little value when the place was owned by Platt, the judgment debtor. One of the witnesses for the plaintiff testifies that they were worth two dollars an acre. This is the highest estimate. The witnesses for the defendant fix it considerably less. All the witnesses differ materially about the number of acres of land cleared since the Platt sale. Those for the defendant state a larger number than those for the plaintiff. We conclude that more than 240 acres were cleared since the sale. The expense of cutting down trees and clearing the land for cultivation is estimated by different witnesses. Some have fixed the amount at $5 an acre, others at $7, others at $15 and $17. There is as much divergence in the estimate of the value of the building improvements and the machinery. Some of the witnesses have fixed it at more than $3,500, others at considerably less. In line with these estimates, the witnesses have testified as to a *pro rata* value of the improvements and of the land. The value of the land unimproved was estimated at $5 by five of the witnesses, and at $20 improved. Several of the witnesses have testified to less. Allowing for the increase in the value of the lands owing to other causes than the improvements, we conclude that the judgment of the district court does substantial justice in the estimate adopted. We do not understand that the principle of prorating values between the makers of improvements on lands and claimants of mortgages thereon—both in good faith—is seriously opposed. Article 3407 of the Civil Code is clear upon the subject, and leaves no room for construction. See, also, Oxford v. Barron, 43 La. Ann. —, 9 South. Rep. 479. Judgment affirmed, at appellant's and appellee's cost jointly.

(43 La. Ann. 1062)

CHAFFE *et al.* v. MACKENZIE. (No. 316.)

(*Supreme Court of Louisiana.* Oct. 23, 1891. 43 La. Ann.)

WRONGFUL ATTACHMENT — ACTION FOR DAMAGES —EVIDENCE OF OFFER TO COMPROMISE—APPLICATION OF PAYMENT—APPEAL-BOND.

1. Where the errors in the transcript are not imputable to the appellant, the appeal will not be dismissed.

2. The Code of Practice does not require that the bond for the appeal shall have the amount fixed in reference to the amount claimed or the value of the property seized under a writ of attachment.

3. When the judgment is for the amount of the debt claimed and damages for the wrongful suing out of the attachment, the amounts to extinguish each other *pro tanto*, the appeal-bond

which is given in reference to the judgment is not a voluntary execution or acquiescence in the same.

4. In order to maintain an attachment there must be some proof that at the time the writ issued the defendant had done or was about to do the act charged. The intent must also exist to defraud or to give an unfair preference. But this intent can only be proved by the acts of the defendant and the conclusions to be draw from them.

5. Where the defendant makes proposals to the plaintiff to prevent suit against him in negotiating for a compromise or settlement of the debt, the offer cannot be used in evidence against the defendant, unless there is some fact or distinct liability admitted.

6. Where the plaintiff by rule prays for the production of books and papers of the defendant, and he answers that they are not in his possession or control, and no effort is made to traverse or contradict the answer, and in the progress of the trial the defendant ascertains where they are, and produces them, and offers them in evidence, this is a substantial compliance with the order, although there may be a well-grounded suspicion that through the influence of the defendant they had been secreted.

7. Where a party owes another a debt evidenced by promissory notes, and another debt on open account, on cotton shipped, and he ships cotton, and immediately draws against it to the full amount, and sometimes in excess of it, he cannot require that the proceeds of the sale of the cotton be imputed to the extinguishment of the notes, particularly when he knows from an account stated to him, to which he makes no objection, and from the course of dealing with the creditor, that the proceeds of the sale of the cotton have been imputed to the cotton account.

8. On the dissolution of an attachment on the grounds that the defendant has disposed of his property, or is about to dispose of it, with intent to defraud, the defendant can recover only actual damages, unless he shows the attachment issued from malicious motives to annoy, distress, and injure him.

(*Syllabus by the Court.*)

Appeal from district court, parish of Webster; J. T. BOONE, Judge.

Suit by Chaffe, Powell & West against M. M. S. Mackenzie on promissory notes. Judgment for defendant. Plaintiffs appeal. Modified.

Boatner & Lamkin, for appellants.

Watkins & Watkins, for appellee.

(1) If the appellant has acquiesced in the judgment of the lower court the appeal will be dismissed. 32 La. Ann. 947; Stinson v. O'Neal, Id. 947; Board v. Perché, 40 La. Ann. 201, 3 South. Rep. 542; also dissenting opinion of Justices TODD and WATKINS in Duncan v. Wise, 39 La. Ann. 84, 6 South. Rep. 13.

(2) Transcript made up by the instructions and under supervision of appellant's counsel, errors therein will be imputed to the appellant, and the appeal dismissed. Samuels v. Brownlee, 38 La. Ann. 34, and cases cited.

(3) Affidavit for attachment that is wanting in elements of positiveness, or is conflicting or uncertain in its allegations, is defective and bad. Hernsheim v. Levy, 32 La. Ann. 340; Drake, Attachm. §§ 101-103; Amer. & Eng. Enc. Law, p. 904, with notes; Cross, Pl. p. 292, § 380; 14 La. Ann. 36; 11 La. Ann. 438, 622.

(4) "The right to attach depends on the state of facts existing at the time the writ issues." 32 La. Ann. 348; Hernsheim v. Levy, 35 La. Ann. 285; Bank v. Moss, 41 La. Ann. 227, 6 South. Rep. 25; quoting 1 La. Ann. 98; 10 La. Ann. 324; 3 How. 509-512; Mann. Unrep. Cas. 220.

(5) "The intent to defraud must exist to justify an attachment." Ferguson v. Chostont, 35 La. Ann. 339; Code Prac. art. 240; 22 La. Ann. 531; 24 La. Ann. 82, 586; 26 La. Ann. 258; 28 La. Ann. 309; 30 La. Ann. 393; 32 La. Ann. 340-344; Lehman v. McFarland, 35 La. Ann. 624; 37 La. Ann. 722.

(6) Damages will be allowed on the dissolution of an attachment. 32 La. Ann. 340; 37 La. Ann. 722; 30 La. Ann. 1140; 33 La. Ann. 6; Byrne v. Gardner, 34 La. Ann. 1203; 38 La. Ann. 353.

(7) The books, etc., ordered produced under Code Prac. arts. 140 and 473, must be in "the possession" of the adverse party, and material to the cause. Id.

(8) There must be an order signed describing the books, etc., to be produced. Code Prac. art. 473. And Code Prac. art. 140, allows the party ruled to produce books, etc., to show "by satisfactory evidence" "the impossibility of producing such documents." Id. arts. 140, 473.

(9) The rule to produce must be answered, tried, and on motion made absolute before the facts, and then only specific facts alleged can be considered in evidence as taken for confessed. Code Prac. arts. 140, 473; 18 La. Ann. 203; Id. 300; 30 La. Ann. 825-827; Id. 514.

(10) If the day fixed for the trial of the cause is the only day on which books, etc., can be ordered produced, (Code Prac. art. 473; 18 La. Ann. 203; 30 La. Ann. 825,) defendant is relieved of the production of books, etc., as the cause was put at issue on the 9th and by rule of court fixed for trial on that day, and the rule to produce only filed on the 14th, when the case had been called for trial, and trial immediately proceeded with before jury.

(11) The case of Morrison v. Butler, 18 La. Ann. 203, which decides that the court cannot order the production of books, etc., on any other day than the day fixed for the trial of the cause, is overruled in same case (page 309) of same volume by same court between same parties, where it is decided that article 473, Code Prac., is only directory, and court may order books, etc., produced on any day. In this case no order was signed at all for the production of the books, etc., and no day fixed for their production. They were produced "on the trial," as ordered in the entry on the minutes of the court.

(12) A "transaction" or "compromise" is defined by Rev. Civil Code, art. 3071, as an agreement between parties for "preventing or putting an end to a lawsuit." An offer of compromise cannot be used in evidence. 1 Greenl. Ev. 192; 19 La. Ann. 362; 1 Hen. Dig. p. 508.

(13) When a debtor owes two debts to same creditor, payments made by him are imputed to the extinguishment of the most onerous debt. 30 La. Ann. 1225, 1263; 32 La. Ann. 142; 15 La. Ann. 457, 526; 24 La. Ann. 472.

(14) "When there is a conflict in the evidence, the verdict of the jury will not be set aside," nor will the estimate of damages fixed by the jury be changed. Fox v.

Jones, 39 La. Ann. 610, 929, 3 South. Rep. 95; 37 La. Ann. 623, 655; and a long list of cases cited in 1 Hen. Dig. p. 92.

McENERY, J. The defendant moves to dismiss this appeal on the grounds: (1) Errors in the transcript, imputable to the appellants; and (2) acquiescence in the judgment.

1. The errors in the transcript are not of that character which would justify the dismissal of the appeal, even if they were imputed to the appellants. But the affidavit of the attorney is attached to the transcript, which satisfies us that the errors complained of are not to be attributed to the appellants. The error in the certificate of date of filing transcript is clerical, and fully explained. It was filed in this court in time.

2. The alleged acquiescence in the judgment is that the appeal-bond is fixed in accordance with the judgment rendered. The bond is given strictly in pursuance of article 575, Code Prac. This article does not require that the bond shall be fixed in relation to the amount claimed in the suit, or the amount of property seized under the attachment. The motion to dismiss is denied.

The plaintiffs sued the defendant on five promissory notes executed by the defendant,—one for the sum of $2,054.80, due 15th October, 1890; one for $3,097.04, due 6th November, 1890; one for $5,000, due the 15th November, 1890; one for $5,000, due 15th December, 1890; one for $5,000, due the 15th January, 1891,—all bearing 8 per cent. interest per annum from maturity. The plaintiffs accompanied their suit with an attachment. The reasons assigned for the same were that the defendant had converted, or was about to convert, his property into money or evidences of debt, with the intent to place it beyond the reach of his creditors. On the same day—24th April, 1891—that the attachment issued, the property of the defendant, comprising his mercantile establishment and a stock of goods in a branch store, and real estate in the parish of Webster, was seized. The defendant filed a motion to dissolve the attachment on the ground of the insufficiency of the affidavit, the untruthfulness of the allegations for the attachment, and insufficiency of the bond. This motion was referred to the merits. The defendant answered, in which he alleged that the notes had been extinguished by the proceeds of the shipments of cotton made by him to the plaintiffs, which ought to have been imputed to the notes, as they were the most onerous debt, and not to the open account due by the defendant to the plaintiffs. He asked for $45,000 damages, itemized as follows: *First*, loss of profits in his business; *second*, actual deterioration of his stock while in the sheriff's hands; *third*, deterioration in value from the reputation of being locked up and bankrupt stock; *fourth*, loss of business; *fifth*, being prevented from making collections; *sixth*, damage to his credit and reputation as a merchant; *seventh*, loss of profitable mercantile transactions and trade with a valuable and growing class of customers; *eighth*, damage to his feelings, annoyance, mortification, and vexation; *ninth*, counsel fees incurred in defending the attachment. S. D. Rawlins intervened in the suit. The case was submitted to a jury. There was a verdict and judgment for the defendant dissolving the attachment, with $30,000 damages, and allowing plaintiffs' demand; the debts to extinguish each other *pro tanto*. The intervention of Rawlins was dismissed. The plaintiffs have appealed.

The evidence fails to sustain the allegations in plaintiffs' petition that the defendant had converted or was about to convert, his property into money or evidences of debt with the intention to defraud his creditors or to give an unfair preference to some of them. In order to sustain the attachment there must be proof that at the time the writ issued the defendant had done, or was about to do, the act charged. The intent also must exist to defraud or to give an unfair preference. This intent, which rests solely in the bosom of the defendant, can only be shown by the acts and declarations of the defendant, and the conclusions to be drawn from them. The plaintiffs rely upon certain proposals made to plaintiffs by defendant, to the disposition of 11 bales of cotton on the day the attachment issued, and on defendant's failure to produce his books under the order of court. We think the disposition of the 11 bales of cotton has been satisfactorily explained by defendant. The proposals made to the plaintiffs were to prevent a suit against him. The amount of plaintiffs' claim was not in dispute. Before the proposition was made which was the basis of the attachment, plaintiff Chaffe and the defendant had had a conference at defendant's house in relation to the manner in which defendant's indebtedness could be liquidated. After this the claim was put into the hands of plaintiffs' attorney, who notified the defendant to meet him and one of the plaintiffs at Monroe. The object for which the conference was called is thus stated by plaintiffs' attorney: C. J. Boatner, sworn on part of plaintiffs, states "that the interview between the defendant and Mr. West, of plaintiffs' firm, at the office of Boatner & Lamkin, of Monroe, was for the purpose of ascertaining if defendant would pay or secure the payment of plaintiffs' claim against him. Defendant made certain propositions to the plaintiffs in settlement of their debt, but nothing in compromise, as I understood it; defendant claiming that plaintiffs would realize their claim in full, and there being no contest developed there as to amount of defendant's indebtedness to plaintiffs. This, so far as I heard, was what transpired between the parties." At this conference the defendant repeated what he had previously proposed to one of the plaintiffs. He also proposed to the plaintiffs that he would, for the consideration of $4,000, execute a sale to the plaintiffs of all of his property, and they could levy an attachment on the same. On a statement by plaintiffs that such a transaction would not stand a legal test, the defendant suggested the manner in which the evidence could be suppressed. "An offer to buy peace is not to be taken advantage of for purposes of

evidence, unless some fact or distinct liability be admitted in the offer, since the offer may have resulted not from the consciousness of indebtedness, but from a desire to avoid litigation." Pike v. Doyle, 19 La. Ann. 363. The facts admitted to be proved by plaintiffs are not facts admitting of distinct liability, but were proposals that occurred in the conversation or negotiations to effect a settlement of the claim. The proposals were, therefore, properly rejected. But, if they were competent evidence, they would not be available for the purpose of sustaining the attachment. The proposition or offer was made to plaintiffs for their benefit. It would have probably authorized an attachment by another creditor, but it is not apparent in what manner the offer to plaintiffs has injured them, or in what manner the intent to defraud his other creditors could justify an attachment on a preferred sale which would inure exclusively to their benefit. There is no evidence that any such proposition was made to any other creditor.

Article 140 of the Code of Practice declares that courts may, at the request of one of the parties, decree that the other party bring into court the books, papers, and other documents which are in his possession, and which are material in the cause, provided the party requesting their production declares in writing and on oath what are the facts he intends to establish by such books, papers, or other documents; and, on the refusal of the party thus called upon to comply with the order, the facts stated and sworn to shall be considered as having been confessed until satisfactory evidence of the impossibility of producing such documents. Under this article the plaintiffs filed a rule on the defendant to produce his books, papers, etc., on the day fixed for the trial. He answered that the books, etc., were not in his possession or control, but were in his store-house, which was under seizure. No effort was made on the part of plaintiffs to show that the books and papers called for were in defendant's possession. Search was made for them in the store-house, but they could not be found. A telegram was received from defendant's former clerk, designating the place where they were placed. They were then produced and offered in evidence by the defendant, but objection was made by plaintiffs. There were very suspicious circumstances attending the secreting of the books in a desk in the store-house, probably induced by defendant's instructions to his clerk. But they were produced before any attempt had been made to compel the defendant to show the impossibility of his producing them. The production of the books and papers was a substantial compliance with the order, as there had been no trial on the rule to produce, establishing the truth or falsity of defendant's answer to the rule.

Defendant avers in his answer that the notes sued on have been extinguished by the proceeds of cotton shipped to plaintiffs. The acquiescence, silence, and consequent approval of the stated account furnished the defendant by the plaintiffs are an effectual disposal of this part of the case. Bloodworth v. Jacobs, 2 La. Ann. 28; McLear v. Hunsicker, 29 La. Ann. 540. The evidence fully sustains plaintiffs' demand on the notes. There seems to be no serious controversy on this point.

The only remaining question is to ascertain the amount of damages suffered by the defendant by the illegal seizure and detention of his property and interruption of his business.

(1) Loss of profits in business. There is no evidence whatever to base any calculation of damages on this item. It is true the defendant aggregates the amount of his loss, but he does not state a single fact or circumstance to sustain his estimate. It is a bare declaration, and the same may be said of items 5 and 7. He does not show that he has lost anything from this source.

(6) Damage to his credit and reputation as a merchant. The defendant owed the plaintiffs a large amount. He was unquestionably insolvent, although this fact was not generally known. The plaintiffs had a right to sue for their debt. His real condition would then have been disclosed. The loss of credit resulted from the suit, and not from the attachment alone. We do not think that the attachment proceedings have been the direct cause of his loss of credit. The witnesses upon whom he relies for an estimate of damages on this item were mainly those whose claims he had discounted, thus establishing a credit with money he obtained from the plaintiffs, and which ought to have gone to purchase cotton to liquidate his indebtedness. But there is no evidence that he has suffered a loss of credit in any particular direction. The witnesses say before the attachment they would have credited him; that his commercial standing was good; but since the attachment, knowing his condition, they would not extend credit to him. His financial condition was a fact soon to be disclosed by the suit without the aid of the attachment. Byrne v. Gardner, 33 La. Ann. 8.

(8) Damage to his feelings, annoyance, mortification, and vexation. On this item there is no evidence upon which to make an estimate, even were it, in a case like this, admissible. It is not shown that the attachment was issued maliciously. Steinhardt v. Leman, 41 La. Ann. 835, 6 South. Rep. 665.

(9) Counsel fees. We think $1,000 a just estimate of the services of the counsel in dissolving the attachment. The case has evidently been one of protracted litigation, and the amount involved is large.

(2) Damage to stock and property by the attachment. The goods seized have evidently been damaged by the seizure. The defendant's witnesses, in estimating the damage, have done so without a personal inspection of the goods. They base their estimates solely upon hypothesis. And the witnesses for the plaintiffs, who examined the stock, did not do it with that particularity to detail which would give an exact estimate. It shows, however, that the stock was a broken one, consisting mostly of winter goods, left over from

the previous year. All the witnesses who made a personal inspection of the goods state that they were well cared for; free from dust and moths, so far as their casual examination permitted them to ascertain their condition. Some of the goods they estimate as worthless and some damaged, aggregating not more than $400. We are satisfied, however, that the estimate is too low. Experience teaches us that a stock of goods seized and stowed away in the summer months must necessarily deteriorate in value. They are generally in the hands of men unaccustomed to handle them, and unacquainted with the many methods used for their preservation. Dust will necessarily accumulate, moths will appear, and their general appearance by frequent handling will not add to their salability. The evidence of all the witnesses shows that a stock of goods held over from one season to the other deteriorates in value, and the estimate is from 20 to 30 per cent. The greater portion of these goods was winter stock from the previous winter. The season had passed for their sale. The stock seized was inventoried at $20,800 cash price. Deducting 20 per cent.,—the lowest estimate for depreciation,—the cash or salable value would be $16,640. All the witnesses agree that a stock of goods known as bankrupt stock depreciates in value regardless of its condition. This estimate is from 25 per cent. to 60 per cent. Adopting, as a fair per cent., 25, we will estimate the damage on the value of the stock—$16,640—at $4,150. We therefore estimate the damages suffered by the defendant for attorneys' fees and damage to stock of merchandise at $5,150.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to allow the defendant $5,150 damages, and in all other respects it be affirmed; the appellees to pay costs of appeal.

(42 La. Ann. 1036)

BONNER *et al.* v. BEAIRD. (No. 305.)

(*Supreme Court of Louisiana.* Oct. 28, 1891. 42 La. Ann.)

ASSIGNMENT OF CLAIM — RIGHTS OF DEBTOR—VALIDITY—CONSIDERATION—LITIGIOUS RIGHT.

A defendant having availed himself of a written compromise, signed by only one of the parties to the suit, and having had the suit dismissed, in which certain rights were reserved to the party who signed, is as bound as if he had signed the writing. The transferee's claim being subject to any of the equities which the debtor may have against the transferrer, the debtor is without interest to inquire into the transfer. The transferrer being estopped from claiming ownership of the claim transferred, the debtor can safely pay to the transferee, and is without right to have the transfer declared a nullity. The validity or consideration of the transfer or the want of consideration is of no concern to him, unless he can show injury. The claim is not a litigious right, although a suit may be necessary for its recovery.

(*Syllabus by the Court.*)

Appeal from district court, parish of Caddo; S. L. TAYLOR, Judge.

Suit by M. C. Bonner and M. A. Bonner against J. H. Beaird to recover a balance due on an annuity. Judgment for defendant. Plaintiffs appeal. Modified.

Land & Land and *Young & Thatcher*, for appellants.

One who, when sued, has availed himself of a written compromise signed only plaintiff, by procuring a judgment thereon in his favor, is as much bound by the written compromise as if he had signed the same. 2 Hen. Dig. 1002, No. 16; 2 La. Ann. 254; 32 La. Ann. 314; Bradford v. Brown, 11 Mart. (La.) 217; 2 Hen. Dig. 1011, Nos. 1-5, 7, 9-11.

The fact that a suit may be necessary to enforce a claim does not make the claim a litigious right. 2 La. Ann. 62, 79; 3 La. Ann. 553; 6 La. Ann. 238; 12 La. Ann. 645; 13 La. Ann. 529; 30 La. Ann. 523; 38 La. Ann. 223.

A donation of an account or debt is valid, as against the debtor, even though not clothed with the form of a notarial act. 12 Mart. (La.) 702; 8 Rob. (La.) 259; 5 Rob. (La.) 275; 2 La. 89; 14 La. Ann. 384; 28 La. Ann. 227.

One who owes a debt cannot, when sued by the transferee of that debt, inquire into the validity or consideration of the transfer of the debt to the transferee by the transferrer, unless he can show that he has been injured thereby. 5 Rob. (La.) 275; 10 La. Ann. 623; 35 La. Ann. 384; 38 La. Ann. 101; 41 La. Ann. 1, 5 South. Rep. 413.

An agreement to furnish a comfortable home includes maintenance as well as lodging. 9 Amer & Eng. Enc. Law, p. 420, and 3 Amer. & Eng. Enc. Law, p. 314.

Interest should be allowed on all debts from the day they are due. Civil Code, art. 1938.

Alexander & Blanchard and *Bell & Randolph*, for appellee.

A price is essential to the contract of sale. Civil Code, arts. 1764, 2439; Hen. Dig. p. 1326; Louque, Dig. p. 625; 5 La. Ann. 433; 24 La. Ann. 85.

A donation is void unless passed before a notary public and two witnesses. Civil Code, art. 1536; Hen. Dig. p. 448.

The transferee of a litigious right can recover only the real prices of the transfer. Civil Code, art. 2652.

Litigious rights are those which cannot be exercised without undergoing a lawsuit. Civil Code, art. 3556, No. 18; 33 La. Ann. 1133; 13 La. Ann. 535.

BREAUX, J. Plaintiffs sue to recover the balance due on an annuity the defendant owed to his mother, at the rate of $500 per annum. Mrs. M. C. Bonner sues to recover a fifth interest in this claim by right of inheritance from her mother, and her husband sues as transferee by purchase from three co-heirs of his wife. The fifth heir is the defendant, who filed a general denial, and, in addition, specially denied that the alleged transferee is the owner of any part of the claim, and in the alternative alleges that, if he is the owner, he is the transferee of a litigious right. The defendant further answers that, should it be found that the agreement with his mother was as alleged by the plaintiffs, he should have credit for the amount of his mother's board, medical attention, and other services, as shown by his account. In November, 1880, the

mother, Mrs. Beaird, instituted suit against her son, J. H. Beaird, to recover a large amount due by him. This suit was compromised. One of the conditions of the compromise on the part of the mother was that defendant should pay her the sum of $500 per annum during her life.

The judgment, in the suit compromised, reserved to the plaintiff the right to demand the annuity of the defendant. The right was recognized by the reservation, but was not made executory. The defendant takes issue with plaintiffs, with reference to his agreement, and contends that the consideration was to support his mother as long as she continued to live with him, and, should she reside elsewhere, he was to pay the $500 a year to cover the costs of her maintenance. The relinquishment made was not unqualified, but specially stipulated a price to be paid annually, as it reads in the reservation incorporated in the judgment. The understanding and agreement, such as now contended for by the defendant, is not sustained by any expression in the judgment. The defendant procured a writing, signed by his mother, agreeing to the dismissal of the suit, and acknowledging payment of certain demands, for the consideration of an annuity. At his instance, the writing authorizing this judgment was filed in evidence on December 20, 1880, and judgment was entered in his favor. He paid the fee of the attorney, for his mother, and availed himself of the expressions in his favor. The mother died March 28, 1889, and at the date of her death defendant owed $3,625, less certain credits. One-fifth of this amount due belongs to the defendant as heir of his deceased mother. The defendant questions the validity of the transfer of the claim, and denies that one of the plaintiffs is the owner of the interest sued for by him. The evidence discloses that there was a written transfer by three of the heirs made to one of the plaintiffs of all their title and interest to this claim; that the price was not fixed in dollars and cents. There was no intention expressed to donate the claim and to formally place the transferee in charge of the claim as donee. The transfer appears to have been absolute. All the transferrers testify in the case, and state that the claim was transferred. Two of these witnesses state the consideration (although undefined as to the amount) as an indebtedness they desired to satisfy. The objection is interposed that the transfer, being without price, was not a sale; that as a donation it was null, as it was not passed before a notary and two witnesses, as required by article 1536 of the Revised Civil Code.

In business transactions no particular form and specific instrument is required in the transfer or assignment of a debt. The assignment or transfer need not be in writing. "It has been decided that the judgment debtor will not be heard in charging the nullity and simulation of the transfer by the original creditor, unless he shows, not only that there was fraud between the contracting parties, but that he was injured thereby. Unless the debtor has equities which could be pleaded against the original creditor, he is without interest to inquire into the transfer." There is an unbroken line of authorities maintaining that principle. Gray v. Trafton, 12 Mart. (La.) 703; Succession of Delassize, 8 Rob. (La.) 259; Long v. Klein, 35 La. Ann. 384; Stockmeyer v. Oertling, 38 La. Ann. 101.

The transferee of the claim holds the rights of the transferrers, and is subject to the defense which the debtor may have against the latter. In the case of Keane v. Goldsmith, 14 La. Ann. 349, there was no written evidence of any transfer, and the parol testimony on the subject was somewhat contradictory as to the nature of the transfer. "A part of the testimony goes to show that the obligation was transferred upon conditions or events which have never happened. The transferrer's knowledge and acquiescence precluded him from gainsaying the validity of plaintiff's title, and a payment by the debtor to the transferee was held valid, and as an absolute protection against any pursuit upon the obligation in controversy." The witnesses testify that a transfer was made. The defendant is estopped from denying the ownership, and he cannot be injured by the transfer. We will not decide that a transfer is absolutely gratuitous, it not appearing that a donation was intended. All the parties to the transfer are estopped from denying the ownership.

The appellee contends that the demand of appellant M. A. Bonner must fail, for the reason that he is the transferee of a litigious right. At the time the claim was transferred the probabilities were that the defendant would refuse to pay it, but it does not appear that the transferee was aware of an absolute determination, on the part of the debtor, to deny the justness of the claim, and to compel the owners to bring suit for its recovery. The authority of McDougall v. Monlezun, 38 La. Ann. 223, a well-considered decision on the subject, is not favorable to defendant's position. Counsel admit that their defense cannot prevail, unless that decision be overruled. Article 2653, Rev. Civil Code, in terms defines a "litigious right." As was held in the quoted case, we discover no reason to supplement the definition given in article 2653, Rev. Civil Code, by reference to that contained in article 3556, Rev. Civil Code. If we were to accept the last definition of "litigious rights" (that in article 3556, Rev. Civil Code) as being "those which cannot be exercised without undergoing a lawsuit," the defendant has not brought this claim within its meaning, for it is not proven that plaintiffs were aware of his determination to undergo a lawsuit. Defendant's account contains various items for board, washing, servants' hire, nursing, clothing, and medical bills, from December 21, 1881, to March 28, 1889. Of the amount, the learned judge of the district court has allowed $1,934 as a credit. If the credit is allowed by the court, the plaintiffs admit the correctness of this amount, except the allowance of $20 per month for board and lodging. The board, they contend, should not be more than $10 per month, and

nothing for nursing. Considering that the mother was sick a great part of the time, required care and attention, we readily accept the amount fixed as reasonable. The defendant contends that a larger amount should be allowed. He says that he has furnished needed tonic and clothing. The district judge's statement with reference to said credits impresses us as being correct, and we therefore accept his figures, and the correctness of his views respecting them, as expressed in his elaborate opinion.

The plaintiffs contend that there is error in allowing legal rate of interest from judicial demand; that it should be allowed on the respective amounts at the end of each year of the annuity. There was mutual indebtedness, and not the least demand had been made prior to suit. No interest is allowed on the claim prior to judicial demand, and none to the defendant.

The total annuity is	$3,625
Credits allowed	1,934
	$1,691

It is therefore ordered, adjudged, and decreed that the judgment of the court *a qua*, in favor of the plaintiff Mary C. Bonner, wife of M. A. Bonner, for the sum of $338.20, with legal interest from judicial demand, be affirmed, and that the judgment appealed from be reversed in all other respects. It is ordered, adjudged, and decreed that plaintiff M. A. Bonner recover judgment against the defendant for the sum of $1,014.60, with 5 per cent. interest from judicial demand, and that appellee pay the costs of appeal.

(43 La. Ann. 1034)

LEVY v. LAKE, Sheriff, *et al.* (No. 306.)

(*Supreme Court of Louisiana.* Oct. 26, 1891. 43 La. Ann.)

MORTGAGES—JUDGMENT—RECOGNITION OF MORTGAGE—FI. FA.—LEVY.

The holder of a mortgage, with the pact *de non alienando*, who has proceeded against the mortgagee *via ordinaria*, and recovered a judgment for his debt, with recognition of his mortgage, has the right to issue a *fi. fa.* on such judgment, and to seize the mortgaged property regardless of alienations which are inoperative against such a mortgage, and without notice to or process against the third possessor. Bienvenu v. Insurance Co., 33 La. Ann. 218, affirmed.

(*Syllabus by the Court.*)

Appeal from district court, parish of Caddo; S. L. TAYLOR, Judge.

Suit by S. Levy, Jr., against John Lake, as sheriff, and others, to enjoin the seizure and sale of certain lands on execution. Judgment for defendants. Plaintiff appeals. Affirmed.

Land & Land, for appellant.

(1) A judgment is a fiat of the court settling the rights of the parties, and, however unjust, erroneous, or illegal the settlement may be, the parties can only claim under it that which, by its terms, the judgment awards. 40 La. Ann. 512, 4 South. Rep. 494.

(2) A judgment *in personam*, recognizing a special mortgage, and decreeing that the plaintiff is entitled to priority of payment out of the proceeds of the sale of the property made *pendente lite* in another suit, does not warrant the seizure and sale of the mortgaged premises in the hands of a third possessor, under a *fi. fa.* issued against the original mortgagor, especially when the judgment is prefaced with the statement that the prayer for the seizure and sale of the poperty need not be granted.

(3) Under a writ of *fieri facias*, the sheriff can seize only the property of the defendant. An order or decree of seizure and sale is essential to the enforcement of a mortgage. When this order or decree is embodied in a judgment *in personam*, then the property may be lawfully seized under a *fi. fa.* in the hands of a third possessor, if the mortgage contains the pact *de non alienando*.

(4) A judgment recognizing a mortgage, and decreeing its payment out of the proceeds of a sale affirms the sale and remits the creditor to the fund for satisfaction. Surely, a third opponent is not entitled to the seizure and sale of the property already sold, on a judgment fixing his right to participate in the proceeds of the sale.

Wise & Herndon, for appellees.

(1) Where a mortgage contains the pact *de non alienando*, one who subsequently purchases the property from the mortgagor cannot claim to be in any better condition than his vendor. Any alienation in violation of the pact *de non alienando* is null as to the creditor; and, where the mortgage contains the pact *de non alienando*, a purchaser from the mortgagor, subsequent to the mortgage, will be considered as standing in the place of the mortgagor, and as subject to the same liabilities. 4 La. Ann. 325; 8 La. Ann. 58.

(2) A prior mortgagor creditor, who holds a mortgage which contains the pact *de non alienando*, may pursue the property in the hands of a third holder without resorting to the dilatory proceeding by an hypothecary action. This is true, though the property may have been bought by the third holder at sheriff's sale. 23 La. Ann. 339; 24 La. Ann. 551; 29 La. Ann. 820; 33 La. Ann. 218.

(3) The third holder of such property is not a third possessor, nor entitled to the rights of one.

(4) The holder of a mortgage note secured with such a pact may proceed against the property and the mortgagor without making party to his suit any third owner, either *via executiva* or *via ordinaria*, and just as if the property had not changed owners. 33 La. Ann. 213.

(5) Damages are allowed on dissolution of an injunction of specific property in same suit. 15 La. Ann. 52; 31 La. Ann. 677.

FENNER, J. Cahn, who was a creditor of S. N. Ford on a debt secured by a special mortgage on property of Ford containing the pact *de non alienando*, proceeded *via ordinaria* against Ford to obtain judgment against him for the debt, together with the recognition and enforcement of his mortgage. The suit resulted in the following judgment: "Wherefore, the law and evidence being in favor of plaintiff, it is by reason thereof ordered,

adjudged, and decreed that plaintiff do have and recover of defendant S. N. Ford the sum of thirty-six hundred and ten and 20-100 dollars, with 8 per cent. interest from March 1, 1888, and 5 per cent. thereon as attorney's fees, and that plaintiff's special mortgage be recognized on lots 5, 6, 7, and 8 of block 61 of the city of Shreveport." He proceeded to issue a writ of *fi. fa.* on this judgment, under which he seized the property on which his mortgage rested, which mortgage is expressly recognized by the judgment. He is met by this injunction suit instituted by plaintiff, who alleges that he is the owner of the property, under a judicial sale made in execution of a junior mortgage placed thereon by Ford, and contends that the property cannot be seized under Cahn's judgment against Ford, but that Cahn must resort to the hypothecary action, and give him the notices required in such an action. We think the contention is silenced by our decision in the case of Bienvenu v. Insurance Co., 33 La. Ann. 218, where we said: "Appellant contends that Bienvenu, having taken a judgment against Lalourie, and having issued a *fi. fa.* under his judgment, could not in law proceed against appellant's property without process against him. It is not disputed that by proceeding *via executiva* the holder of a mortgage containing the pact *de non alienando* can ignore any subsequent alienation of his mortgagor, and follow the property in any hands, without notice to the subsequent vendee or possessor. And it therefore appears that we are called upon to recognize a difference as to the mortgage rights of plaintiff between the two modes of proceeding. But such a difference does not exist either in reason, logic, or law. The holder of a mortgage importing confession of judgment is authorized by law to proceed by executory process against his debtor's property, and we cannot see how any of his mortgage rights can be restricted by a judgment of a competent court, condemning his debtor personally, to pay the debt and recognizing his mortgage rights. We understand, on the contrary, that by such a judgment the rights of the creditor are enlarged instead of being curtailed or abridged. We are at a loss, therefore, to perceive any strength in the position that a creditor, proceeding *via ordinaria*, is debarred from following the property of his mortgagor in the hands of any vendee, and without process against such vendee." The foregoing decision covers this case like a blanket. It would, indeed, be a strange anomaly to hold that a creditor having a mortgage with the non-alienation clause evidenced only by an authentic act, and only importing a confession of judgment for the debt claimed, can seize the mortgaged property in the hands of any third possessor without notice to or process against him; but that when he not only holds the same authentic evidence of the mortgage, but has had, in addition, his debt and mortgage ascertained and recognized by a final judgment of a competent court, he thereby forfeits his right to invoke the same remedy. The fact that the decree did not specifically order the seizure and sale of the mortgaged property is of no moment. The judgment recognizing the mortgage recognized all its stipulations, and authorized its enforcement in the manner and to the extent which those stipulations, under the law, justified, including the right under the non-alienation pact to seize the mortgaged property, regardless of any alienation, which was inoperative as against such a mortgage, and without necessity of notice or process to or against any party but the mortgage debtor himself. We notice the prayer for an amendment of the judgment, by increasing the damages allowed, only to say that the allowance made by the district judge is conservative, and sufficient to satisfy the requirements of justice.

Judgment affirmed.

(43 La. Ann. 1042)

FLOWER *et al.* v. O'BANNON. (No. 313.)

(*Supreme Court of Louisiana.* Oct. 28, 1891. 43 La. Ann.)

FACTORS—ACCOUNT STATED — LIMITATIONS—IMPUTATION OF PAYMENTS—MORTGAGES — EXTENSION BY IMPLICATION—ACCOUNTING.

1. When accounts between factor and planter have been repeatedly rendered to the latter, and have been received without objection, and with petitions for indulgence and promises to pay, he cannot afterwards question the correctness of the items thereof, or of the charges of interest therein contained.

2. Prior, at least, to Act 78 of 1888, such accounts became stated accounts, prescriptible only by 10 years. The act of 1888 need not be construed in this case, because under no view could it operate the prescription pleaded.

3. If the debtor do not impute his payments when made the creditor may do so, and, if he make such imputation, and inform the debtor thereof by account rendered, which the debtor receives without objection, he cannot afterwards question the imputation.

4. Mortgages cannot be extended by implication to secure any other obligation than that expressly mentioned. A mortgage, given to secure "$2,500 for money advanced and acceptances made and to be made during the present year," cannot be extended to cover advances made after the expiration of the year, and to do so by any implication from the subsequent dealings between the parties would involve the creation of a mortgage by parol or implication.

5. Where the balance due at a particular time in long accounts has never been struck, and cannot be ascertained without numerous and difficult calculations, this court will not undertake such labor, but will remand the case for the purpose of ascertaining the amount.

6. Judgment reversed and case remanded on a single point.

(*Syllabus by the Court.*)

Appeal from district court, parish of Claiborne; ALLEN BARKSDALE, Judge.

Suit by Flower & King against J. W. O'Bannon to enforce a mortgage given to secure a balance on an account. Judgment for plaintiffs, who appeal therefrom. Reversed, and new judgment entered, which, on rehearing, is amended.

H. H. Hall and *J. W. Halbert*, for appellants.

(1) Prescription: "A written acknowledgment is not necessary to constitute an account stated. An account rendered, unless objected to within a reasonable time, is an account stated, *compte arrêté*, from its presumed approval." 28 La. Ann. 605. 26 La. Ann. 208; 27 La. Ann. 133; 20 La.

Ann. 119; 19 La. Ann. 185; and authorities cited on page 208, 26 La. Ann.

(2) Interest and commissions: "Where mercantile accounts have been closed by rendition and acceptance without objection, the debtor cannot thereafter object to charges of 8 per cent. interest, and to compounding interest by capitalization of succession of balances." 39 La. Ann. 788, 2 South. Rep. 602. "A stipulation in a contract between a planter and a commission merchant, by which the former agrees to secure the latter in a certain amount in any event, is not illegal, and may, therefore, be enforced against the planter, notwithstanding he has failed to make a crop." 23 La. Ann. 201. *Vide*, also, 24 La. Ann. 159.

(3) Imputation of payments: Article 2163, Civil Code: "The debtor of several debts has a right to declare, when he makes a payment, what debt he means to discharge." Article 2165, Civil Code: "When the debtor of several debts has accepted a receipt by which the creditor has imputed what he has received to one of the debts specially, the debtor can no longer require the imputation to be made to a different debt, unless there has been fraud or surprise on the part of the creditor." 30 La. Ann. 1225: "Payments made by a debtor without special instructions as to their imputation will be imputed in accordance with the tacit agreement of the parties as disclosed by their dealings and correspondence. A debtor who receives, without objection, an account current from his creditor, which imputes payments made by him to the less onerous part of his debt, is held to ratify by his silence the imputation of payments made in the account." "It is therefore false doctrine to say that, where a factor who has made advances to a planter, and who has a mortgage upon his plantation to secure an antecedent debt, receives the crop of the planter, the proceeds of the crop must be imputed first to the payment of the mortgage debt, the residue going to discharge the debt incurred for supplies. The privilege vests upon the crop, and this privilege the crop must first discharge before any part of it may be applied to any other obligation." Richardson v. Dinkgrave, 26 La. Ann. 657, and also 43 La. Ann. 1. Bloodworth v. Jacobs, 2 La. Ann. 24: "The debtor has the right to make the imputation of any payment made by him. If he do not exercise this right, the creditor may do so. When a debtor has accepted a receipt, in which a payment is imputed to a particular debt, it is irrevocable, unless in cases of surprise or fraud on the part of the creditor. Civil Code, art. 2161." Dunbar v. Bullard, 2 La. Ann. 810: "Where a factor sends an account to his principal at the usual time, in which certain imputations are made by the former, and the latter affirms it, or receives and acquiesces in it, and no fraud or surprise is complained of, the imputation of payment must be considered as having been made by the authority of the principal, the ratification of the acts of the factor being tantamount to original imputation by the principal and relating back to time of the acts which are the subject of ratification." Wilson v. Lewis, 6 La. Ann. 774: "Where the plaintiff had carried on the business of making advances to a party on consignment, payments made to them in the course of that business will be imputed to the mercantile accounts, and not to a mortgage note held by them on the party."

(4) The mortgage: "Mortgages, under the hypothecary system of Louisiana, may be given to secure debts having no legal existence at the date of mortgage. It is not essential, in such a mortgage, even with respect to third persons, that it should express on its face that it was executed to secure future debts. It may be described as a security for existing debts, and yet used to protect those which, in the contemplation of the parties, were to be created at a future time." 7 La. Ann. 288, 307. "It is the eventual balance in the account current that is covered, not the isolated items as they fluctuate through its successive operations. Whilst running, it cannot be arrested at a particular period, when, by an offset of debits and credits, they might be equally balanced, the account destroyed, and the mortgage extinguished. The account cannot thus be disintegrated. An aggregate is to be formed of its component parts. Until the balance be struck, the relation of debtor and creditor cannot be determined. On that balance it is—with whose ebb and tide it rises and falls—that the mortgage finally fastens itself, and which it finally secures." Hen. Dig. p. 940, No. 17; 7 La. Ann. 308.

J. E. Moore and *J. A. Richardson*, for appellee.

When there is a question of payment the payment will be imputed to the debt bearing a mortgage. 15 La. Ann. 174; Loque, Dig. p. 517, par. III., "Of the imputation of payment."

In order to interrupt prescription it must be acknowledged in writing. Acts 1888, No. 78; Civil Code, art. 3538.

An acknowledgment must not only be in writing, but must be of the debt claimed. 36 La. Ann. 407.

FENNER, J. The motion to dismiss has no merit, and is overruled. Plaintiffs sue defendant for a balance of account, and for the recognition and enforcement of a mortgage which they claim to hold to secure the same. The questions involved logically divide themselves into two branches: (1) The amount of defendant's indebtedness to plaintiffs; (2) the extent to which that indebtedness is secured by the mortgage.

1. We think there can be no doubt that plaintiffs are entitled to recover a personal judgment against defendant for the full amount claimed. The dealings between the parties were in account current running from March, 1887, to 1890. Detailed statements of the account were repeatedly rendered to defendant, who received the same without objection, and made requests for indulgence and repeated promises to pay. It is too late for him now to contest the correctness of the items of the account, which, however, we consider sufficiently proved, and not discredited. His

objections to the charge of 8 per cent. interest, and to compounding of interest, are defeated by our decision in Allen v. Nettles, 39 La. Ann. 788, 2 South. Rep. 602, where we said: "Defendant now seeks to overhaul these accounts from 1881, and claims, and was allowed, a deduction of $407.01 for overcharges of interest at 8 per cent., and from the compounding thereof by capitalizing, in the succeeding accounts, the balances from those preceding. We think this was error. So far as these matters are concerned, the defendant cannot go beyond the accounts which have been rendered and accepted by him, without objection." The plea of prescription of three years against the earlier items of the account cannot avail. An account rendered, and not objected to within a reasonable time, is an account stated, and only prescribed by 10 years. Darby v. Lastrapes, 28 La. Ann. 605; Blanc v. Scruggs, 26 La. Ann. 208, and other authorities therein referred to. Such was the undoubted law, at least up to the adoption of Act 78 of 1888, which prescribes all accounts by three years. We need not presently construe this act, because it was only passed on July 12, 1888, after the accounts had been rendered and converted into stated accounts prescriptible by 10 years. This suit was brought on May 2, 1890. On no basis of calculation of the prescriptive term could it have accrued prior to this suit.

2. Defendant claims that the debt secured by the mortgage was entirely extinguished by payment, on the ground that all the remittances and the proceeds of cotton shipped by him should be imputed to the mortgage as the most onerous debt. It is not pretended that defendant declared any special imputation when he made the payments. On the other hand, the accounts rendered by the plaintiffs show that they imputed the payments otherwise than to the mortgage indebtedness, the accounts stating the balance due as remaining secured by the mortgage. The law on the subject is well stated in the following authorities, cited in plaintiffs' brief: Article 2163, Civil Code: "The debtor of several debts has a right to declare, when he makes a payment, what debt he means to discharge." Article 2165, Civil Code: "When the debtor of several debts has accepted a receipt, by which the creditor has imputed what he has received to one of the debts specially, the debtor can no longer require the imputation to be made to a different debt, unless there has been fraud and surprise on the part of the creditor." McLear v. Hunsicker, 30 La. Ann. 1225: "Payments made by a debtor, without special instructions as to their imputation, will be imputed in accordance with the tacit agreement of the parties as disclosed by their dealings and correspondence. A debtor who receives without objection an account current from his creditor, which imputes payment made by him to the less onerous part of his debt, is held to ratify by his silence the imputation of payments made in the account." Bloodworth v. Jacobs, 2 La. Ann. 24: "The debtor has the right to make the imputation of any payment made by him. If he do not exercise this right, the creditor may do so. When a debtor has accepted a receipt, in which a payment is imputed to a particular debt, it is irrevocable, unless in cases of surprise and fraud on the part of the creditor. Civil Code, art. 2161." Dunbar v. Bullard, 2 La. Ann. 810: "Where a factor sends an account to his principal at the usual time, in which certain imputations are made by the former, and the latter affirms it, or receives and acquiesces in it, and no fraud or surprise is complained of, the imputation of payment must be considered as having been made by the authority of the principal; the ratification of the acts of the factor being tantamount to original imputation by the principal, and relating back to time of the acts which are the subject of ratification." Wilson v. Lewis, 6 La. Ann. 774: "Where the plaintiff has carried on the business of making advances to a party on consignment, payments made to them in the course of that business will be imputed to the mercantile accounts, and not to a mortgage note held by them on the party." Moreover, as appears from the mortgage, the advances were made to aid defendant in his planting operations, and were specially secured by a privilege on his crops, and, as heretofore held, the proceeds of the crop were imputable to the privilege, and not the mortgage. "It is therefore false doctrine to say that where a factor, who has made advances to a planter, and who has a mortgage upon his plantation to secure an antecedent debt, receives the crop of the planter, the proceeds of the crop must be imputed first to the payment of the mortgage debt, the residue going to discharge the debt incurred for supplies. The privilege vests upon the crop, and this privilege the crop must first discharge before any part of it may be applied to any other obligation." Richardson v. Dinkgrave, 26 La. Ann. 657, and also Bank v. Meyer, 43 La. Ann. 1, 8 South. Rep. 433. We encounter a question of greater difficulty in determining what part of the debt is, or was ever, secured by the mortgage. The mortgage was not given to secure advances generally, or to secure any resulting balance of account without limitation as to time. Its terms explicitly declare that it is given "to secure the sum of $2,500 for money advanced and acceptances made and to be made during the present year." Plaintiffs seem to consider that the "present year" means the year running from the date of the mortgage, but such is not a natural construction of the words in their ordinary use, which obviously suggest the year 1887; and this is confirmed by the fact that the notes given to represent the debt matured, respectively, on 1st December, 1887, and 1st January, 1888. We cannot see our way to holding that this mortgage was intended to secure, or did secure, advances or acceptances not made during the year 1887, or any balance of account beyond that existing on the last day of that year. We have held that "mortgages are so far *stricti juris* that they cannot be extended by implication to secure any other obligation than that expressly mentioned." Schadel v. St. Mar-

tin, 11 La. Ann. 175. This principle is unquestionably sound. We should violate it grossly if we acceded to the suggestion of plaintiffs' counsel that by the dealings of the parties the security of the mortgage has been extended to cover subsequent advances. We must look for the obligations of a mortgage in the act itself. To extend them beyond the plain terms of the act on evidence such as that here suggested would be to create a mortgage by parol or by implication, in violation of the express provision of the Code, which declares: "A conventional mortgage can only be contracted by an act passed in presence of a notary and two witnesses, or by an act under private signature. No proof can be admitted of a verbal mortgage." Defendant never granted, and plaintiffs do not hold, any mortgage to secure anything except "the sum of $2,500 for money advanced and acceptances made and to be made during the present year."

We have thus solved all the questions in the case except that of the amount due on the account of plaintiffs on 31st day of December, 1887, for which amount they are entitled to a recognition and enforcement of their mortgage, together with interest thereon at the rate of 5 per cent. from the 31st day of December, 1887, until paid, and for the additional amount of 5 per cent. on the gross amount so due on the mortgage as attorneys' fees. No balance has ever been struck of the account of plaintiffs as it stood on the 31st of December, and it requires an accountant to ascertain the exact balance then due, involving a calculation of interest on all the numerous items,—labor which cannot be thrown on this court. We shall therefore be compelled to remand the case on this point. It is therefore adjudged and decreed that the judgment appealed from be avoided and reversed, and it is now adjudged and decreed that there be judgment in favor of plaintiffs and against the defendant, J. W. O'Bannon, for the sum of $2,500.35, with interest at 5 per cent. per annum from April 6, 1890, and costs of suit; and it is further adjudged and decreed that plaintiffs' mortgage herein sued on be recognized and enforced to the extent of the balance due by defendant, as shown by plaintiffs' accounts rendered, on the 31st day of December, 1887, together with 5 per cent. interest on said balance from said date, and 5 per cent. attorney's fees on the amount of principal and interest of said balance when ascertained. And for the purpose of ascertaining the balance so due on December 31, 1887, the case is remanded to the lower court, with instructions to ascertain the same, and render judgment therefor in accordance with the opinion and decree; defendant and appellee to pay costs of appeal.

ON REHEARING.

Both parties claim amendment of the decree, and in exact justice each is entitled to some relief.

1. The defendant's application claims that the accounts rendered by plaintiffs on April 5, 1889, and April 6, 1890, were not acknowledged. This is not correct as to the first account, no objection to which was urged until March, 1890, after it had been acquiesced in by prior correspondence. But it is correct as to the final account of 1890, and we think the charges made therein of 8 per cent. interest and 2½ for advancing on balance of former account of April 5, 1889, should be reduced to 5 per cent. interest. This reduces the amount due on account sued on to $2,382.61, and we shall amend the judgment accordingly. The commissions charged on cotton not shipped were proper under the agreement and dealings of the parties, and other objections of defendant have no merit.

2. The application of plaintiffs demonstrates beyond question that the balance due on December 1, 1887, as shown by account rendered and acknowledged, considerably exceeded $2,500, the amount of the mortgage stipulated. Therefore the mortgage vested to the entire amount, and there was no necessity for remanding the case to ascertain a fact patent on the record. It is therefore now ordered and decreed that our former decree herein be amended by reducing the principal of the judgment against defendant from $2,500.35 to $2,382.61; and, further, by recognizing and enforcing the mortgage of plaintiffs on the property described therein for the full amount of this judgment, together with 5 per cent. attorneys' fees on the principal and interest thereof, and by canceling that part of the decree which remands the case; and that, as thus amended, the said decree be maintained.

(44 La. Ann. 69)

CHASE v. HIBERNIA NAT. BANK OF NEW ORLEANS. (No. 10,857.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 44 La. Ann.)[1]

CORPORATIONS — LIABILITIES TO STOCKHOLDERS—TRANSFER OF STOCK BY WIFE—ESTOPPEL—PRESCRIPTION.

1. The rights and duties of both the stockholders and the corporation whose stock they hold grow out of a contract implied in a subscription for stock.

2. A married woman, who owns shares in a corporation, is not relieved from all losses caused by her acts.

3. A wife, having transferred her certificate of shares to her husband, and having had noted the transfer on the books of the corporation, the husband having subsequently sold these shares, she having brought suit against him for separation of property, and in her petition having claimed the proceeds, and judgment having been obtained recognizing her rights, cannot recover as an error of the corporation to which she contributed, and which she made her own by her judicial declaration, sufficiently to enable the defendant to maintain the plea of prescription of 10 years, running from the day judgment was rendered in her favor, decreeing her to be the owner of the proceeds of the sale of the shares.

4. If the wife aid her husband in converting her estate into cash, so that he can use it, it is her fault, and she must blame herself if he uses such cash in payment of his debts, and if other people act on the confidence which her conduct implies.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Suit by Kate Sherry Chase against the

[1] Rehearing refused January 4, 1892.

Hibernia National Bank of New Orleans to recover certain shares of stock. Judgment for defendant. Plaintiff appeals. Affirmed.

George L. Bright, for appellant. *Jos. C. Gilmore* and *Saml. L. Gilmore*, for appellee.

BREAUX, J. Plaintiff, before her marriage, was the owner of 20 shares of the capital stock of the Hibernia Bank of New Orleans. She was married to Charles H. Chase on the 5th of November, 1870. She collected three dividends of her shares after her marriage. On the 6th day of November, 1872, she transferred these shares to her husband by written instrument. No consideration was paid; none is expressed in the transfer, except the customary "for value received" of bills and promissory notes. An entry of transfer was inscribed on the books of the bank. On the 23d of September, 1873, Chase transferred these shares to Joseph Maristany, and they were, from time to time, thereafter transferred to different parties. The capital stock of the bank was twice reduced; also the number of shares. Those claimed by plaintiff were reduced to 16 at first, and in the fall of 1886 this number was reduced to 12. Six hundred dollars were paid on the last of these shares called in, and nothing on the first. The Hibernia Bank has been reorganized, and is now the Hibernia National Bank. Plaintiff kept a bank-account at this bank. The defendant had no notice of an adverse claim of plaintiff before the 1st day of December, 1890,—some eight months after her husband's death. Plaintiff sued her husband for a separation of property. She alleged in her petition for a separation that she was the owner, at the time of her marriage, of property, which she described, and that her husband assumed its administration, and sold the Hibernia Bank shares for the sum of $2,640, and that the total appropriated to his own use was $14,100, less $2,500 of the said amount, which was invested in her name in a lot of ground as an investment of so much of her paraphernal funds. During the trial for a separation of property she introduced in evidence the certificate of the cashier of the bank, to prove the transfer of the shares to her husband on the 6th day of November, 1877, in said suit. She obtained a judgment against her husband for a separation of property, and for $11,620, and for recognition of her rights to the lot in her name. A writ of *fi. fa.* was issued under the judgment, and was returned "not satisfied." The purpose of this suit is to recover from the bank the value of the shares, alleged as being $5,000, and the dividends, amounting to $6,000. The plaintiff appeals from an adverse judgment.

Plaintiff's counsel, in support of her claim, ably argues the proposition that the transfer to the husband is an absolute nullity, which cannot, in any respect, avail the bank in its defense. The wife parted with her possession of the certificate of shares in favor of her husband, and was a party to the error committed by the officer of the bank in entering a note of the transfer on its books. There can be no question that the bank should have refused to act, and should have declined to incur any responsibility. We are called upon to determine whether the responsibility still exists. The plaintiff, by her voluntary act, without marital influence, severed her relations with the bank as a shareholder. She placed her husband in charge, and gave him control. There was at least an inchoate transfer made, which, by admission or the lapse of time, could become legal. The bank from that time was, by the registry of the stock, the trustee of the husband. He collected a dividend while the stock was in his name. After many years of acquiescence she called on the bank for the shares, as if only a few days had elapsed, and no intention of transferring them had ever been entertained. The husband had the administration, as alleged by her, and she placed these shares in his name. There was, to say the last, something of a conversion from this time. Miller v. Handy, 33 La. Ann. 164. In business matters, if other people act on the confidence in the husband, which the conduct of the wife justifies, the wife must blame herself. Succession of Gilmore v. Baily, 12 La. Ann. 562.

Plaintiff sued to dissolve the community, and for judgment for different amounts, among them that realized by her husband from the conversion of the certificate of shares. In the present suit the wife erroneously testified that her husband never had at any time assumed the administration of her property. She obtained judgment for the proceeds of these certificates. Had she sold them to her husband, as now contended, he would have been responsible for the price, and not for the amount received by him when he sold them. The wife cannot escape the effect of these proceedings, and pass them as if void. Her declarations to obtain the judgment were made with the legal authority of the judge. Estoppel by judicial declaration will not apply to escape the effect of marital influence. There is no intimation of such influence. She is therefore bound by the conversion, and the judgment made conclusive by the lapse of time. She cannot be allowed to shift her position at will. In her first suit, with legal evidence, she maintained the allegation that her husband sold these bank shares and received the price, with the exception of an amount expended from these proceeds and others, in purchasing property for her, which he owned, and obtained judgment. In the present suit she purposes to ignore those proceedings entirely, and recover judgment, as if she had never parted with the title, and had never placed her husband in possession of the certificate. Plaintiff contends that the conversion dates from the date of her demand for their delivery. The error is not of that date. The delivery of the shares, and her judicial declarations, fix an earlier day. A corporation is ordinarily justified in treating the assignee and holder of certificates of stock as the owner. Wiltbank's Appeal, 64 Pa. St. 256. Although the principle does not justify a corporation in making an illegal registry, when the owner calls alone and

has the transfer noted, knew that they were transferred into third hands, and claimed the proceeds, the dates of her acts and declarations cannot be left out of all consideration. "The relation of stockholders to the corporation whose stock they hold is that of contract, and the rights and duties of both parties grew out of contract implied in a subscription of stock." Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691. When the wife is one of the parties to such contract, she is not relieved from every care and concern of an owner.

There can be no estoppel, plaintiff urges, because the transfer made by the wife to the husband—the basis of defendant's liability—was made years before the institution of her suit against her husband, and that defendant was not thereby induced to change its position. The estoppel is not by recitals of a deed or by conduct. The plea is based on the solemn act of a competent court, which plaintiff has executed in part at least. Judicial declarations are accepted as true without regard to any influence they may have had on the party in whose behalf they are pleaded.

Relative to the suspension of prescription, article 3525 of the Revised Civil Code is quoted as applying. The husband is not bound in warranty to the bank. The act was that of the wife, which she has made clearly hers. The error, if actionable, would give right to damages owing to defendant's negligence, which do not give a right to cite plaintiff's husband in warranty. The plea of prescription interposed by the defendant is a bar to plaintiff's demand. Plaintiff's right of action accrued more than 10 years prior to the institution of this suit. More than that length of time had elapsed from the date of a judgment in her favor decreeing her to be the owner of the price for which the property was sold by her husband. Judgment affirmed, at plaintiff's costs.

(43 La. Ann. 1052)

PACE v. AWBREY *et al.* (No. 314.)

BENNETT v. SAME. (No. 314.)

(*Supreme Court of Louisiana.* Oct. 26, 1891. 43 La. Ann.)

MALICIOUS PROSECUTION—PROBABLE CAUSE.

In case reputable citizens are wantonly and illegally arrested and incarcerated in jail on "trumped-up" and purely gratuitous charges of grave crimes committed, and thereafter the prosecutor confesses that his only purpose was to procure immunity from prosecution for his brother for the same offense, the prosecution is malicious, and without probable cause, and damages should be awarded.

(*Syllabus by the Court.*)

Appeal from district court, parish of Claiborne; ALLEN BARKSDALE, Judge.

Consolidated suits of J. F. Pace against J. P. Awbrey and P. A. Awbrey, and of J. C. Bennett against the same defendants, to recover damages for a malicious prosecution. Judgment for each plaintiff as against defendant J. P. Awbrey, who appeals. Affirmed.

McClendon & Seals, for appellant.

(1) Suits for damages for a malicious prosecution are contrary to public policy, and are reprobated by the courts. 41 La. Ann. 511, 6 South. Rep. 815; 40 La. Ann. 375, 4 South. Rep. 72; 12 La. Ann. 53; 15 La. 278.

(2) To maintain such a suit it must affirmatively appear that the prosecution was "tainted with two concurrent vices." *First*, malicious motive; *second*, want of probable cause. 2 Greenl. Ev. § 454; 33 La. Ann. 919; 40 La. Ann. 375, 4 South. Rep. 72.

(3) "Malicious motive" has a technical meaning, and is composed of bad feelings and a consciousness that the prosecution is groundless.

(4) "'Probable cause' does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting." 2 Greenl. Ev. § 455; 15 La. Ann. 337; 10 La. Ann. 537.

(5) The probable cause of any particular case depends upon the surroundings, as viewed by the prosecutor of that case.

(6) A person who insures his house for twice its selling value is guilty of fraud.

(7) A person who sees a negro set fire to his neighbor's house, and leaves without giving the alarm, is guilty of a crime.

(8) Persons who go to jail at their own instance, under the advice of counsel, have not been damaged thereby.

(9) A defendant who is slandered in a suit for damages has a right to recover.

J. A. Richardson and *J. E. Moore*, for appellees.

Malice is proved in this case by direct testimony.

"Probable cause" means reasonable grounds of belief, supported by circumstances sufficiently strong to warrant a cautious man in the belief that the accused is guilty of the offense charged. Dillon v. Linox, 33 La. Ann. 392.

For an action for malicious prosecution the discharge of plaintiff by the committing magistrate is *prima facie* evidence of want of probable cause sufficient to throw upon the defendant the burden of proving the contrary. Barnholdt v. Lorrillard, 36 La. Ann. 103; Weil v. Israel, 42 La. Ann. 955, 8 South. Rep. 826.

WATKINS, J. These consolidated suits are, each one, respectively against the defendants *in solido* for $5,000 damages for a causeless and malicious prosecution of said plaintiffs, respectively, wholly without probable cause, and with malice and ill will. On these issues of fact and law the causes were consolidated, and put to a jury, who rendered a verdict of $500 in favor of each of the plaintiffs against J. P. Awbrey alone, with cost. From that verdict, and the judgment thereon rendered, that defendant has appealed; the other defendant having been discharged.

The following is a substantial synopsis of the principal facts to be considered: On the 13th of October, 1890, the defendant J. P. Awbrey made a sworn complaint before a justice of the peace of the neighborhood against the two plaintiffs, charging them with having set fire to and burned the dwelling-house of the plaintiff J. F. Pace on the 9th of October previously. On this charge the accused parties were arrested and incarcerated in jail for a

short while, pending the preliminary examination. A hearing was had before the judge of the district court on the 4th of November following, and thereat they were discharged. Subsequently the case was duly presented to the grand jury, and they ignored the complaint. It appears that some time recently, previous to these occurrences, Leon Awbrey, a brother of J. P. Awbrey, had been on trial for the burning of his own store-house and hotel to obtain the insurance; that he was acquitted of the charge, but another prosecution was pending against him, connected therewith; and that the plaintiffs, Pace and Bennett, had been prominent as witnesses against said Leon Awbrey, while the defendant J. P. Awbrey had been a witness for his brother aforesaid. The residence of Pace was consumed by fire soon after this trial was concluded, and public suspicion was directed against Leon Awbrey and a negro living with him. An affidavit was made against Leon Awbrey on the day after the fire, and he disappeared; and two days subsequently J. P. Awbrey made the stated complaint against the plaintiffs. J. P. Awbrey was at the time cognizant of the complaint against his brother, had inquired into the matter, and consulted with friends. On the night plaintiff's house was burned, a conversation between him and a friend was overheard in reference to the proceedings that were to be taken to relieve Leon Awbrey, and to suppress the warrant against him. In accordance therewith, the friend and counselor of the defendant J. P. Awbrey visited a village in the community, with the purpose in view of effecting a compromise; and, pursuant thereto, intimated that the affidavits against the plaintiffs would be withdrawn. An additional, important, and confirmatory fact—one worthy of due consideration—is that an apparently trustworthy person states that on the very date the plaintiffs were arrested and jailed the defendant J. P. Awbrey told him "he had sworn out [the] warrant against Pace and Bennett, but that he did not intend to have them arrested, and that he had sworn out the warrant to effect a compromise of the case against his brother;" that the defendant stated his object to be "to get up a compromise in his brother's case, and get the people of Athens to withdraw the warrant; that he would leave the community. He wanted to be free, so he could take his family with him." There is a great deal more of this kind of evidence in the record, and, in our opinion, it makes out quite a clear case for damages. It is manifest that the charges brought against the two plaintiffs were "trumped up," and purely gratuitous. That they were not seriously made, nor well grounded, is shown by the defendant J. P. Awbrey's own statements. The prosecution of the plaintiffs was wholly and confessedly without probable cause. Weil v. Israel, 42 La. Ann. 955, 8 South. Rep. 826; Savoie v. Scanlan, 43 La. Ann. 150, 9 South. Rep. 916. The appellees have requested no increase in the allowance awarded, and the appellant assigns no special ground for relief, and none is apparent. We think the jury were moderate in their appreciation of the damages sustained, but they followed precedents. Judgment affirmed.

(42 La. Ann. 991)

STATE v. SIMMONS. (No. 295.)

(*Supreme Court of Louisiana.* Oct. 22, 1891. 48 La. Ann.)

MOTION TO QUASH INDICTMENT — CHALLENGE TO VENIRE — COSTS IN CRIMINAL CASES — ATTORNEY'S FEES.

1. Motion to quash an indictment on a challenge to the general *venire*, based on alleged irregularities in the manner of drawing and summoning the jurors, is properly demurrable when it alleges neither fraud, wrong, nor injury.

2. In absence of express statutory authority, the fees of counsel acting as counsel for accused, in obedience to an assignment by the court, cannot be taxed as costs to be paid by the parish.

(*Syllabus by the Court.*)

Appeal from district court, parish of De Soto; W. P. HALL, Judge.

Indictment against Gus Simmons for murder. Verdict of guilty, and judgment thereon. Defendant appeals. Affirmed.

E. W. Sutherlin and *J. W. Parsons*, for appellant.

(1) Section 11 of Act 44 of 1877 requires that all objections to the manner of drawing juries must be urged on the first day of the term; but the letter of the statute cannot be rigidly enforced in all instances, when circumstances render it impossible to do so. Where the term of court begins on the 3d, and is adjourned to the 6th, when the indictment is presented and counsel assigned, the accused being in jail, and unable to employ counsel, a motion to quash indictment and challenge to the *venire* made on the 7th, before arraignment, is seasonably made. 19 La. Ann. 436; 31 La. Ann. 387, 398; 41 La. Ann. 513, 6 South. Rep. 471; 41 La. Ann. 679, 6 South. Rep. 583.

(2) The *venire* must be drawn in accordance with section 4 of Act 44 of 1877, p. 56. 29 La. Ann. 824; 20 La. Ann. 356, 442.

(3) The fees of counsel assigned by the court for the defense of an accused unable to employ counsel, like all other expenses attending criminal proceedings, must be paid by the respective parishes, and taxed as costs. This view is supported by precedent and sound public policy. The assignment of counsel is indispensable to the trial, and "as essential to the due examination of the case as counsel for the prosecution; and to leave the services of the one unremunerated is as impolitic as it would be to leave the services of the other unremunerated." Const. art. 8; Rev. St. §§ 992, 1042; 25 La. Ann. 381; 33 La. Ann. 979; 36 La. Ann. 91; 37 La. Ann. 267, 606; 38 La. Ann. 23; 1 Bish. Crim. Proc. (3d Ed.) §§ 304-306; Whart. Crim. Pl. §§ 557-559.

J. C. Pugh and *J. Henry Shepherd*, Dist. Attys., for the State.

(1) In all criminal prosecutions the accused shall enjoy the right to defend himself, and have the assistance of counsel. Article 8, Const. Where the accused cannot employ counsel the judge should assign one. State v. Doyle, 36 La. Ann. 91; State v. Viana, 37 La. Ann. 606; State v. Simpson, 38 La. Ann. 23.

(2) Courts can require lawyers to act as counsel in cases where the accused are unable to pay, on the ground that they are officers of the court, bound to perform official duties; for they are a necessary part of the administration of justice. 1 Bish. Crim. Proc. p. 305.

(3) The state, as a sovereign, owes no costs in litigation before her own courts, even when cast in a civil suit. State v. Taylor, 33 La. Ann. 1272; 34 La. Ann. 978; Succession of Kate Townsend, 40 La. Ann. 66, 3 South. Rep. 488.

(4) No irregularity in drawing, summoning, returning, or impaneling grand or trial jurors furnishes ground for challenging the array, or is sufficient to set aside a verdict, unless it operated to the injury of the party complaining. Thomp. & M. Juries, 63, 143; State v. Harris, 34 La. Ann. 118; State v. Rector, 35 La. Ann. 1098; State v. Sandoz, 37 La. Ann. 376; State v. Gonsoulin, 38 La. Ann. 459.

(5) All objections to the manner of drawing juries, or any defect or irregularity that can be pleaded against any array or *venire*, must be urged on the first day of the term. Acts 1877, § 11 of Act 44; State v. Price, 37 La. Ann. 215.

FENNER, C. J. The defendant, convicted of murder, and sentenced to be hung, assigns but one complaint of error in the proceedings, which consists in the overruling of his motion to quash the indictment, based upon a challenge to the general *venire*. His objections to the *venire* are stated as follows: "Neither the clerk of this court nor the jury commissioners have ever made or kept a list of the names of three hundred good and competent men, from which the *venire* for each term of court is by law required to be drawn, nor has any such list ever been kept complete and supplemented from time to time by said clerk or jury commissioners, as required by law; and that the pretended list kept by the clerk of the court was not kept and maintained at the original standard of 300, as required by law; nor have the names of those who have served, nor of those who are known to have died, removed from the parish, or become exempt or disqualified to serve as jurors, since their names were entered thereon, been stricken therefrom; but that the pretended list from which the *venire* for this term of court were drawn contained the names of more than one thousand persons, many of whom had previously served, and who are known to have died and removed from the parish and become exempt or disqualified from jury service." The motion to quash was met by a demurrer on two grounds, viz.: (1) That the challenge to the array was not pleaded on the first day of the term, as required by section 11 of Act 44 of 1877. (2) That the motion made no averment of fraud or great wrong or of injury to defendant. The trial judge sustained the demurrer.

The letter of the statute is very peremptory that all objections to the array or *venire* "must be urged on the first day of the term, or all such objections shall be considered as waived, and shall not afterwards be urged." We have, however, held that the statute does not require impossibilities, and have recognized certain cases to which it could not be applied. State v. Sterling, 41 La. Ann. 680, 6 South. Rep. 583; State v. Strickland, 41 La. Ann. 513, 6 South. Rep. 471; State v. Vance, 31 La. Ann. 398. The defendant here urges certain circumstances as bringing his case within a necessary exception to the statute, the sufficiency of which, however, we need not presently consider, because we hold the second ground of demurrer to be conclusive. The same statute which directs the methods to be pursued in the drawing of juries specifically provides that "no such defect or irregularity in the drawing thereof, or the summoning of the jury, shall be sufficient cause [to challenge the *venire*] if it shall not appear that some fraud has been practiced, or some great wrong committed, that would work a great and irreparable injury." We have uniformly enforced this requirement of the statute. State v. Gonsoulin, 38 La. Ann. 459; State v. Sandoz, 37 La. Ann. 376; State v. Rector, 35 La. Ann. 1098; State v. Harris, 34 La. Ann. 118; State v. Dozier, 33 La. Ann. 1362; State v. Smith, Id. 1414. We find every inducement to adhere to this line of decisions. The inconvenience and delay occasioned to the administration of criminal justice by the setting aside of the *venire* are too grave to be lightly incurred on account of irregularities which have arisen from no fraud, and resulted in no injury. There is no suggestion that the 50 names drawn from the general venire-box to compose the grand and petit jurors for the first week of the term were not good, true, and qualified jurors, or that the grand jury selected from said number, and which found the indictment against defendant, was not composed of qualified jurors, honest and impartial. What more does justice require? Defendant has alleged neither fraud nor injury, and therefore the statute and jurisprudence silence his complaint. The attempt to assimilate these irregularities in the proceedings of a qualified jury commission to disqualifications of the commission itself is not sound. The curative effect of the statute applies only to defects or irregularities in the proceedings of the commission, not to defects in the constitution of the commission; and therefore, in the latter case, allegation and proof of specific fraud or injury are not required.

2. The defendant in this case being unable to employ counsel, the attorneys who represent him acted under assignment by the court. They took a rule to have their fees taxed as costs of the case to be paid by the parish. The judge denied the rule, and from his judgment the attorneys have appealed. We can find no warrant for the relief asked. There is certainly no precedent for it in this state. The subject is referred to by Bishop and Wharton. 1 Bish. Crim. Proc. § 304 et seq.; Whart. Crim. Pl. § 558 et seq. They cite an Irish case, in which the chief baron said, in a case of such service, "that he should certainly recommend that the fee should be paid by the crown." It also appears that in some states of the Union civil actions have been maintained against counties for

remuneration for such services. They refer to no case in which such fees have ever been taxed as costs in criminal proceedings in absence of express statutory authority. It would be manifestly unjust to do so, because the parish is not a party to a criminal case, and is certainly entitled to be heard on such a demand. There is no such statutory authority in this state. It is true that section 1042, Rev. St., provides that "all expenses whatever attending criminal proceedings shall be paid by the respective parishes;" but no statute includes such attorney's fees among those expenses. On the contrary, Act No. 7 of 1877, entitled "An act to regulate and limit the liability of parishes of this state for costs and fees in criminal proceedings," makes no reference to such fees, and impliedly excludes them. The better doctrine seems to be that followed in Massachusetts, Illinois, California, Pennsylvania, Georgia, Alabama, Arkansas, and Montana, where, as stated by Mr. Bishop, the county is held not liable unless made so by particular statute. We shall adopt and follow this rule until the legislature shall otherwise direct. Judgment affirmed.

(44 La. Ann. 22)

CRESCENT CITY BREWING CO. v. FLANNER.

(No. 10,782.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 44 La. Ann.)[1]

CORPORATIONS—POWERS OF DIRECTORS—SALE OF LAND—PURCHASE BY DIRECTOR.

1. The board of directors of a corporation has the undoubted right to sell property of the corporation to pay its debts.

2. But when the board of directors sells the property to one of the members of the board to pay debts, it must appear that there was a necessity for the sale; that the property was bought by the director in open market, at a fair price, without any undue advantage over the corporation, in good faith, and without the slightest unfairness.

3. When the board of directors who sold the property made the sale necessary by its mismanagement, one of the directors on said board will not be permitted to purchase the property.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit by the Crescent City Brewing Company against Joseph Flanner to set aside a certain conveyance of land. Judgment for plaintiff. Defendant appeals. Affirmed.

Harry H. Hall and *W. S. Benedict*, for appellant. *Buck, Dinkelspiel & Hart*, for appellee.

MCENERY, J. The Crescent City Brewing Company, under the laws of this state, organized in 1887, as a corporation, for the purpose of purchasing vacant or unimproved real estate in the city of New Orleans, and constructing thereon and conducting a brewery for the manufacture of beer and malt liquors, and for the sale of all products of the brewery. Its capital stock was $250,000, in 2,500 shares, of the value of $100 each. The powers of the corporation were executed and its business managed by a board of directors composed of five stockholders, a majority of whom constituted a quorum. In pursuance of article 11 of the act of incorporation, on the 17th day of September, 1887, the company purchased (1) a square of ground in the second district in the city of New Orleans, designated by the municipal number 188, bounded by Canal, Custom-House, Claiborne, and Robertson streets; (2) a certain piece or portion of ground, comprising about three-fourths of a square, designated by the municipal number 187, bounded by Canal, Custom-House, Robertson, and Villere streets,—the whole price being $100,000. The property last described is that in controversy. Joseph Flanner, who purchased the above-described property from the company, was a member of the board of directors when he made the purchase. On the 19th of July, 1888, a special meeting of the board of directors was called for the purpose of disposing of said property. At the meeting of the board a resolution was adopted which recited that the above property was idle capital, and it was resolved to sell the same to Joseph Flanner for the sum of $20,000. The president was authorized to transfer the property to Flanner. Flanner was present, and voted blank, and one of the directors voted nay, on the motion to adopt the resolution. The deed was made to Flanner, and he went into possession of the property. On the first Monday in February, 1890, a new board of directors was elected, and at its first meeting, February 3, 1890, a resolution was adopted repudiating the action of the former board in selling the property to Flanner, the former director and vice-president of the board, and authorized a tender to be made to him in conformity to law, and, on his failure to retransfer said property to the company, suit should be instituted against him for the property. The tender was duly made, and Flanner refused to accept the same and retransfer the property. This suit was then instituted to avoid the sale to Flanner as illegal, and avoidable, as an unfair and suspicious transfer of property by a trustee to himself, he being one of the board of directors who derived pecuniary, substantial advantage therefrom. On the 17th May, 1890, the New Orleans Brewing Association purchased all the property and assets of the Crescent City Brewing Company. The property in controversy was conveyed, among the other assets, with a recital of the pendency of this suit for its recovery; and the New Orleans Brewing Association was authorized to have itself recognized as party plaintiff therein, to carry on the suit at its own expense and for its own account to final termination. It appeared in court, and was subrogated, and entered of record as plaintiff. The corporation acted within a reasonable time in the institution of this suit to set aside the sale. The first board of directors, elected after the sale occurred, at its first meeting, repudiated the sale, and authorized this suit. It does not appear that any meeting of the shareholders had been called, and this sale submitted to them for ratification, nor does it appear

[1] Rehearing denied, January 4, 1892.

that they had any notice of the transaction.

In a case similar to the instant one, where the relations of the parties gave rise to suspicions, this court, in the case of Hancock v. Holbrook, 40 La. Ann. 53, 3 South. Rep. 351, announced the principle of law which should govern, as follows: "As a strictly legal question, the right of a board of directors of a corporation to apply its property to the payment of its debts, and the right of the majority of the stockholders present at a meeting called for the purpose to ratify such action and to dissolve the corporation, cannot be questioned. But when such action is taken at the instance and through the influence of the president of the corporation, and when the debt to which the property is applied is one for which he is himself primarily liable, and especially when he acquires in his personal right the property thus disposed of, such circumstances undoubtedly subject his acts to severe scrutiny, and oblige him to establish that he acted with the utmost candor and fair dealing, for the interest of the corporation, and without taint of selfish motive. Oil Co. v. Marbury, 91 U. S. 590." And to the same effect is the doctrine in Morawetz on Private Corporations, (volume 1, § 527,) which says: "But a transaction between a director and a corporation, even if the latter was represented by a majority of the board, will always be scrutinized by the courts with strictness, and will be set aside at the suit of the corporation upon proof of the slightest unfairness or imposition practiced upon it. A director will not be allowed to obtain any advantage over the corporation of which he is agent, through his position, on the information which he has obtained of the affairs of the corporation, or his influence over his co-directors." The circumstances attending the sale were of that character which will not bear the above test. It is alleged in the resolution which authorized the sale that it was idle property. The defense is that the sale was a necessity, as the affairs of the company were in a desperate condition, and it was necessary to sell the property in order to raise money to complete the brewery building. The property was purchased for the use of the brewery,—is an absolute requirement to its successful operation. It was necessary to have a separate lot from the one on which the brewery building was located, under the United States revenue laws, for a bottling establishment. This is made certain by the fact that, after the property was purchased by Flanner, he leased a part of it to the company, from which he had purchased it, for the very purpose for which it had been originally bought. That he thought it would be necessary for the company to repurchase it, is apparent from the declaration that he would resell to the company on reimbursement of the purchase price. This declaration he afterwards affirmed under oath in the proceedings in the United States court, in the matter of the application for the appointment of a receiver. The sale therefore was not advantageous to the company, but, on the contrary, was an obstacle—an embarrassment—to the successful operation of the brewery. The sale does not seem to have been an imperative necessity. The outstanding subscriptions for stock had not been collected, and there were bonds of the company unsold. But in this desperate condition of the company, before the sale of any property which was essential for its success, the stockholders should have been convened, and their interest consulted. The record shows that the wreck of the company was through the fault and mismanagement of the board of directors who sold the property to one of its members. This is the judicial admission made by the board in the matter of the appointment of the receiver in the United States court. It is said that this was only a *pro forma* admission for the purpose of having a receiver appointed, but it is nevertheless the solemn judicial admission of the board of directors. It would be the grossest injustice to the stockholders, and against the soundest principles of public policy, to permit a board of directors, to whom the offices of the corporation have been committed, under the plea of the necessity to pay the debts rendered necessary by their mismanagement, to sell the property of the corporation, and to become the purchasers. The sale was not made in open and fair market, but by agreement among the directors. Several persons were asked to purchase the property. But in a large commercial city it would be unreasonable to suppose that the directors could by private inquiry exhaust the list of buyers. It would have been prudent, at least, to have fixed a minimum price on the property, and offered it to the public through the usual channels for selling city property. There were several auctioneers consulted, but it seems their advice was solicited more in the interest of protecting the purchaser than fixing a just price on the property. That Flanner bought the property for his own interest and advantage, with a view of its speculative value, is, we think, fully disclosed in the record. According to his own statement, he sacrificed in securities more than $3,000 to raise the cash to pay for the property. Subsequent events proved it a profitable investment. He refused, in accordance with his own sworn declaration, to retransfer the property to the company; and the lease of the property to the brewery, and his estimated value of $10,000 on a part of it show that the company lost by the sale. We do not reflect upon the motives of the directors nor of the purchaser. They had no intention of committing a fraud upon the stockholders, and no actual "fraud" has been committed, within the ordinary meaning of the word. They undoubtedly thought they were at the time acting for and in the interest of the corporation, in the desperate condition of its affairs, and the sale of the property, under the circumstances, would be justified. They took the advice of their attorney, who advised the sale. But the corporation suffered an injury, nevertheless, and the relations of the parties were such that the law will not permit the

slightest advantage to appear against the corporation of which the purchaser is a director. Such acts are held constructively fraudulent and voidable, at the election of the principal. Judgment affirmed.

(44 La. Ann. 28)

FARELLY v. METAIRIE CEMETERY ASS'N *et al.* (No. 10,765.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 44 La. Ann.)[1]

CEMETERIES—POWERS OF OFFICERS—LIMITING INTERMENTS—INJUNCTION—PARTIES.

1. The acts of defendants, intrusted with enforcing rules and regulations of an association, do not bind them so as to prevent them from recognizing changes that may have taken place since the title-deeds were issued to lots in its cemetery.

2. They have the right to limit all interments in lots to the members of the family owning lots, and their relatives.

3. The plaintiff not having been placed in charge of the property, it having been placed by the testatrix in charge of another, she cannot recover judgment.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Injunction by Kate Farelly against the Metairie Cemetery Association and others to restrain them from placing the remains of a deceased person in a certain tomb. Judgment for defendants dissolving the injunction. Plaintiff's application for a new trial was overruled, and she appeals. Affirmed. Rehearing refused.

Aug. Bernau, for appellant. *Gus. A. Breaux* and *Charles B. Stafford*, for appellees.

BREAUX, J. Mrs. Kate Farelly, the plaintiff and appellant, was granted a writ of injunction against the Metairie Cemetery Association; also against the sexton of the cemetery, and against the sisters of St. Mary's Catholic Boys' Orphan Asylum. In her original petition she alleged that she is the sole heir of Mrs. Mary Burke, her late aunt, who was the owner of a tomb in Metairie cemetery, which by the will was left in charge of the sisters of the asylum before mentioned, for the burial of the members of her family; that the defendant had given authority to bury in this tomb a deceased person not related to her family, and that his remains would be placed therein unless defendants are enjoined. In a supplemental petition she alleged error in her original petition in having alleged that she is the sole heir, there being other heirs and legatees. There was no objection made during the trial to this supplemental petition, not supported by affidavit or bond. It was placed at issue by answer, and is now properly part of the pleadings. In their answer the defendants aver that plaintiff is without title or interest in the tomb claimed by her; that it was paid for by Edward Burke, the deceased husband of the late Mary Burke, or by the executor of his will; that, if this tomb was a part of the property of the succession of the late Mary Burke, it was left by her will in the care and charge of the sisters of St. Mary's Catholic Boys' Orphan Asylum. The sisters of this asylum, having been joined in this answer with the other defendants, without their consent, and in error, presented a separate defense, in which they alleged that they are absolutely without interest, as the St. Mary's Catholic Boys' Orphan Asylum is a chartered institution, of which they are not the legal representatives. This asylum is represented by a board of directors. On the trial it was proven that Edward Burke died in June, 1880. His heir is a daughter,—Mrs. Goddin. By last will he appointed Augustine Burke his executor, and made him his residuary legatee. In September, 1880, 5 lots of ground, containing 360 superficial feet, were purchased for the sum of $500, and the title issued in the name of Mrs. E. Burke. Plaintiff's witness, the president of the association, testifies: "The title to lots in the cemetery is made out to the one to whom the party paying for them directs, and the appearance of the latter, as a party signing the deed of purchase, is not required." Another witness for plaintiff identified the lots in which the remains of Mrs. Burke now lie, and testified that the tomb is the Burke tomb. The secretary of the St. Mary's Boys' Asylum testifies that on reading Mrs. Burke's will they were informed that their board had charge of the tomb, but, as they had never been authoritatively placed in possession of the tomb, they never took any special steps in the premises. By him it was proven that application had been made to place the body of Mrs. Etherel Stafford, a niece of E. Burke, in the Burke tomb. He wrote in answer that the asylum could not raise any objection to the use of the tomb by actual relatives of Mrs. Burke. The plaintiff does not oppose the placing of the remains of Mrs. Stafford in the tomb. The contention arises in opposition to placing the remains of her husband, Etherel Stafford, in that tomb. A receipt was filed in evidence, showing that the executor of E. Burke's estate paid at one time $1,000 "on account of tomb built for the estate." The entire cost of the tomb, viz., $3,150, was paid for by the executor of that estate, with the written approval of Mrs. Burke and of Mrs. Goddin, his daughter. The executor filed a final account, which was opposed by his widow, in which she claimed to be refunded the amount paid by her for the lots. Mrs. Burke died in 1884. She bequeathed one-eighth of her property to the St. Mary's Boys' Asylum, and left the tomb in charge of that institution. The plaintiff also was one of her legatees. Plaintiff pleads the authenticity of the transfer to Mrs. Burke under sections 386 and 387 of the Revised Statutes, and that it cannot be defeated by parol. The defendant contends that under the rules and regulations of the association all interments in lots in the cemetery are restricted to the members and their relatives, and that it devolves upon them to enforce these rules and regulations. It is admitted that the sisters of St. Mary's Catholic Boys' Orphan Asylum were made parties in error, and that they are without any interest in the suit. Judgment was rendered in favor of defend-

[1] Rehearing refused, January 4, 1892.

ants, dissolving the writ of injunction. An application for a new trial was made and overruled.

The motion for a new trial relates that the copies of deeds issued to Mrs. Burke were not introduced in evidence, for the reason that they could not be found, as they were in the possession of the executor of Mrs. E. Burke's estate, who did not know that he had them. The plaintiff objected to a question to the president of the Metairie Association, propounded with reference to the entry in their books in the name of any individual, not necessarily showing ownership, on the ground that they are estopped by the recitals of the deed of sale, and parol evidence is not admissible. The first ground relating to estoppel will be hereafter considered. As to the second, the testimony, being verbal, will not be considered in determining the rights of the parties, in so far as it does not refer to facts testified to by the witness when he was examined in chief. This witness for plaintiff testified: "When a party comes in and pays for a title, we make out the title to whoever he directs. Of course we know no one except the party he names. If he takes another man's money, and he asks us to make the title in his name, we issue it in his name, as we would in any one else's." The record discloses that the title issued to Mrs. Burke. That the tomb was paid by the estate of the husband. It was intended as a family tomb by Mrs. Burke and the heirs of her husband. In this tomb their remains should rest undisturbed. They are protected by the rules and regulations of the Metairie Cemetery Association.

She bequeathed one-eighth of her property to the St. Mary's Boys' Asylum, from which a round sum was realized, and directed in her will that the constituted authorities of that asylum should have charge of the tomb. They have not been made parties to this suit, and have not in any manner taken part in this suit. The authentic character of the recital from the defendants' books, and of the title issued, are relied upon by the plaintiff. The defendant association is bound by these, and cannot be heard to deny any of its acts in matter of the issuance of this title. But if it be shown by competent evidence that Mrs. Burke was not the owner, the defendant company can take notice of the fact, and invoke its rules, maintaining the rights of members and their families. Changes may take place; transfers may be made; agents may have acted in their own names, and afterwards acknowledged the titles of their principals; the tomb may be owned by another than the owner of the land,—in all these possible occurrences the defendant company is not estopped from applying its rules so as to carry out the interest of the organization. The trust is important. The association should not be held estopped unless grounds are manifest and conclusive. If by her acts or declarations Mrs. Burke has conclusively shown the ownership in her husband's estate, this fact can be established at defendants' instance. If, as contended by the plaintiff, the evidence is parol, it cannot prevail against the title as issued. But, if by written evidence it be proven that the price was paid by the executor from the husband's estate, the plaintiff is without right of action. The tomb was paid for by the estate of the husband. The payment was made by the executor; not as a loan to Mrs. Burke, but in satisfaction of the price. This is proven by her signature. As to the lots, she filed an opposition, claiming the amount paid by her. Counsel for the defendants state this opposition has been maintained. There is no evidence of payment of record. The payment is not denied by plaintiff's counsel. As to this plaintiff, it is manifest that, whether Mrs. Burke has been paid or not, she is without right, for the tomb has been placed in charge of the St. Mary's Boys' Asylum. If the land is not paid, its value relative to the tomb is small, of which plaintiff would own only a fractional portion were her claim allowed.

In any event, be the interest what it may, Mrs. Burke has shown a regard for the memory of her husband which strongly appeals to the equity of the court. "Her remains are now near his." Her will, as expressed, should be respected, and the charge complied with by the St. Mary's Boys' Asylum, legatees and beneficiaries. With the consent of that authority the defendant association can act in matter of enforcing their said rules and regulations.

In her motion for a new trial plaintiff alleged diligence. Questions of diligence in procuring evidence are left in great part to the district court. The plaintiff's oath that another did not know that he had these title-deeds is not sufficient to entitle her to a new trial. She testified as a witness that they had been delivered to the executor, or were seen in his possession. He was not called upon during the trial to testify with reference to his possession of these titles. Our conclusions, as above expressed, do not make it necessary to amend the judgment appealed from.

Judgment affirmed at appellant's costs.

(44 La. Ann. 91)

SMITH *et al.* v. BOARD OF ASSESSORS *et al.*
(No. 10,881.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 44 La. Ann.)[1]

TAXATION—EXEMPTION OF MANUFACTURERS—TAXABLE PROPERTY.

1. A person engaged in the manufacture of harness and saddlery in the year 1890 was protected by constitutional exemption from taxation on the capital, machinery, and other property therein employed.

2. In case such manufacturer carries with his stock of manufactured goods a small assortment of other articles, not manufactured by him, but which constitute a necessary accessory to his business, the latter is taxable.

3. If such person has been once assessed, and has paid the tax on such taxable property, an additional assessment will be annulled, as one made on non-taxable property; the proof showing that the assessment made and paid covers the full value of the taxable values of the manufacturer.

(*Syllabus by the Court.*)

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[1] Rehearing denied, January 4, 1892.

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Suit by Smith & Boullemet against the board of assessors and others to have canceled and annulled a certain assessment. Judgment for plaintiffs. Defendants appeal. Affirmed.

Henry Renshaw, Asst. City Atty., and *Carleton Hunt*, City Atty., for board of assessors, appellants. *Wynne Rogers*, for state tax collector, appellant. *Henry P. Dart*, for appellees.

WATKINS, J. Plaintiffs, having been assessed in 1890, on "money loaned on interest, all credits, and all bills receivable, for money loaned or advanced, or for goods sold, $5,000," seek by this suit to have canceled and annulled said assessment, on the ground that the property assessed is such as is the product of materials by them "employed in the manufacture of * * * harness, saddlery," etc., and exempt from taxation under article 207 of the constitution; they being engaged in the business of manufacturing and selling saddles and harness in the city of New Orleans, and therein employing more than thirty-two (32) hands. They have an invested capital of about $60,000 in said business. Their contention is that they have no such property as that assessed save and except the "capital, machinery, and other property employed in the manufacture of saddles and harness," and the products and avails thereof, which is exempt from taxation under said article of the constitution, unless it be a small stock of goods they carry as a necessary adjunct of, and as accessory to, their business. This stock of goods consists of such articles as belt-hooks, belt-lacings, horse-brushes, curry-combs, lap dusters and robes, whips, whip-stocks, and the like. Those are non-manufactured goods, and are confessedly liable to taxation. But their statement is that they have submitted to and paid, upon an assessment of $10,000 valuation, for all those things, "although for ten years they have seldom had such an amount." They insist that the sales made of these articles are merely accidental, and not incidental to their business, and such sales constitute an infinitesimal part of their business; hence their "bills receivable and all credits" represent, in the main, the price of manufactured articles sold, and which are exempt from taxation. One of the plaintiffs swears that "of the sales of different items, exempt and not exempt, * * * to the best of [his] knowledge and belief, the tax on $10,000 that [he has paid] covers everything that Smith and Boullemet have, subject to taxation, [*i. e.*,] not exempt." The assessment of $5,000 that is assailed is additional to that of the $10,000 assessment, to which the witness refers. Plaintiffs' book-keeper shows that their bills receivable aggregated $4,132.37, and their open accounts about $40,000, equal to a total of $44,132.37. One-tenth of that sum is $4,413.23. This sum represents non-manufactured goods liable to taxation. But, inasmuch as plaintiffs have already paid on an assessment of $10,000, nothing is due on that score, and "the additional assessment of $5,000.00" is essentially a tax on exempt property, and consequently null. Of this the testimony clearly satisfies us, as it did our learned brother of the district court. Judgment affirmed.

(44 La. Ann. 103)

Succession of ANDRIEU. (No. 10,812.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 44 La. Ann.)[1]

DISCHARGE IN BANKRUPTCY—NEW PROMISE—CONSIDERATION—FRAUD—CLAIMS AGAINST SUCCESSION.

1. When a person has been discharged in bankrupt proceedings, and afterwards gives his note to a creditor for a claim on his schedule, the moral obligation to pay is a sufficient consideration for the note.

2. Where a person deals with another, who furnishes him supplies under an agreement to make monthly statements of the condition of his business, and he omits to place in said monthly statements a debt due his book-keeper, which was created before he became the employe, and which is in no way connected with the business, this is not such evidence of fraud on the part of said book keeper as to prevent his participation in the funds of the succession of the deceased employer equally with all the other ordinary creditors, including the merchant who furnished the supplies and to whom the monthly statements were made.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge.

Accounting by the succession of F. Andrieu, deceased. Rene Dumestre filed an opposition to the administrator's account, so far as such account related to the claim of P. Thormaehlen as a creditor of deceased. Thormaehlen also opposed the claim of Dumestre. Decree ordering that Dumestre's claim be allowed, but not to conflict with the claim of Thormaehlen. Dumestre appeals. Modified.

Aug. Bernau, for appellant. *Buck, Dinkelspiel & Hart*, for appellee administrator. *E. J. Wenck*, for appellee P. Thormaehlen.

MCENERY, J. The administrator of the succession of F. Andrieu filed his final account, without placing the claim of Rene Dumestre thereon. He filed an opposition to the account, opposing the account generally, but afterwards restricted his opposition to the claim of P. Thormaehlen, who was placed on the account as a creditor for the sum of $30,239.69. Thormaehlen also attacks the validity of the claim of Dumestre. Dumestre is the owner and holder of a note, executed by the deceased April 4, 1887, payable to his order 12 months after date, for the sum of $2,636.76, with 8 per cent. interest thereon. Andrieu, previous to his discharge in bankruptcy, owed the opponent a certain sum of money. The amount was placed on his schedule, and the opponent voted for his discharge. After his discharge, Andrieu gave Dumestre his note for the amount, and renewed the same from time to time, the last renewal note, with accumulated interest, being the one now held by Dumestre, and upon which his opposition is founded. There is no doubt of the execution of the note by Andrieu. The moral obligation resting upon him to pay the note was a

[1] Rehearing refused January 4, 1892.

sufficient foundation for the new promise to pay, and the consideration of the note. It is therefore a valid claim against the succession. Thormaehlen started Andrieu in the shoe factory business many years ago. He entered into an agreement with the deceased, Audrieu, that he should purchase supplies only from him, and that Andrieu was to furnish him monthly statements as to the condition of his business. Dumestre, during the existence of this agreement, became the book-keeper for Andrieu. In the monthly statement furnished Thormaehlen the note of Dumestre was omitted. Dumestre states that this omission was in consequence of instructions from his employer, who told him, if the note appeared in the statements, it would cause Thormaehlen to break him up. The fact of the omission of the note from the monthly statement is urged by Thormaehlen as a reason why Dumestre should not be allowed to participate in the funds of the succession to his injury. The decree of the lower court took this view of the case presented by Thormaehlen, and ordered that Dumestre's claim be allowed, but not to conflict with the claim of Thormaehlen. From the statements in the record as to the agreement, we infer it related exclusively to the factory business conducted by the deceased, Andrieu. In the monthly statements there are some items for house rent, clothing, and some other outside transactions, but they seem to be exceptional, and were paid from funds derived from the business, and entered in the cash-book. Dumestre's note was an outside transaction, and had no reference to Andrieu's business. There was no reason why it should have appeared in the accounts of the factory business. It does not appear that Thormaehlen required any statement as to Andrieu's outside indebtedness. It is in proof that Andrieu did purchase from other parties, to which violation of his agreement it does not seem that Thormaehlen made any opposition. The monthly statement showed that Andrieu was insolvent from the time he was furnished with materials by Thormaehlen until his death. Dumestre, when he was unemployed by Andrieu, was the creditor of the deceased. He was the creditor and holder of a note which had been afterwards renewed when Thormaehlen was furnishing Andrieu. He became his clerk, and, by direction of his employer, omitted to place the note on the monthly accounts. It had not been placed there before he became the clerk and book-keeper of Andrieu. Had the indebtedness of Andrieu to Dumestre been disclosed in the monthly accounts, and Thormaehlen had proceeded against his debtor Andrieu, he would have been in no better condition than at the time of Andrieu's death. The indebtedness of Andrieu to him kept at pretty much the same figures during their business engagement. The claim of Dumestre being a legal and valid one against the succession, there is no law which provides for giving Thormaehlen's debt a privilege prior to it. They are both ordinary claims. Dumestre did not intentionally deceive Thormaehlen, and we can see no reason why his debt should not share equally with that of Thormaehlen, both being ordinary claims against the succession. Four of the notes held by Thormaehlen were executed by Andrieu's son during his father's absence. These notes were given to balance accounts, and were for goods already sold and delivered to Andrieu The accounts are fully proved, and the claim of Thormaehlen is a just one. It does not rest exclusively on the notes for the evidence of the indebtedness. It is ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, so far as it directs the payment of the claim of the opponent, Dumestre, after the satisfaction of the claim of Thormaehlen; and it is now ordered that the claim of Dumestre be paid proportionally and equally with all ordinary claims in the distribution of the funds in the succession of F. Andrieu. In other respects the judgment is affirmed, appellees to pay costs of appeal.

(44 La. Ann. 54)

CANAL & C. R. Co. v. ORLEANS R. Co. (No. 10,887.)

(*Supreme Court of Louisiana.* Dec. 14, 1891. 44 La. Ann.)[1]

STREET RAILWAY — USE OF ANOTHER'S TRACKS — COMPENSATION—EXPROPRIATION—PROCEDURE.

1. A street-railway company which is authorized by the city of New Orleans to enter upon the tracks of another must, before doing so, make compensation to that company.

2. The material in place is the private property of the company occupying the street; and, in the absence of any agreement, it must be expropriated to public uses like any other private property.

3. When the city ordinances provide the mode of compensation, and the two corporations are within the limits of the same franchise, the ordinances will control the mode to be pursued in reference to fixing the compensation, as the corporations accept their franchises with reference to said ordinances.

4. But the city ordinances cannot arbitrarily fix the amount of compensation.

5. There is no limitation in the ordinances of the city of New Orleans which prevents the street-railway companies from contracting with reference to the amount due for the use of tracks.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Suit by the Canal & Claiborne Railroad Company against the Orleans Railroad Company to recover on a contract. Judgment for plaintiff. Defendant appeals. Modified.

Chrétien & Suthon and *Frank N. Butler*, for appellant. *B. R. Beckwith*, for appellee.

MCENERY, J. The plaintiff sues the defendant for $2,800 on the following contract: "Be it known, on the sixth day of August, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States of America the ninety-fifth, before me, William Joseph Castell, a notary public in and for the parish of Orleans, state of Louisiana, duly commissioned and qualified, and in presence of the witnesses hereinafter named and undersigned, personally

[1] Rehearing denied, January 4, 1892.

came and appeared Bertrand Saloy, Esqr., herein acting in his quality of president of the Orleans Railroad Company, and under and by virtue of a resolution of the board of directors adopted at their sitting on the 18th of July, 1870, a duly-certified copy of which resolution is hereto annexed, and made part hereof, of the first part, and Edward S. Wurzburger, Esqr., herein acting in his quality of acting president of the Canal and Claiborne Streets Railroad Company, and John G. Campbell, Esqr., herein acting in his quality of secretary of said Canal and Claiborne Streets Railroad Company, and under and by virtue of a resolution of the board of directors of said company adopted at their sitting of the first day of August, 1870, a duly-certified copy of which resolution is also hereto annexed, and made part hereof, of the second part, of this city. Which appearers declared that, acting as aforesaid, and in accordance with Ordinance No. 810, article 878, approved December 24th, 1867, and Ordinance No. 1443, approved May 11th, 1869, all new series of the common council of the city of New Orleans, they do by these presents bind their respective companies or corporations, their administrators and assigns, as follows: (1) That the said Orleans Railroad Company, party of the first part, shall pay to the Canal and Claiborne Streets Railroad Company, party of the second part, four (4) cents per mile for each and every mile traveled by each and every car belonging to or run by the said party of the first part on the track or trunk road from Drayades street to St. Charles street, on the upper side of Canal street, and on the lower side of Canal street from Royal to Dauphine street; the tracks on Canal street being left free and unobstructed. (2) The said Canal and Claiborne Streets Railroad Company, party of the second part, shall keep its roads, such as they now exist, on the upper side of Canal street, from Drayades to St. Charles streets, and on the lower side of Canal street, from Royal to Dauphine streets, in good order and repair. (3) That the said Orleans Railroad Company, party of the first part, shall put in and keep in good order during the time, or as long as they may use them, all necessary switches, inlets, and outlets, that may be requisite to connect their different roads with the trunk road on Canal street, and shall also put in good order and running gear such portions of the trunk road that may be necessarily disturbed to make the said connections; and said party of the first part shall furnish and pay for all switch-tending and other labor that shall be necessary in running their cars on, over, and off the trunk road on the upper and lower side of Canal street. (4) That the said Orleans Railroad Company, party of the first part, shall make monthly returns to the Canal and Claiborne Streets Railroad Company, party of the second part, of the number of cars and miles run over the trunk road on Canal street, from which returns settlements shall be made monthly; said returns to be certified by the president and secretary of said Orleans Railroad Company. (5) That the said Canal and Claiborne Streets Railroad Company shall not be responsible for any accidents to persons or damages to property arising from the carelessness or negligence of the employes of said Orleans Street Railroad Company, while running their cars on the trunk road on the upper and lower side of Canal street as aforesaid; but said party of the second part shall be responsible for all accidents or damages which may be caused by the dilapidated or bad condition of said trunk road. (6) That nothing in this contract or agreement shall be construed as preventing or to prevent the said Canal and Claiborne Streets Railroad Company from negotiating with other companies for running their cars on said trunk road on Canal street: provided the same shall not interfere with the rights of said party of the first part, and the free passage of travel of their cars on the trunk road on the upper side of Canal street, from Drayades to St. Charles streets, and on the lower side of Canal street, from Royal to Dauphine streets, as aforesaid, under this agreement or contract. (7) That this agreement shall last during the term of the charters granted to the said respective corporations or of any extension of said charters."

The right of plaintiff to recover depends upon the validity of this contract. The power to regulate and control the public streets of the city of New Orleans is lodged in the municipal authority. The object of the legislature in conferring this power, and its exercise by the city government, are to serve the public welfare and convenience. The establishment of street railroads is one of the most important modes of promoting the welfare and convenience of the citizens of New Orleans. We have held that the council of the city of New Orleans is without power to grant the exclusive use of a street which belongs to the public to a railway company. Canal & C. St. R. Co. v. Crescent City R. Co., 41 La. Ann. 561, 6 South. Rep. 849. But the street-railway company which is authorized to enter upon the tracks of another, within the limits of the franchise of both companies, must make compensation to that company for the use and wear of the tracks. The street-railway company over whose tracks another company enters does not lose its right of private property in the material of which the road is constructed. The material in place is the private property of the corporation. When, therefore, a right of way for street-railway purposes is granted over the same route to another company, it cannot be appropriated by the latter company until compensation is first made to the former company. Kinsman St. R. Co. v. Broadway & N. St. R. Co., 36 Ohio St. 252; Metropolitan R. Co. v. Highland Ry. Co., 118 Mass. 291. If there is no agreement between the corporations as to the amount of compensation, it must be fixed as in other cases of the condemnation of private property to public uses.

Both corporations were organized and operated with reference to Ordinance 1204, New Series. Section 4 of said ordinance is as follows: "Should the city of New

Orleans, at any time during the existence of the contract of the 6th of May, 1867, between it and the Canal and Claiborne Streets Railroad Company, enter into an arrangement with other companies whereby said road on Canal street, from Claiborne street to Front Levee street, and from Front Levee street to Claiborne street or any part thereof, may be granted, the city of New Orleans, or the road or roads to which the privilege may be granted, shall reimburse to the Canal and Claiborne Streets Railroad Company a fair and reasonable proportion of the value of the portion or portions of the road to be so used; and should such proportion not be agreed upon between said Canal and Claiborne Streets Railroad Company and the city of New Orleans, or the said road or roads, two disinterested persons shall be appointed,—one by the city of New Orleans, or the road or roads, as the case may be, and the other by the Canal and Claiborne Streets Railroad Company; and in the event of a disagreement, as to said proportion to be paid, between said persons thus appointed, a third person or umpire shall be appointed by the judge of one of the district courts of the parish of Orleans, and the decision thereby had shall be final and binding." This section was repealed in 1882. But, in the absence of any agreement, it would be binding upon the two corporations, as they were incorporated with reference to its provisions. Kinsman St. R. Co. v. Broadway & N. St. R. Co., 36 Ohio St. 239. There is nothing in said ordinance which prevented the Canal & Claiborne Streets Railroad Company and the defendant from fixing by contract the compensation due the former corporation for the use of its tracks and road-bed. There are no limitations in the ordinance as to the amount of compensation; and, if there were, we would be inclined to consider them unconstitutional, as being in violation of the rights of private property.

The defendant contends that, if the contract was legal and valid in its inception, it expired by limitation; the plaintiff's contract with the city for its franchise having expired in May, 1887. After the expiration of its contract with the city for the franchise, the Canal & Claiborne Streets Railroad Company, in pursuance of the advertisement of the city of New Orleans, purchased the franchise, and there was a new contract made between the city and said corporation. The corporation still existed, and as such, through its president, made the contract with the city. The contract between the Canal & Claiborne Streets Railroad Company and defendant was to continue during the existence of their charters; and it is a reasonable construction of the agreement that it was to last as long as the former or its assignee owned the material of the road, and the defendant occupied and used it. After the purchase of the right of way over a part of which defendant ran its cars, there was another corporation organized, the Canal & Claiborne Railroad Company, the present plaintiff. It was organized for the purpose of purchasing the material and right of way of the Canal & Claiborne Streets Railroad Company, and in pursuance of its act of incorporation did purchase all of said material and the right of way and franchises of said corporation. This transaction, defendant urges, destroyed the contract made with the first corporation. The obligation resulting from the contract between the two corporations is a real obligation, as it is a contract relative to immovable property, and passed with the property. Civil Code, art. 2011. As we have stated, the contract was for the use of the road of the Canal & Claiborne Streets Railroad Company. It is immaterial who owns the property. It owns the servitude during the existence of the defendant company; and this company, under the agreement, must pay the amount stipulated to the assigns of the first corporation. It is so stipulated in the contract, in the following words: "They do by these presents bind their respective companies or corporations, their administrators and assigns."

There is a clerical error in the title of the suit made by the clerk of the lower court, styling the plaintiff the Canal & Claiborne Streets Railroad Company. The judgment is amended so as to give the case its proper title,—The Canal & Claiborne Railroad Company v. The Orleans Railroad Company. The amendment not changing the substance of the judgment in any way, it will not carry the costs with it. As thus amended, the judgment is affirmed.

(94 Ala. 514)

BALDWIN v. WALKER.

(*Supreme Court of Alabama.* Dec. 16, 1891.)

WRONGFUL ATTACHMENT—EVIDENCE—DAMAGES—ATTORNEY'S FEES.

1. Plaintiff's property was attached on the ground that she was about to leave the state. She sued defendant as surety on the attachment bond. A cross-interrogatory in a deposition by plaintiff was, in effect, as follows: Did you offer your house for sale, and tell several parties that you intended going to Pennsylvania to live? "Tell all about it." She answered: "I did offer my house for sale, and spoke to several of going to Pennsylvania to visit my mother, but not about going there to reside. I told parties that I wanted to sell my house in order to provide a smaller one." *Held*, that the answer was responsive.

2. Plaintiff's answer that she had told several persons that she expected to end her days at her home in Alabama was not responsive to the interrogatory.

3. The statement of a witness that he knew that plaintiff was not about to leave the state was a mere opinion, and should have been excluded.

4. Where evidence was admitted, without plaintiff's objection, that she did leave the state in the summer of 1888, it was competent for plaintiff to rebut such evidence by showing that it was her habit to leave on a visit every summer.

5. Where plaintiff testified that her interview with one R. relative to a sale of her house was prior to the attachment, and R. testified that it was subsequent, the question as to when it occurred should have been submitted to the jury, with instructions not to consider plaintiff's statements to R. as evidence against her, if not made until after the attachment.

6. Where plaintiff employed an attorney to defend an attachment against her house and lot, which were not sold under the attachment, and of which she was not dispossessed, she cannot recover, as damages, in an action for wrongful attachment, the amount paid by her as attorneys' fees.

7. Defendant requested a charge that if the attaching creditors' agent, before making the levy, consulted an attorney as to whether there was ground for attaching, and informed such attorney of all the facts, and was advised by him to make the attachment, plaintiff could not recover vindictive damages. *Held*, that the request was defective in excluding all inquiry as to the agent's diligence in ascertaining the truth of such facts, and as to his good faith in acting on the advice of the attorney.

8. Though the property was derived by plaintiff through the will of her husband, and was liable for his debts, yet she had a right to sell it subject to such liability, and could be injured by a wrongful levy of attachment thereon.

9. Where the attachment was wrongful and without probable cause, and after levy was made the attaching creditors were informed of all that had been done by such agent, and ratified his conduct, they would be liable for vindictive damages.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Action by Ida S. C. Walker against A. M. Baldwin to recover damages for the breach of an attachment bond on which defendant was surety. Judgment for plaintiff for $375. Defendant appeals. Reversed. For former report and statement of the case, see 8 South. Rep. 365.

The depositions by the plaintiff had been taken and were read in evidence to the jury. The second cross-interrogatory was as follows: "Did you before the 29th day of March, 1888, offer said house, in which you then resided, for sale? State if you did not state to several parties before the 29th day of March, 1888, or about that time, that you desired to sell your house for the purpose of moving to Philadelphia, or elsewhere out of the state of Alabama. Did you not talk to any person about that time about your going to Philadelphia to reside? Did you not say to one or more parties that it was your intention to go to Philadelphia? Tell all about it." The plaintiff's answer to said cross-interrogatory was in the following language: "I did offer my house for sale prior to March 29, 1888. I spoke to several of going to Philadelphia to visit my mother. I did not talk to any person of going to Philadelphia to reside there. Montgomery has been my home for 18 years. My children have had no other home, and my husband's remains are buried here. All else I can say is while my husband's relatives reside in Philadelphia, and wanted his remains brought there, I brought him here. I have said to many that I did expect to end my days in Montgomery. I never told any person or party that it was my intention to go to Philadelphia to live. I did tell parties that I wanted to sell my house in order to provide a smaller one." The defendant moved to exclude the answer of the plaintiff to this cross-interrogatory, but the court overruled his motion, and the defendant duly excepted. The witness Wharton testified that "he knew the plaintiff was not about to move out of the state on March 29, 1888." The defendant objected to this answer, and moved to exclude it. The court said that this answer would be excluded, unless the witness stated the facts by which he knew it. Upon the witness' being asked to state the facts upon which his knowledge was predicated, he said that "he and his family were boarding with them. He saw her making no preparations to move; nothing was packed up; she said nothing to us about moving." The defendant then moved to exclude the statements of Wharton that he knew plaintiff was not about to move out of the state on March 29, 1888; which motion the court overruled, and the defendant excepted. In connection with this testimony, the witness Wharton further stated that the plaintiff was in the habit of going away every summer from Montgomery on a visit. The defendant then moved to exclude this last statement, but the court overruled his motion, and the defendant thereupon duly excepted. The defendant then introduced as a witness John D. Roquemore, who testified that he went to the house of the plaintiff with the view of purchasing said plaintiff's house and lot; that the plaintiff offered to sell him her house and lot and her furniture with it; that she stated to him that she wished to sell her house and lot and go to Philadelphia, saying that either her husband's relatives or her own resided there. This witness testified, first, that the above conversation occurred before March 29, 1888, the day on which the attachments were sued out; but, upon refreshing his memory, he afterwards testified that the conversation took place within about 10 days before June 3, 1888. The plaintiff proved that she had employed an attorney to defend her in the attachment suit, and proved what was the value of his services. There was no evidence that the plaintiff was ever dispossessed of her said house and lot by the said writ of attachment, or that it had been sold under judgment in the attachment suit. The defendant reserved a separate exception to the court's refusal to give each of the following charges requested by him: (1) "If the jury believe from the evidence that Crane, as agent of the Empire Paper-Bag Company, before suing out the attachment consulted a reputable attorney as to whether there was ground for suing out the attachment, and informed such attorney of all the facts in his possession, and such attorney advised him to sue out the attachment, then the jury should not give vindictive damages in this case." (2) "If the jury believe from the evidence that the plaintiff derived the property levied on under the writ of attachment in this case through the will of her late husband, and that his estate was indebted and unsettled at the time said writ was sued out, then she had no right to sell said property at that time, and was not injured by the levy of said writ on said property." (3) "Vindictive damages cannot be recovered against sureties on an attachment bond when the attachment was sued out by an agent for the principal in said attachment. When so sued out, actual damages only, in any event, can be recovered." (4) "If the jury believe from the evidence that Crane was the agent of the Empire Paper-Bag Company in the collection of their debt against plaintiff, and that said Crane maliciously sued out the attachment in this case, such

malice affords no ground for a recovery of vindictive damages in this case, unless it is shown that one of the partners who at the time the attachment was sued out composed the firm of the Empire Paper-Bag Company participated in the malice of said Crane." (5) "If the jury believe from the evidence that the Empire Paper-Bag Company intrusted its claim against the plaintiff for collection to Crane, and Crane consulted a reputable attorney as to what course to pursue, and that attorney advised him to take out an attachment, and that his principals provided him with security to enable him to sue out the attachment upon a telegram from said attorney, and that he had no communication with his principal until the attachment was sued out, and there is no evidence that his principals were informed of the grounds upon which the attachment was sued out, and they were not informed of any malice or vexatious conduct on the part of Crane, then the jury cannot give vindictive damages against the defendant." (6) "If the jury believe from the evidence that the attachment was not maliciously sued out, and was wrongfully sued out, they cannot find for the defendant any damages which she has not shown to have sustained to her property, except nominal damages." (7) "That the malice of Crane, if any, in suing out the attachment in this case as agent of the Empire Paper-Bag Company, cannot be considered by the jury in estimating vindictive damages." (8) "Although the attachment may have been wrongfully sued out, the plaintiff is not entitled to recover any counsel fees incurred in defending the attachment suit, unless she had some defense against the writ of attachment, as against the debt upon which it was founded." (9) "Counsel fees incurred in defending an attachment suit against which the defendant has no defense are not recoverable in this action." (10) "The plaintiff is not entitled to recover any counsel fees incurred in the defense of the attachment suit of the Empire Paper-Bag Company against her." (11) "If the jury believe from the evidence that the attachment was wrongfully sued out, they should not find anything for the plaintiff on account of counsel fees incurred in the defense of the attachment suit, unless the evidence showed that it was necessary to employ counsel to defend that suit."

Arrington & Graham, for appellant. *A. A. Wiley* and *W. S. Thorington*, for appellee.

WALKER, J. A party is in no position to complain of statements of fact called out by his own questions. The defendant's comprehensive request in his second cross-interrogatory, that the plaintiff "tell all about it," justified the plaintiff in giving her own version of the matter inquired about. Most of her answer was fairly responsive to the question. It was unobjectionable, so far as it was a statement of facts pertinent to the matter of inquiry.

But the plaintiff's statement as to what she had said to others about ending her days in Montgomery was not responsive to the interrogatory. They were mere expressions of intention made before the attachment was sued out. The rule against the admissibility of such declarations in a party's own behalf was stated in the opinion in this case on the former appeal. Baldwin v. Walker, 91 Ala. 428, 8 South. Rep. 365. The defendant's motion to exclude that part of the answer to the second cross-interrogatory should have been granted.

The witness Wharton stated that he knew that the plaintiff was not about to remove out of the state on the 29th of March, 1888. This could have been no more than the opinion or conclusion of the witness, drawn by him from the facts. It is for the jury to deduce such conclusions from the facts proved before them. The verdict should not be merely the echo of the opinions or inferences of witnesses, and such evidence should be excluded. 3 Brick. Dig. p. 436, § 436 et seq.

Evidence was admitted, without objection, that the plaintiff did leave the state in the summer of 1888. It might be contended for the defendant that this was in pursuance of a purpose, entertained by the plaintiff before the suing out of the attachment, to remove from the state. It was competent to rebut such evidence by showing that it was plaintiff's habit to leave Montgomery on a visit every summer. The proof of such a habit would tend to explain a fact which might otherwise be treated by the jury as evidence of a permanent removal. When the question is whether or not a person was about to remove from a place at a certain time, it is plain that his actually leaving such place a few months thereafter would have less weight, as evidence of a permanent removal, if he had frequently gone off on a visit at that season of the year, than if his going away was an unusual occurrence.

The testimony of the plaintiff tended to show that her interview with the witness Roquemore in regard to the sale of her house was prior to the suing out of the attachment. Though that witness himself stated that the conversation to which he testified was had at a date subsequent to the issue of the attachment, yet, as the evidence as to the date of the interview was conflicting, the question as to when it occurred should have been submitted to the jury, with instructions not to consider the plaintiff's statements to the witness Roquemore as evidence against her, if their conclusion from the evidence was that such statements had not been made until after the attachment had been sued out. As there was evidence tending to show that the statements of the plaintiff to the witness Roquemore were admissible against her as having been made prior to the date of the attachment, it was error to exclude the testimony of that witness.

A defendant in an attachment suit may employ an attorney to look after his interests, and to see that his rights are properly guarded, even though no issue can be made in that case as to the existence of the ground of attachment, though no defense can be made to the claim sued on, and though no ground for quashing the attachment may exist. It is not un-

reasonable for one whose property has been seized under legal process to employ counsel to protect it as far as the law may justify, though there may be no possibility of defeating the proceeding. The question of the propriety of incurring such expense does not depend upon the defendant's ability to make a successful defense. One whose property is in the clutches of the law may seek professional aid to secure whatever measure of protection the law may afford. Though it may not be necessary or proper to undertake a defense of the suit, the defendant may still have counsel to watch its progress, and to see that no undue advantage is taken of him. If property is involved in the suit as a result of a wrongful levy of process upon it, the necessary expense of employing counsel to secure its protection, so far as the law permits, may, in the opinion of the writer, be regarded as a natural consequence of the wrong. I think that reasonable and necessary counsel fees paid or incurred for such services as could properly be and were in fact rendered by the attorney in looking after the attachment for the defendant are recoverable as damages in a suit on the attachment bond, if the attachment was merely wrongful, or was wrongful and malicious, (Flournoy v. Lyon, 70 Ala. 308; Dothard v. Sheid, 69 Ala. 135; Seay v. Greenwood, 21 Ala. 491; Marshall v. Betner, 17 Ala. 832;) and that there was no error in admitting evidence tending to show the employment of an attorney in the attachment suit, or in refusing to give charges 6, 8, 9, 10, and 11 requested by the defendant. Of course, in estimating the value of the professional services rendered, due regard should be had to the circumstance that no defense was made, and that nothing more could be done than to guard the rights of a losing party. The majority of the court, however, hold that on the evidence in this case the plaintiff is not entitled to recover damages on account of the attorney's fees.

Without noticing all the defects in the several other charges requested by the defendant, the refusal of the court to give them may be justified on the following grounds, respectively: Charge 1 was defective in pretermitting all inquiry as to whether the agent was diligent to ascertain the truth of the facts laid before counsel, and as to his good faith in acting on the advice when given. Steed v. Knowles, 79 Ala. 446. Charge 2 was incorrect in asserting that the plaintiff had no right to sell the property, and could not be injured by a levy made upon it, because her title to it was derived through the will of her husband, and it was liable for his debts. If the title was in her, she could sell the property subject to the liability for the debts of the decedent. Charge 3 asserts that when an attachment is sued out by an agent actual damages only can be recovered, in any event. If the attachment was wrongful, and was sued out without probable cause, and the principal, with full knowledge, ratified the act of the agent, then the recovery was not limited to actual damages. Baldwin v. Walker, 91 Ala. 428, 8 South. Rep. 365. This charge ignored the question of ratification and the evidence on that subject, as do also charges 4, 5, and 7. On the last trial there was evidence tending to show that, after the attachment was sued out, the principals were fully informed of all that was done by the agent in reference thereto, and of the grounds upon which he acted, and that they ratified his conduct. In this respect the case presents a different aspect from that presented when it was in this court on the former appeal. For the errors above noted the judgment must be reversed, and the cause remanded.

(95 Ala. 101)

LEVY *et al.* v. ALEXANDER *et al.*

(*Supreme Court of Alabama.* Dec. 18, 1891.)

PARTNERSHIP—WHEN RELATION EXISTS AS TO THIRD PARTIES—INSTRUCTIONS.

1. Plaintiff sued three persons as partners. One of the defendants denied that he was a partner, and offered a copy of the articles of copartnership to prove that he was not. The said copy recited that the agreement was between two of the defendants, who were to bear the expenses of the business, and to pay the other defendant a certain part of the net profits for the use of his store-room and influence, and for a loan of money, and that the remaining profits were to be divided between the two. Defendants testified that the original articles had been lost, and that the instrument offered was a true copy. Plaintiff testified that it was not a true copy, and that there were other provisions in the original. The court instructed that the articles as shown by the copy did not constitute the other defendant a partner. *Held*, that the instruction was not objectionable as excluding from the jury the consideration of any other evidence tending to show that he was a partner.

2. An instruction that if the said defendant was, "with knowledge and consent," held out to the public as a partner, he might be charged as a partner, was erroneous, in seeking to fasten liability upon him whether he was held out with his own knowledge and consent or not, and because there was no evidence that the claim sued on had been contracted upon the faith that he was a partner.

Appeal from circuit court, Marengo county; W. E. CLARKE, Judge.

This was an action of *assumpsit*, brought by A. G. Levy & Co. against D. C. Alexander & Co., for goods sold and delivered. The complaint alleged that the firm of Alexander & Co. was composed of D. C. Alexander, A. D. Alexander, and J. D. Alexander. J. D. Alexander interposed two pleas; the first being the general issue, and the second a denial of any interest as a partner in the firm of Alexander & Co. The plaintiffs introduced testimony tending to show that on October 1, 1885, the said D. C., A. D., and J. D. Alexander formed the said partnership; that the articles of the copartnership were placed with J. D. Alexander for safe-keeping; and that the copy of the said articles offered in evidence by the defendants was not, as claimed by them, a true copy. The plaintiffs' evidence further tended to show that the stipulations of the said copy were untrue, in that the agreement between the members of the firm was that the capital stock of the said firm should be $1,500; that each one of the three should contribute $500; that the profits should be divided equally, and the losses borne equally; and that, in compliance with said articles, J. D. Alexander was credited in the stock

account on the books with $500. The defendant J. D. Alexander introduced in evidence what he claimed to be a true copy of the original agreement between him and the said D. C. and A. D. Alexander, which was made Exhibit A to the bill of exceptions, and which was in the following language: "Articles of partnership between D. C. Alexander and A. D. Alexander in the mercantile business at Fairview, near Faunsdale, Alabama. (1) The capital stock of said firm is to be ($1,500.00) fifteen hundred dollars. (2) The said partners agree to pay equal amounts of the necessary expenses in carrying on said business. (3) It is further stipulated and agreed that the said partnership shall continue at the pleasure of the partners. (4) The said partners, D. C. Alexander and A. D. Alexander, agree and hereby promise to pay J. D. Alexander one-third of the net profits of the said mercantile business for the use of his store-house, trade, and influence, and for the loan of five hundred dollars, and more if he thinks it advisable. (5) It is further agreed and stipulated that the remaining two-thirds of the net profits shall be equally divided between the said partners, D. C. Alexander and A. D. Alexander, share and share alike. (6) It is further agreed and stipulated that neither partner shall draw any money from the partnership funds, nor contract any debt against the firm, without the consent of the other partner." The defendant introduced evidence tending to show that this was the true copy of said original agreement, and that he was in no way a partner of said firm, being connected therewith only as is shown by said articles of agreement. The plaintiffs excepted to a certain portion of the general charge given by the court, in which the court charged that the said articles of agreement, as shown by said Exhibit A, did not make J. D. Alexander a partner. The plaintiffs also separately excepted to the court's refusal to give the following written charges requested by them: "(1) If the jury believe from the evidence that Exhibit A is a copy of the articles of partnership of the firm of D. C. Alexander & Co., then J. D. Alexander, under said agreement, was a copartner in said partnership. (2) That, if the evidence shows that J. D. Alexander was, with knowledge and consent, held forth to the public as a partner in the firm of D. C. Alexander & Co., then he may be charged as a partner with the debt of the plaintiffs." There was judgment for defendants. Plaintiffs appeal. Affirmed.

G. B. Johnston, for appellants. *John C. Anderson, J. W. Bush, Pettus & Harwood*, and *G. W. Taylor*, for appellees.

COLEMAN, J. If J. D. Alexander was a party to the instrument offered in evidence, the argument of appellants to show that its terms are of such a character as to constitute him a partner in favor of creditors would be in point, and entitled to consideration. The construction of this instrument by the court did not exclude from the jury the consideration of other evidence, which tended to show that J. D. Alexander was a member of the firm of D. C. Alexander & Co. Neither was there any error in the charge of the court, which construed and declared the legal effect of the instrument offered in evidence as a copy of the original copartnership agreement. The testimony without dispute showed that the copartnership agreement was in writing, and that the original had been lost. The testimony of the defendants tended to show that Exhibit A was a true copy of the original agreement, and the testimony of the appellants (plaintiffs) tended to show that it was not, and that it had other provisions. The charge of the court was simply to the effect that Exhibit A, of itself, did not constitute J. D. Alexander a partner. Of the correctness of this charge there can be no doubt. Standing by itself, and construed alone, that agreement was no more binding upon J. D. Alexander than it was upon his counsel. As to him, it was strictly *res inter alios acta*, and, if there was no other understanding to bind J. D. Alexander as a partner, it could not be said in any sense that he was *inter sese*, a partner. The first charge requested by plaintiffs was properly refused.

Where one permits himself to be held out as a partner, and persons contract with the firm upon the supposed fact that he is a partner, he makes himself liable as such, whether in fact he be a partner or not; but if the evidence shows that credit was given to the partnership in ignorance of this fact, and not upon the supposition or faith that he was a partner, then no such liability arises. Fertilizer Co. v. Reynolds, 85 Ala. 23, 4 South. Rep. 639. The second charge asked by appellants, and refused by the court, is erroneous for two reasons: *First*. It seeks to fasten a liability upon J. D. Alexander, if he was held out to the public as a partner, whether it was done with his knowledge and consent, or without it. It must be done with his knowledge and consent to render him liable. *Second*. Because there is no evidence in the record to show that plaintiffs' debt was contracted upon the faith that he was a partner, or that such information was ever conveyed to plaintiffs until after their debt was contracted. We have seen that the credit must be given upon the faith that he was a partner. There is no error in the record. Affirmed.

(44 La. Ann. 11)

BURDEAU v. HIS CREDITORS. (No. 10,839.)

(*Supreme Court of Louisiana.* Nov. 30, 1891. 44 La. Ann.)[1]

INSOLVENCY — OPPOSITION TO DISCHARGE — FRAUD — EVIDENCE.

1. When the charge of fraud preferred against an insolvent is that, in certain transactions with certain of his creditors, he made unfair *dations en paiement* to them of his property, whereby he gave such creditors an undue advantage over the complaining creditor, and the effect of which was to injure such complainant, the *gravamen* of such charge is (1) intention on the part of the insolvent to defraud; and (2) injury to the complainant resulting therefrom.

2. The proof disclosing that the disposition made of his property by the insolvent resulted in his having received therefrom a cash surplus,

[1] Rehearing refused, January 4, 1892.

above the amount of the claims of the creditors who were paid, sufficient to satisfy the complainant's demand, *held* that, whatever may be the inference therefrom of fraudulent intent on the part of the insolvent, there is no resulting injury to the complainant.

3. There may have been a *consilium fraudis*, but no *eventus damni*.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Application of Charles K. Burdeau for a discharge in insolvency. Certain of his creditors filed opposition charging him with fraud, on which charge he was tried by jury and acquitted. From a final judgment in favor of Burdeau, opponents appeal. Affirmed.

Gurley & Mellen, for Marx Levy & Bro., appellants. *Geo. L. Bright*, for appellee.

WATKINS, J. Seeking the benefit of the insolvent laws of the state, Charles K. Burdeau made a cession of his property to his creditors, filed a schedule of his assets, accompanied with a list of his creditors, and obtained an order of the judge accepting same for the benefit of his creditors. At a meeting of the creditors of the insolvent, duly convoked, a majority in number and amount voted for his discharge; there being only four who voted against his discharge,—their debts aggregating $5,490.66, or about one-fifth of the aggregate of the claims of those voting for a discharge. Of those voting against a discharge was the firm of Marx Levy & Bro., whose claim amounted to $3,526.61, who filed an opposition to the discharge of the insolvent, based on three specific charges of fraud; and whereupon said opponents pray that there be a judgment of court "depriving said Burdeau forever of the laws in favor of insolvents in this state, and sentencing [him] to imprisonment for a term not exceeding three years, as provided by section 1807 of the Revised Statutes," and for a trial by jury. The answer or replication of the defendant was a general and special denial, and a plea in reconvention, which cuts no figure in this case. On the trial, the jury rendered a verdict acquitting the insolvent of the charge of fraud; and, having unsuccessfully sought a new trial, opponents have prosecuted this appeal from the final judgment rendered in favor of the insolvent. We have, therefore, for solution, the single and distinct issue, fraud *vel non*, as denounced in the 1807 section of the Revised Statutes; and, finding that the insolvent "has been guilty of fraud," as therein denounced, we have for decision the quantum of punishment that shall be inflicted on him.

1. The charges and specifications made by the opponents are substantially as follows, to-wit: *First.* (*a*) That on or about the 25th of January, 1889, the insolvent transferred and delivered to Martin Thompson & Co., horse and mule traders of the city of New Orleans, 20 mules, at an agreed valuation of $145 per head, "all or some of said mules being given by said Burdeau to said Martin Thompson & Co. in payment of the indebtedness then due by him to said firm." (*b*) That on or about the 16th of February, 1889, said insolvent transferred and delivered to William B. Leonard, of said city, or to the firm of Leonard, Gentry & Co., of which said Leonard was the senior member, 10 mules, at an agreed valuation of $160 per head; that said Burdeau was then largely indebted to said Leonard or to his firm, say $1,600, "and said mules were given to said Leonard or his firm in payment of said indebtedness." (*c*) That on or about the 28th of February, 1889, said insolvent, being indebted to said Leonard or to his firm, "transferred and delivered to him or to his firm ten (10) mules, at an agreed valuation of $160.00 per head, in payment of said debt." (*d*) That on the 18th of March, 1889, said insolvent transferred and delivered to said Leonard or to his firm 10 mules, at an agreed valuation of $147.50 per head, "and said mules were given said Leonard or his said firm in payment of said indebtedness." (*e*) That on or about the 3d day of April, 1889, said insolvent, being then indebted to said firm of Martin Thompson & Co., transferred and delivered to said firm 7 mules, at an agreed valuation of $160.00 per head, as a "giving in payment of said indebtedness." Predicated upon these five preceding specifications, the opponents make the following specific charges, to-wit: "That said Burdeau made each and every one of said *dations en paiement* within three months prior to his surrender, was insolvent when he made them, and made them with intent to defraud his creditors, and particularly opponents, and to give an unfair preference to said Martin Thompson & Co. and to said W. B. Leonard, or his said firm of Leonard, Gentry & Co." The opponents, varying the character of the charge previously made, declared and affirmed as follows, to-wit: *Second.* (*a*) "But if said Burdeau should claim that said transfers were not *dations en paiement*, but real sales, and such be the truth, then the amount received by him for said fifty-seven (57) mules was $8,695, or thereabouts, and he has surrendered no cash. Although said sales were made within three months prior to his surrender, he has paid out in cash, between the date of the first sale and the date of his surrender, only the sum of $492.28, so far as opponents are informed and know. And if said transfers were sales, and not *dations en paiement*, then opponents charge said Burdeau with converting his property into cash with intent to place it beyond the reach of these opponents and other creditors, and so to defraud them. That said Burdeau has not surrendered said cash, nor any part thereof, but has fraudulently concealed the same." *Third.* That the insolvent has failed and refused to surrender to his creditors his interest in the firm of Jos. A. Aiken & Co., wharf lessees in this city; he being a member of that firm. The charges and specifications are well and accurately drawn, and are of easy comprehension; but before considering them, and applying the evidence thereto, we must examine and dispose of an exception that was urged in the court below, and is pressed by the insolvent's counsel here.

2. His exception is that "the three charges are (1) fraudulent sales; (2) and

dations en paiement; and (3) non-surrender of the prices received for the sales, predicated on the same transfers. The first two cannot exist at the same time. If he gave the mules in payment, he cannot have sold them, and concealed the price received; for none was received. If he paid the price, he cannot have given the mules in payment." Counsel's contention is that the plain requirement of the insolvent law is that an opposing creditor must state specifically the several acts or facts of fraud he wants to urge against the insolvent, and that the opponents have not done so. He cites and relies upon the following authorities, viz.: Beste v. His Creditors, 14 La. Ann. 518; Burdon v. His Creditors, 20 La. Ann. 366; Campbell v. His Creditors, 16 La. 351. Giving these decisions due weight, and conceding their applicability to the state of facts therein respectively presented, yet we cannot concede their pertinency to the case at bar. The particular transactions of the insolvent which are denounced as fraudulent are detailed and fully described. It was a matter of utter impossibility for the opponents to have known, when the opposition was filed, whether they were sales in good faith for cash, the proceeds whereof were concealed from the insolvent's creditors, or reprobated *dations en paiement.* Consequently the acts were particularized, and the charges of fraud were specified, alternatively. It was a strike in the dark, and the best that could have been done under the circumstances. Counsel complained that the opposition fails to state that the insolvent "knowingly omitted to declare some of his property," in the words of the statute. Rev. St. § 1803. We think the phrase employed—*i. e.*, "fraudulently concealed"—is sufficient. The exception was correctly overruled.

3. As appertaining to the merits of the controversy, the facts may be fairly summarized as follows, viz.: Charles K. Burdeau and W. C. Ahern were the individual members who composed the firm of Burdeau & Ahern, and were engaged in the draying business, hauling cotton for the cotton-presses, in the season of 1888–89. As was the custom of the trade, they bought mules in the fall season to operate their business with, and made sale of some of them during the latter part of the winter and spring, when business became dull and unremunerative. Burdeau purchased mules of the various parties named, for which he owed on January 25, 1889, to Martin Thompson & Co., $2,602.25 on open account; he owed Leonard, Gentry & Co., $1,782.43, represented by his promissory notes due on that date; and he owed the opponents' firm of Marx Levy & Bros. $3,526.61, evidenced by two promissory notes bearing date of January 11, 1889,—one for $2,005.28, due at 90 days, and another for $1,992.28, due at 60 days, but which was, on the date it went to maturity, diminished by the partial payment of $500, and the payment of the remainder thereof was extended. At the date of the maturity of their debt, Burdeau disposed of 20 of his mules to Martin Thompson & Co. at $145 per head, realizing therefor the aggregate sum of $2,900, with which his entire account was discharged; they paying him the difference of $297.75. On the 3d of April, 1889, Burdeau sold to said firm 7 mules at $160 per head, aggregating in amount $1,100, for which he received a check. On the 18th of January, 1889, Burdeau made a sale of 10 mules to the firm of Leonard, Gentry & Co., at $160 per head, aggregating the sum of $1,600, on which he was given a check for only $800; the remainder not being at that time paid. On the 17th of February, Burdeau delivered to said firm 10 mules in addition, at $160 per head, aggregating $1,600. On the following day, he was furnished a check for $1,782.43,—the exact amount of his note, that day maturing; and he used it in paying his note in the Canal Bank. On the 2d of March, 1889, he received a check of $617.57; it thus "evening up" those two transactions. On the 18th of March, following, Burdeau sold to said firm 10 mules, in addition, at $147.50 per head, aggregating $1,475 in amount; and he received a check of $250 on the 19th of March, and one for $1,225 on the 23d of March, 1889. The result of the transactions with Martin Thompson & Co. was that Burdeau satisfied their account of $2,602.25, and received in cash the surplus of $1,397.75; and the result of his transactions with Leonard, Gentry & Co. was that he satisfied their demand, of $1,782.43, and received in cash the surplus of $2,892.57,—the cash items reaching a total of $4,290.32. The manner in which said mules were disposed of was this: The time having arrived when, in the opinion of the parties, it was necessary that their stock of mules should be reduced, Mr. Ahern selected the mules that were to be sold, and put them in suitable lots; and different dealers were notified, and examined these lots, and made bids therefor, at so much per head. In this case the two firms mentioned were competitors, and secured the mules specified above, and at the prices and on the terms stated. In the latter part of December, 1888, opponents' firm was notified of its being the intention of the insolvent's firm to sell off some of their mules; and the former were questioned as to whether they would like to buy, and their reply was in the negative. Thereafter, no further notice was given them of the said sales being made. On this state of facts the question is whether these transactions were fraudulent *dations en paiement*, which were, on the part of the insolvent, intended to confer on Martin Thompson & Co. and Leonard, Gentry & Co. an unfair preference over opponents, and the effect of which was to injure them, in the sense of the provisions of the insolvent law, upon which opponents rely for a conviction.

The transcript fails to disclose any specific proof of fraud or fraudulent intent, and the insolvent emphatically and circumstantially denies and disavows any such intention or act. The only inference there is of any such fraudulent purpose or design must be drawn from the foregoing statement of facts. It is a fact that should be noted that all of the parties named dealt with Burdeau alone, in selling mules to him and in purchasing mules

from him, notwithstanding the fact that the latter at once covered same into his partnership, and the sales were made as of partnership property. The principle of the insolvent law that is sought to be enforced against the insolvent, Burdeau, is that, "if the jury summoned for the purpose of deciding on the accusation of fraud against the insolvent debtor declare in their verdict that he has been guilty of fraud, the insolvent debtor shall forever be deprived of the laws passed in favor of insolvent debtors in this state, and shall be sentenced to imprisonment for a term not exceeding three years," etc. Rev. St. § 1807. In the section of the Revised Statutes immediately preceding the one quoted, we find the term "fraud" defined, and the character of proof necessary to convict, supplemented by illustrations and examples, in the way of fraudulent acts, which come within the provision of the statute under consideration. For instance, section 1802 declares that "all persons shall be considered guilty of fraud who shall have concealed their body, or any of their property, with an intention to keep it from their creditors," etc. Section 1803 says that "every insolvent debtor shall also be considered as guilty of fraud who shall have passed simulated deeds, for the purpose of conveying the whole or any part of his property, and depriving his creditors thereof, or shall have knowingly omitted to declare any of his property right or claims in his schedule, * * * always with an intent to defraud his creditors," etc. For the perpetration of any one of the acts enumerated, or others of like import, the insolvent is deemed and considered to be a fraudulent debtor *per se*. Section 1804 declares that "if a debtor who has voluntarily surrendered his property to his creditors * * * shall have given, within the year, an unjust advantage or preference to any one or more of his creditors, by payment or otherwise, * * * the effect whereof shall be to injure the complaining creditor, or shall purchase property for cash, the delivery whereof shall be made to him, and then shall sell or dispose of the same without paying his vendor, * * * or shall have made a conveyance, transfer, mortgage, or pledge of his property, to the prejudice of the complaining creditor, any such act shall be held presumptive evidence of fraud, liable, however, like all other presumptions, to be disproved." Whether the insolvent be guilty of fraud or not, under this section, is, in the *first* place, dependent on a question of fact, as to the insolvent's commission of the reprobated act; and, in the *second* place, on the fact of his having successfully rebutted the legal presumption of guilty intent raised on the proof of the act. Coupled with the foregoing sections are the supplemental provisions of section 1808, which are to the effect that "any debtor who shall, within three months next preceding his failure, have sold, engaged, or mortgaged any of his goods and effects, or shall otherwise have disposed of the same, in order to give an unjust preference to one or more of his creditors, shall be debarred from the benefit of the insolvent laws," etc. It thus appears to have been the manifest purpose of the legislature in this section (1808) to declare that the acts which in section 1804 are denounced as "presumptive evidence of fraud" if done "within the year" previous to the surrender of an insolvent, shall be deemed a conclusive presumption of fraud if done "within three months next preceding his failure," and as a legal consequence thereof the insolvent "shall be debarred from the benefit of the insolvent laws." But, in order to determine the main question,—the insolvent's guilt of fraud, under and in contemplation of the sections of the Revised Statutes we have quoted,—we are to first ascertain whether, as matter of fact, Burdeau did give, within the year, "an unjust advantage or preference to any one or more of his creditors, by payment or otherwise, * * * the effect of which [was] to injure the complaining creditor," or did he make "a conveyance, transfer, mortgage, or pledge of his property to the prejudice of the complaining creditor," within the meaning of section 1804? If such we find to have been a fact, then the next question to be determined is whether the act or acts complained of occurred within three months preceding the failure or surrender, in contemplation of section 1808.

We have already found and stated that there is in the record no specific proof of fraud on the part of the insolvent. Is there to be legitimately drawn from the facts stated any inference of any unjust advantage or preference having been given by him to Martin Thompson & Co. or Leonard, Gentry & Co. over the opponents, the effect whereof was to injure the opponents? These precepts of the insolvent law have often been examined and interpreted, and in so doing our predecessors have said that they are highly penal in character and in their consequences on conviction of fraud, "and must be strictly pursued. The acts charged must not only be such as the law declares fraudulent, but done with fraudulent intent." Campbell v. Creditors, 16 La. 348. In other cases they have said: "To constitute fraud, there must be an intention of defrauding, *consilium frandis*, and an actual loss, *eventus damni*." Montilly v. Creditors, 18 La. 383; Slocomb v. Bank, 2 Rob. (La.) 92. Those decisions conform strictly to the precise wording of the statute; for it declares, not only that the act complained of must have conferred, or have been intended to confer, on some of the creditors of the insolvent, an "unjust preference or advantage" over the creditor who charges fraud, but it also declares that "the effect whereof shall be to injure" them. The transactions of which the opponents complain are specifically enumerated in the opposition, and same have been reproduced in this opinion with care. They are charged collectively as badges of fraud and unfair *dations en paiement*. Upon examination and careful comparison, we find that, by one of Burdeau's transactions with certain of his creditors, he not only paid their account of $2,602.25, but received from them a cash surplus of $1,397.75; that by another of his

transactions, with others of his creditors, he not only paid a debt due them of $1,782.43, but received from them a cash surplus of $2,892.57,—*i. e.*, a cash surplus of $4,290.32 in excess of their demands against him altogether. As all of these transactions occurred during the months of January, February, March, and April, and antecedent to the maturity of Burdeau's indebtedness to the opponents, and as the amount of cash realized therefrom exceeded the amount of opponents' demands against him, it seems to be manifest that "the effect" of same was not to injure them. Indeed, it is a fact exhibited by the record that, contemporaneously with said transaction, Burdeau paid opponents $500, which was put to his credit on the first maturing note, and it was extended for the remainder, and that said sum was not part of the cash so received. On the 17th day of April, 1889, opponents levied an attachment on Burdeau's property, and the sheriff found and seized 10 mules, (one-half as many as opponents sold him originally, those having remained on hand and unsold at date of seizure,) 11 sets of harness, and 15 cotton floats, and some other property, not needing mention. Hence, on this branch of the case, our conclusion is that opponents' appeal cannot prevail.

4. But coupled with the foregoing charge is a further specification of fraud on the part of the insolvent, and it is this: That, on the 25th of January, 1889, Burdeau had in all 67 mules, 57 of which he had bought in 1888; that of those he had purchased 20 of the opponents, 17 of which he had disposed of, as above stated, to other parties, to the prejudice of opponents' vendors' lien. The provisions of section 1804 of the Revised Statutes, above quoted, on this subject, are that if any insolvent "shall purchase property for cash, the delivery whereof shall be made to him, and then shall sell or dispose of the same without paying his vendor, * * * such act shall be held presumptive evidence of fraud." Certainly that provision of the law was not intended to apply to sales of property or goods and effects on terms of credit, as the sales of mules were made to Burdeau; for it is a precept of our Civil Code that the vendor's lien on movable property is lost by a sale and delivery thereof to another. It declares that "he who has sold to another any movable property, which is not paid for, has a preference on the price of his property over other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser." Rev. Civil Code, art. 3227; Brent v. Shouse, 16 La. Ann. 158; Elkin v. Harvy, 20 La. Ann. 545; Flint v. Rawlings, Id. 557. Evidently there is no prohibition against a sale being made by a vendee of goods which are purchased on a credit, and no fraudulent intent can attach to the act, though his contract be thereby violated. As matter of fact, had it been the intention of Burdeau to defraud opponents by selling mules on which opponents had a vendors' lien, it is inexplicable that he should have retained 3 and sold 17; for, after Burdeau's surrender, opponents appeared in the insolvency proceedings, and made claim for the proceeds of 3 mules on which they had a vendor's lien, and it was allowed. This charge is not sustained.

5. The remaining question for consideration is that Burdeau was guilty of fraud in "concealing his cash with intent to defraud his creditors." Page 3 of opponents' supplemental brief. Their counsel disavow any intention on their part to charge that the insolvent "knowingly omitted to declare [some] of his property rights and claims in his schedule." The charge is made under section 1802, and not under section 1803, of the Revised Statutes. This charge is the alternative that is made mention of in the treatment of the insolvent's exception.

(*a*) And just here we may as well dispose of the insolvent's bill of exception taken to the ruling of the judge *a qua*, rejecting a memorandum made by him of various and sundry expenditures, indicating the manner in which he had disposed of the cash he had received in the transactions detailed, and in the course of his business. The unbending rule of law is that "the books of a merchant cannot be given in evidence in his favor." Rev. Civil Code, art. 2248; 1 Greenl. Ev. § 115. It proceeds on the principle that the entries therein are his own memoranda, and he cannot be allowed to manufacture evidence in his own favor. As an aid to the memory of a witness testifying, this memorandum was objectionable on the ground that it did not purport to be contemporaneous in date with the transactions therein detailed. It was properly excluded.

(*b*) On the question of the insolvent having concealed his cash to defraud his creditors, there is no evidence that is at all satisfactory or conclusive. The general tendency of it is to show that Burdeau had spent all of his money, and at date of his surrender had none. He denies the possession or concealment of any cash, and avers that at that time he did not have a cent, and that, under the advice of counsel, he sold a pony and a wagon for $125 to meet the expenses of his cession, and surrendered that to his creditors. Such an item prefaces his schedule. In his testimony he accounts for all his cash except a few hundred dollars, which he claimed to have expended in the payment of small dues and the like. We do not consider this charge as supported by the evidence.

(*c*) This is not in any sense a revocatory action, or one *de simulation*, and hence the precepts of the Code do not apply. Rev. Civil Code, arts. 1983, 1984, 2658, 3530.

(*d*) In so far as the charge that Burdeau had failed to surrender his interest in the firm of Joseph A. Aiken & Co., wharf lessees, is concerned, it has been only recently decided by this court, in a suit in which his syndic was a party, that the interest therein represented by Burdeau was not his own, but that of his minor children; and to that suit opponents were at least privies, if not parties, as it was in their interest and at their instance that it was brought. Burdeau v. Davey, 43 La. Ann. 585, 9 South. Rep. 752.

Certain it is that, under the circumstan-

ces detailed, we do not feel justified in reversing the finding of the jury, acquitting the insolvent of the charge of fraud, in view of the district judge's declination to grant opponents a new trial. Our predecessors once held that the insolvent law "is of such a highly penal character that the court should never feel authorized to convict and punish without the verdict of a jury." Thompson v. Chapman, 7 La. Ann. 258. While not adhering to this doctrine, save for the illustration it affords, we will affirm this not to be such a case as will justify this court in reversing a verdict, and sentencing the insolvent to the penalty of the law. Judgment affirmed.

(44 La. Ann. 90)

STATE *ex rel.* LEWIS v. PIERSON, Judge. (No. 10,960.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)

CONSTITUTIONAL LAW—TITLE OF ACT.

Section 1 of Act No. 138 of 1890 is null and void, being in conflict with article 29 of the constitution. The title of the act refers to labor contracts; the body of the act refers to any contract.

(*Syllabus by the Court.*)

Application of Arnold Lewis for writs of prohibition and *certiorari* to prevent David Pierson, a judge, from proceeding further in a prosecution against the relator. Rule made absolute, and the writ of prohibition made peremptory.

Charles V. Porter, for relator. *David Pierson, in pro. per.*

MCENERY, J. The relator was convicted and sentenced for violating the provisions of section 1, Act No. 138, of 1890. Under the authority of article 90 of the constitution, and its interpretation in the case of State v. Judge, 39 La. Ann. 133, 1 South. Rep. 437, he applies for writs of prohibition and *certiorari* to prevent the respondent judge from proceeding further in the case on the ground that said act is unconstitutional, violating article 29 of the constitution, which requires that every law shall embrace but one object, which shall be set forth in its title. The title of the act is: "To enforce labor contracts, and to provide a penalty for the willful violation thereof, and to make it a misdemeanor for persons not parties to said contracts to willfully interfere therein, and to provide for the punishment thereof." Section 1 provides "that whoever shall willfully violate a contract, upon the faith of which money or goods have been advanced, and without first tendering to the person from whom said money or goods was obtained the amount of money or the value of the goods, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not less than fifty dollars nor more than two hundred dollars, and in default of payment thereof with cost shall be imprisoned in the parish jail for not less than ten days nor more than thirty days, at the discretion of the court." The contention is that the title of the act refers to "labor" contracts, and the above section provides for a violation of a contract, omitting the word "labor" before the word "contract." When the title indicates the object and purpose of the law, it is sufficient. It was the intention of the law to punish the violation of labor contracts. Nothing is said in the first section of the act, under which the defendant was indicted, about labor contracts. The title of the act is restricted to this particular kind of contract. The body of the act refers to all contracts. Any one, who is not a laborer, and who makes a contract, upon the faith of which money is advanced or goods delivered, is subject to an indictment for the violation of section 1. Suppose, for instance, that a merchant, planter, or any one employed in any other occupation than that of laborer on a plantation or elsewhere should be indicted under this section. The defense that his contract was not a labor contract, and not covered by the title of the act, would be a valid one. It is evident that there is a wide difference in meaning and the object to be attained as expressed in the title and the law. It clearly violates article 29 of the constitution. It is therefore ordered that the rule herein be made absolute, and the writ of prohibition issued be made peremptory.

(44 La. Ann. 95)

CRILLY v. TEXAS & P. RY. CO. (No. 10,891.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

INJURY TO RAILROAD EMPLOYE—FAILURE TO FENCE TRACK—ASSUMPTION OF RISK.

1. Under the laws of Louisiana, railroad companies are not compelled to fence in their tracks, and it is not negligence on the part of said companies to neglect to fence their tracks at a point where there is no public crossing.

2. It is not negligence to fail to fence a trestle over a small canal in an open field where there is no public road or general thoroughfare. Where a railroad company voluntarily fences a part of its track, this will not impose upon it the obligation to fence its entire track.

3. Where an employe, not too young and too ignorant to appreciate the dangers of the situation, is aware that proper precautions have not been taken for his safety, and he continues the services notwithstanding the risk, he will be considered as having assumed the responsibility for his own safety.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Suit by Estella Tillotson, widow of Thomas Crilly, against the Texas & Pacific Railway Company to recover damages for the death of her husband through defendant's alleged negligence. Judgment for defendant. Plaintiff appeals. Affirmed.

W. S. Benedict and *E. M. Hudson*, for appellant. *Howe & Prentiss*, for appellee.

MCENERY, J. The plaintiff is the widow of Thomas Crilly, who was killed in a railroad accident, while in the employ of the defendant company. She brought suit claiming damages in the sum of $25,000, alleging that her husband, the conductor of a freight train, was killed in a wreck of said train near Seymourville, La., on the 30th January, 1890; and she alleges that the accident which resulted in the death of her husband was caused solely through the gross negligence, fault, want of care on the part of the defendant cor-

poration, and without fault, imprudence, or negligence on the part of her deceased husband. The answer of the defendant is the usual one in cases of this kind. The facts in the case are as follows: Seymourville is a flag station on defendant's road. The train on which plaintiff's husband was conductor was a through freight train. It arrived at Seymourville on time. There was a section of the freight train behind it, and the train on which plaintiff's husband was conductor was running under orders to make 20 miles an hour. The limit of the speed of freight trains was 25 miles an hour. On the morning of the accident it was foggy, and the headlight on the locomotive revealed objects not more than 15 feet ahead. The conductor, Crilly, was on the engine, having taken this position in order to secure the safety of his train in consequence of the fog. He was a sober and trusted employe of the company, careful and vigilant. The accident occurred when the train was passing over a trestle in a field. The trestle was over a small canal, uninclosed. A cow was on the track, and was caught between the cross-ties, and was struck by the train. The locomotive was overturned, and the conductor, Crilly, and the engineer were killed. There is no complaint that there were any deficiencies in the equipments of the locomotive, and that the road-bed was not in proper condition. The elements of fault and negligence on the part of the defendant are thus stated by the plaintiff: (1) Compelling, by special order, the train to be run on such a cloudy and foggy night at the rate of 20 to 25 miles per hour, in order also to keep out of the way of another freight train immediately following it, and running at the same speed. (2) The construction of open bridges, serving as traps to catch cattle on the track, by their falling partly through, becoming entangled and held fast in the open spaces, and this for the sole purpose to avoid a little additional expense, knowing that the employes on train could not, if they wished, see and know the condition of the road and track, whirling over it night and day, as they had to do. (3) Knowing and recognizing the necessity of fencing the road, as shown by having fenced various parts of the same, and being then in course of fencing more, yet failing to fence the portion of it about the scene of the accident, in a sugar plantation, it being usual for defendant to fence in sugar plantations, to keep cattle off the track. There was a trial by jury, and a verdict was rendered in favor of the defendant. A new trial was refused, and judgment was entered according to the verdict, from which the plaintiff appealed.

It is a rule frequently affirmed by this court that the verdict of a jury will not be disturbed unless it is manifestly wrong. In the instant case we do not think the verdict was an improper one. There is no proof that the company knew it was a foggy morning about Seymourville. There is no law in this state requiring the fencing in of railroad tracks. Stevenson v. Railway Co., 35 La. Ann. 498. It is not negligence, therefore, for a railroad company to neglect fencing in its tracks where there is no public thoroughfare. The fact that, as in this case, when in thought it was necessary to do so, the company fenced a part of its track, will not impose upon the company the duty of fencing its whole track. The fencing of a portion of it, where the company thinks there is danger, shows, at least, that they are not entirely unmindful of the safety of its trains. In the absence of legislation requiring the entire fencing of the tracks, it leaves the company with the discretion to place fencing where there is, in its judgment, danger. The defendant company seems to have exercised this discretion. At the point where the accident occurred there was no public thoroughfare crossing the track, and there does not appear to be a great necessity for fencing at that particular point. The three causes of negligence assigned by the plaintiff may be disposed of by the fact that the plaintiff's husband knew the orders of the company relative to the speed of its trains and the condition of the track when the accident occurred. In the case of Smith v. Sellars, 40 La. Ann. 530, 4 South. Rep. 333, we said: "The servant assumes the risk only of such hazards as are apparently incidental to an employment, intelligently undertaken; and if he is aware that proper precautions have not been taken for his safety, and still continues the service, notwithstanding the risk, he will be considered as having assumed the responsibility of his own security." Cooley, Torts, 55. It is not shown that the plaintiff's husband was too young or too ignorant to appreciate the danger to which he was exposed. Beach, Contrib. Neg. pp. 371, 372. Judgment affirmed.

(44 La. Ann. 64)

CITY OF NEW ORLEANS *et al.* v. NEW ORLEANS & N. E. R. R. (No. 10,895.)[1]

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

SPECIFIC PERFORMANCE — CONTRACT — COMPENSATION IN DAMAGES.

1. Specific performance of a contract cannot be demanded as an absolute right, as it rests largely in the discretion of the court, to be exercised in strict conformity to equity and justice.

2. The contract must be fixed in its terms, and the liability of the defendant so certain that the duty imposed upon him by the court in ordering the execution of the contract can be readily ascertained and as readily executed.

3. A decree of specific performance will not be granted when the plaintiff can be adequately compensated in a suit for damages.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit by the city of New Orleans and the Orleans levee board against the New Orleans & North Eastern Railroad to enforce specific performance of a contract. Judgment for plaintiffs. Defendant appeals. Reversed.

Harry H. Hall, for appellant. *Bernard McCloskey*, for appellee Orleans Levee Board. *Carleton Hunt*, City Atty., for appellee city of New Orleans.

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[1] Rehearing refused, January 18, 1892.

MCENERY, J. This is a suit, under the provisions of ordinance No. 7483 of the city of New Orleans, which embodies a contract between the city of New Orleans and the defendant to compel the latter to a specific performance of certain obligations therein stipulated relative to the building of an embankment or levee on Florida walk from the intersection of People's avenue to Fisherman's canal, according to plans and specifications furnished by the city surveyor. The cost of the work is estimated at $50,000. The importance of the work cannot be denied, and there is also a certainty that there are obligations to the city assumed by the defendant corporation, arising under said ordinance relative to the continuation of the embankment along Florida walk to Fisherman's canal, which the railroad has not carried out in good faith. It has used for a railroad bed an important levee for economical reasons, and in consideration thereof it had agreed to continue the embankment along Florida walk to its intersection with the Fisherman's canal. Its failure to perform its duty has resulted in this suit to compel a specific compliance with its agreement. The injustice of measuring all rights and wrongs, which as a remedy is often inadequate, led to the establishment of the equity power, in common-law jurisdictions, of decreeing a specific performance when the remedy at law has failed. In the jurisprudence of this state the law is expressed in articles 1926, 1927, Rev. Civil Code. It is therefore only when no adequate compensation can be made in damages that courts in this state can decree a specific performance of a contract. The decree cannot be demanded as a matter of right. It rests largely upon judicial discretion, not arbitrarily exercised, but according to the soundest principles of equity and justice. Not only the question of the ability of the plaintiff to seek adequate compensation in damages, but the ability of the court to grant the relief, must necessarily enter into the discretion which the court is bound to exercise in considering the remedy invoked. The contract must be fixed, and the liability of the defendant so certain that the duty imposed upon him by the court in ordering the execution of the contract can be readily ascertained and as readily enforced. Each case must depend upon the facts disclosed. Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. Rep. 109. A strict adherence to this jurisprudence is rendered the more necessary because of the summary remedy by *mandamus* allowed under act 133 of 1888, in the enforcement of contracts entered into with the state, parochial, and municipal authorities by corporations for building levees, bridges, culverts, etc. There must be an element of certainty in the contract, or the courts would be continually met with applications to enforce by *mandamus*, specifically, obligations arising merely by implication, and the duty, if these writs were indiscriminately granted, would be imposed upon the judiciary of supervising all such contracts in their execution; and it would be bewildered with a multitude of accessory proceedings, in the way of rules for contempt, and additional or supplemental writs. The specifications for the construction of the levee are as follows: "Specifications for embankment from the intersection of People's avenue and Florida walk, along Florida walk to the Fisherman's canal: Said embankment shall be built on such lines as the city engineer will give when called on for them. The excavation shall be from the river side of the embankment, and shall form a canal 30 feet wide on top, and 16 feet wide at the bottom, and 7 feet deep. That there shall be a beam not less than 5 feet between the canal and the embankment. The embankment shall have a net grade of at least two feet above the Metairie ridge, as established by the city engineer, the slopes not steeper than one on two. The width of the crown shall be regulated by the amount of filling furnished by the canal. It shall be surfaced and crowned so as to draw to either side, all substantially as per accompanying diagram. The base shall be cleared of all trees and brush. [Signed] B. M. HARROD, City Engineer." In addition to the building of the levee, the defendant corporation is required to make a canal of certain dimensions. The ordinance, in order to facilitate the extension or continuation of the embankment, authorized the defendant to take dirt from the canal. There is under the ordinance no obligation on the part of the defendant to dig a canal of any dimensions; nor is there any obligation on the defendant to build a levee of any particular dimensions. If the duty of constructing a levee is imposed upon the defendant by the contract, there is some doubt whether a new levee is intended, or a continuation of the levee, in size and dimensions, upon which the defendant corporation was allowed to place its tracks. We are of the opinion that act 133 of 1888 in no way changes the provisions of articles 1926, 1927, Rev. Civil Code, and that when there can be adequate compensation in damages a decree of specific performance will not be granted. The fact that the city is unable to advance the money to build the levee is not sufficient to bring the demand within the exception provided by article 1927, Rev. Civil Code. It is evident from the facts in the case that the city can obtain adequate compensation in a suit for damages for the breach of the contract. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the plaintiffs' demand be rejected, without prejudice to sue for damages for breach of contract.

(44 La. Ann. 74)

DURBRIDGE v. CROWLEY *et al.* (No. 10,903.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

PETITORY ACTION—LIABILITY FOR RENTS—BENEFICIAL EXPENDITURES.

1. In a petitory action the unsuccessful defendant, though previously a possessor in good faith, is liable for rent or rental value from judicial demand.

2. Defendants are entitled to their beneficial expenditures for repairs, improvements, taxes, etc., but they cannot claim taxes paid by the authors of their invalid title, who had the enjoy-

ment of property exceeding in value the taxes paid.

3. There being no proof of enhanced value of the property resulting from defendants' expenditures thereon beyond the amount of the expenditures themselves, the allowance in their favor of the expenditures satisfies their right.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Bernard; A. E. LIVAUDAIS, Judge.

Petitory action by Ida Durbridge against Charles H. Crowley and others. Judgment for plaintiff for one-fourth interest in certain lands, and for rents, and judgment for defendants for one-fourth of the expenses claimed by plaintiff. Defendants appeal. Affirmed.

Drolla & Augustin, for appellants. *Walshe & Braughn*, for appellee. *Henry Chiapella*, for Mrs. Mary E. Doherty, Intervener.

FENNER, J. The plaintiff brought a petitory action against the defendants for the ownership of certain real estate, coupling therewith a demand for partition and for one-fourth the rents or rental value of the property from judicial demand. The case was before us in April last upon exceptions to the cumulation of such demands, which had been maintained in the lower court, but was reversed in this court. Durbridge v. Crowley, 43 La. Ann. 504, 9 South. Rep. 95. The defendants answered, denying plaintiff's allegations of title; alleging that they had paid out as expenses on the property for improvements, repairs, taxes, insurance, etc., the sum of $1,040.49, which should be reimbursed to them in event of destitution of title, and calling in warranty the author of their own title. The warrantor appeared, and pleaded a general denial. On these issues the case went to trial, and resulted in a judgment recognizing plaintiff as one-fourth owner, decreeing a partition, giving her judgment against defendants for rents from judicial demand, and giving defendants judgment against plaintiff for one-fourth of expenses claimed and proved by the former, together with a judgment in favor of defendants against the warrantor for the purchase price. The defendants only have appealed. They do not complain of the judgment so far as the maintenance of plaintiff's title is concerned, or as to the decree of partition. The complaint is confined to the adjustment of the revenues and expenses.

1. As to the rents. Defendants were clearly liable for rent from judicial demand. Rev. Civil Code, 503; Duflibo v. Mayer, 27 La. Ann. 399. The evidence clearly fixes the rental value at the rate allowed by the court. During a portion of the time since judicial demand, defendants rented out the property at that rate; during the rest of the time, they used it themselves. They are liable for the rental value in both cases.

2. As to the allowance in their favor, the court allowed defendants all they claimed in their answer, viz.: One-fourth of the expenses for improvements, taxes, etc., paid out by them during their supposed ownership. Their claim for one-fourth the taxes which have been paid by the authors of their title has no support either in their pleading, in the proof, or in the law. The property is shown to have had a rental value, and those who paid the taxes had the use and enjoyment of the property. Even as possessors in good faith, they would be bound to compensate the taxes against the rents. Appellants also claim an allowance for enhanced value resulting from their expenditure on the property. No enhancement is proved beyond the amount of the expenditures, and the allowance for the latter satisfies all their possible right. Judgment affirmed.

(44 La. Ann. 76)

NICHOLSON *et ux.* v. PARKER, Tax Collector.

(No. 10,939.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

TAXATION—EXEMPTIONS—PUBLISHER OF NEWSPAPER.

The publisher of a newspaper is not a "manufacturer of stationery," within the meaning or intent of article 207 of the constitution. Decision in State v. Dupre, 42 La. Ann. 561, 7 South. Rep. 727, referred to, and its inapplicability to the instant case shown.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit by George Nicholson and wife against C. H. Parker, tax collector, to restrain the collection of a certain tax. Judgment for defendant. Plaintiffs appeal. Affirmed.

F. P. Poché and *Lamar C. Quintero*, for appellants. *Wynne Rogers*, for appellee. *Buck, Dinkelspiel & Hart*, as *amici curiæ*.

FENNER, J. Plaintiffs, as owners of the presses, boilers, type, machinery, and other appurtenances used by them in printing and publishing the newspaper known as the "Daily Picayune," claim exemption from taxes levied on said property by virtue of article 207 of the constitution, which exempts from taxation property "employed in the manufacture of textile fabrics, leather, shoes, harness, saddlery, * * * stationery, ink, and paper," etc. In the case of State v. Dupre, 42 La. Ann. 561, 7 South. Rep. 727, we had under consideration the preceding article,—206,—which exempts from license taxation all "manufacturers other than those of distilled alcoholic or malt liquors, tobacco and cigars, and cotton-seed oil. The difference between the two articles is very pointed. Article 206 exempts from license tax all manufacturers, with certain designated exceptions; article 207 exempts from property tax only manufacturers of certain designated articles. The question in Dupre's Case was whether the publisher of a newspaper is a manufacturer; the question in the instant case is whether such a publisher is a manufacturer of "stationery." In Dupre's Case we held that, although the publisher of a newspaper might not be considered as a manufacturer, in the general acceptation of that term, yet that the constitution evidently used the term in a broader sense, and we referred to the following article 207, which treated a maker of stationery as a manufacturer, and we held that, if a maker of

stationery, such as blank-books, account-books, etc., was a manufacturer, the maker of printed books and of newspapers must equally be so considered. We referred to the provisions of article 207 on the subject of the manufacture of "stationery" merely by way of analogy and illustration; but there is certainly no word in the opinion which hints that the publisher of a newspaper was a manufacturer of stationery. If we had so considered, a mere statement of the fact would have solved the case, since nobody questions that the constitution, in express terms, recognizes the maker of stationery as a manufacturer. In that case, all our reasoning by analogy would have been superfluous, and the dissenting opinions in the case would not have been written. That the publisher of a newspaper, any more than a publisher of books, is not a manufacturer of stationery, is a proposition to our minds so self-evident that its statement is sufficient without the necessity of any enforcement. The contrary would doubtless never have been advanced by any one but for the very gross misinterpretation of our opinion in Dupre's Case. Judgment affirmed.

(44 La. Ann. 78)

NICHOLSON *et ux.* v. CITY OF NEW ORLEANS *et al.* (No. 10,938.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

The case is identical in questions presented with No. 10,939, 10 South. Rep. 403, (just decided.)

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge.

Action by George Nicholson and wife against the city of New Orleans and others to restrain the collection of a tax. Judgment for defendants. Plaintiffs appeal. Affirmed.

F. P. Poché and *Lamar C. Quintero*, for appellants. *H. C. Cage*, Asst. City Atty., *Carleton Hunt*, City Atty., (*W. B. Sommerville*, Asst. City Atty., of counsel,) for appellees. *Buck, Dinkelspiel & Hart*, as *amici curiæ*.

FENNER, J. The questions involved in this case are identical with those just decided in case of same plaintiffs against Parker, (No. 10,939,) 10 South. Rep. 403, and, for the reasons there given, judgment affirmed.

(44 La. Ann. 93)

STATE v. GESSNER. (No. 10,936.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

IMPEACHMENT OF WITNESS — LARCENY — DECLARATIONS OF ACCUSED.

1. It is not necessary to lay the foundations for the introduction of evidence to contradict statements of the accused which form a part of the *res gestæ*.

2. When a person seeks entry into a house, representing himself to be a gas inspector, and steals from the premises after admission to the same, his declarations made at the time are part of the *res gestæ*, and it is not necessary to lay the foundation to contradict them.

(*Syllabus by the Court.*)

Appeal from criminal district court, parish of Orleans; ROBERT H. MARR, Judge.

Indictment against J. F. Gessner for larceny. Judgment on conviction. Defendant appeals. Affirmed.

James C. Walker, for appellant. *Walter H. Rogers*, Atty. Gen., for the State.

MCENERY, J. The accused was indicted for larceny, and convicted and sentenced. He has appealed. On the trial of the case two witnesses testified that the accused came to their father's house in the city of New Orleans, and represented himself as a "gas inspector, and wished to look at the gas." He was accompanied through the house, and was permitted to examine the gas-fixtures and gas-burners. Shortly after he left the house a gold watch and chain were missing from the bureau in one of the bedrooms. The evidence against the accused was circumstantial. We have no jurisdiction of the facts in a criminal case, and will only consider them when they are incorporated in a bill of exceptions, and it becomes necessary to do so, in order to pass intelligently upon the questions of law presented. There may have been other circumstances which influenced the verdict of the jury than those disclosed in the testimony of the above witnesses. Therefore it is immaterial to determine whether the accused was convicted on circumstantial or direct evidence. Victor Valois was sworn for the prosecution, and testified that the accused was not an inspector in the employ of the New Orleans Gas Company, and that he had never been so employed, and that he could not be a gas inspector of the New Orleans Gas Company unless he was appointed by the witness. To this evidence the accused objected, on the ground that it was irrelevant, and inadmissible for the reason that no foundation had been laid to warrant said evidence beyond the testimony of the two witnesses who testified to the statements of the accused when he sought admission to the house. And the further objection was made to the evidence of the witness on the ground that the question whether the accused could or could not be a gas inspector unless appointed by the witness was purely in the province of the jury to determine.

The statement made by the accused when he entered the house was a part of the *res gestæ*. The testimony introduced, therefore, was not for the purpose of contradicting any independent declaration of the accused, made before or after the larceny, but of a fact stated by him, contemporaneous with the larceny. It is not necessary to lay the foundation for the introduction in evidence of any statement made by the accused at the time the offense was committed, and so connected with it as to form a part of the *res gestæ*. The statement by the witness that the accused could not have been appointed a gas inspector of the New Orleans Gas Company without his consent only corroborated his testimony that the accused had never been in the employ of the company.

Judgment affirmed.

(44 La. Ann. 79)

STATE v. BAKER. (No. 10, 889.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

VIOLATION OF CITY ORDINANCE—KEEPING ASSIGNATION HOUSE—AFFIDAVIT.

1. The precision required in indictments for crime before courts of record is not applicable to affidavits against violators of municipal ordinances before recorders' courts.

2. An affidavit against defendant for keeping an assignation house at a designated place, in violation of section 8 of ordinance 4424, is a sufficient foundation for trial and sentence, although it does not state all the circumstances contained in the section referred to as constituting the offense.

(*Syllabus by the Court.*)

Appeal from recorder's court of New Orleans; J. C. AUCOIN, Judge.

Prosecution against Baker for keeping an assignation house. From the judgment on conviction she appeals. Affirmed.

James C. Walker, for appellant. *Henry Renshaw*, Asst. City Atty., and *Carleton Hunt*, City Atty., for city of New Orleans, appellee.

FENNER, J. The defendant, charged with violating a municipal ordinance, was tried before the recorder, and sentenced to pay a fine of $25, or, in default of payment, to be imprisoned for 30 days. She appeals to this court, and assigns that the fine and penalty imposed are illegal, because she was charged, tried, and sentenced for no offense denounced by any municipal ordinance. The affidavit under which she was held charges her with keeping "an assignation house, in violation of section 8 of city ordinance 4434, Council Series." The said section is in the following words: "That whenever a house of prostitution or assignation, within or without the limits established by this ordinance, may become dangerous to public morals, either from the manner in which it is conducted or the character of the neighborhood in which it is situated, the mayor may, on such facts coming to his knowledge, order the occupant of such house, building, or room to remove therefrom within a delay of five days, by service of notice on such occupants in person, or by posting the notice on the door of the house, building, or room, to remove therefrom within a delay of five days, and, upon such occupants failing to do so, each shall be punished as provided in section 10 of this ordinance." The record shows that the recorder received full proof that accused was keeping an assignation house at No. 336 Dauphine street; that the mayor had received a petition signed by numerous residents of the neighborhood complaining and denouncing the same as injurious to the public morals; that he had served upon defendant the notice provided by the ordinance; and that she had not removed within the delay therein stated. The defendant, however, excepted to all the evidence, and objected to the whole proceeding, on the ground above indicated, that she was not charged with any offense denounced in section 8 of said ordinance. No other offense is denounced by that section except the keeping of a house of prostitution or assignation in a designated locality, after having been notified by the mayor to remove within five days, and after having failed to remove within that delay. The charge in the affidavit that she was keeping an assignation house "in violation of section 8" meant and could mean nothing but that she was so keeping it after receiving the notice, and after the expiration of the delay allowed. The affidavit was sufficient, the evidence under it was properly received, and the sentence corresponded to the offense. The precision required in indictments for crime before courts of record is not required in affidavits for violation of municipal ordinances before recorders' courts which are not courts of record. State v. Dunbar, 43 La. Ann. —, 9 South. Rep. 492. We have already maintained the legality and constitutionality of this ordinance. State v. Mack, 41 La. Ann. 1079, 6 South. Rep. 808. Judgment affirmed.

(44 La. Ann. 87)

STATE *ex rel.* BLOCK *et al.* v. JUDGE CIVIL DISTRICT COURT. (No. 10,947.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)

ATTACHMENT—SALE IN LIMINE — RIGHT TO BOND PROCEEDS.

When property attached has been sold *in limine*, under article 261, Code Prac., the proceeds take the place of the property, and still continue to be the property attached, and subject to the right of the defendant to bond in every stage of the suit, under article 259, Code Prac., unless the defendant has waived the right to bond by an agreement that the proceeds shall remain in hands of the sheriff, subject to the rights of the attaching creditors, until the further order of the court.

(*Syllabus by the Court.*)

Application of Henry Block and others for a writ of *mandamus* to compel Nicholas H. Rightor, judge of the civil district court in the parish of Orleans, division D, to issue an order to the sheriff, directing him to release on bond and pay over the proceeds of the sale of certain property seized in attachment. Writ granted.

Calhoun Fluker, for relators. *Moise & Cahn* and *W. S. Benedict*, for respondent.

MCENERY, J. The relators apply for a writ of *mandamus* to compel the respondent judge to issue an order to the civil sheriff of the parish of Orleans, directing him to release on bond, and pay over to the relators, the proceeds of the sale of perishable property seized in several attachment proceedings against them. The several attachment suits were allotted to the different divisions of the civil district court. C. Lazard & Co., the first attaching creditors, obtained the order to sell the property. All the attaching creditors and the relators agreed to the sale; but there was no agreement that the proceeds should remain in the hands of the sheriff, subject to the rights of the attaching creditors, and until the further orders of the court.

In the case of State v. Judge, 37 La. Ann. 261, we held that where property is attached and sold *in limine* under article 261, Code Prac., the proceeds of the sale of the property continue to be the "property attached," and subject to the rights of the defendant to bond "in every stage of the

suit," under article 259 of the Code of Practice. We are referred to the case of State v. Young, 40 La. Ann. 203, 3 South. Rep. 722, and Wickman v Nalty, 41 La. Ann. 285, 6 South. Rep. 123, as announcing a contrary rule. In the first case there was an agreement that the proceeds of the sale of the attached property should remain in the hands of the sheriff, subject to the claims, rights, and liens of the various attaching creditors. In pronouncing the decree, we said: "Whatever the legal right of the relators was, apart from the agreement, the agreement became a law to all the parties thereto, and by its terms they must abide." In the second case there was no application to bond the property. The question presented for consideration was the dissolution of the attachment. All parties had agreed to the sale of the property, and the retention of the proceeds by the sheriff to await final judgment. The rule to dissolve the attachment was discharged on the ground that the agreement effectually debarred the defendant from questioning the validity of the process against him and his property. That the relators are fugitives from justice, and that the numerous attachment suits will involve further litigation on the bond to recover the proceeds, cannot be considered as valid reasons for denying a positive right given to the relators by law. The relators forfeit none of their civil rights by absenting themselves, and it is to be presumed that the bond will be paid in accordance with its terms and conditions. The relators urge that the bond should only be for an amount equal to the proceeds of sale in the hands of the sheriff. The proceeds represent the property. The bond, therefore, must be in an amount and conditioned as though the property was still in the hands of the sheriff, in strict compliance with article 259, Code Prac. The rule herein is made absolute, the relief prayed for granted, and the *mandamus* made peremptory.

(44 La. Ann. 61)

Succession of LLULA. (No. 10,909.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)

MARRIAGE—PROOF—CONCUBINAGE—RIGHTS IN COMMUNITY PROPERTY.

1. A wife who, three weeks after marriage, deserts her husband, and in the same community forms an adulterous relationship with another, cannot—being in bad faith—maintain the *status* of a married woman.

2. She cannot claim her interest in the community as the widow in community.

3. She has only the rights of a concubine, and can only recover from the estate of the deceased, when the concubinage was incidental, and not the motive or cause for the illicit connection, for her personal services as domestic or nurse, or for her industry, when it has enriched the estate, or for the capital and property she furnished in any enterprise undertaken by the deceased, and her profits in the same.

4. The contract of marriage may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party, and cohabitation and the reputation of man and wife are presumptive evidence of a preceding marriage.

5. But presumption arising from facts which tend to establish the solemnizing of the contract of marriage is not conclusive, but subject to be rebutted by testimony negativing the fact of marriage.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Suit by Mary Ann Whitlow against the succession of Joseph Llula, deceased, to recover one-half of his estate, basing her claim on the fact that she was induced by him to believe that she was his wife, and as such lived with him. Judgment for defendant. Plaintiff appeals. Affirmed.

W. S. Benedict, for appellant. *A. L. Tissott* and *Henry P. Dart*, for appellee.

MCENERY, J. Mary Ann Whitlow brought suit against the succession, alleging in her petition that she is the owner of one-half of the property in the estate of the late Joseph Llula, together with other rights and claims in said succession. She alleges as the basis of her claims to the property in said succession that when a minor, under the age of 20 years, she was induced by the representations of Llula to contract with him, and that she was made to believe and consider that she was his wife, and that she lived with him as such, thereafter, for 28 years, and as his wife, bearing to him two children, both of whom died in infancy; that she maintained his household, controlled his personal affairs, and, educating herself,—he being illiterate,—she conducted his business affairs to within 18 months prior to his death; that during said time she was known, recognized, and respected as his wife, and was introduced by him as his wife, and still bears his name, and is looked upon as his late wife, and is regarded as his widow; that she took care of and educated certain children of the deceased, who were illegitimate; that the entire real and personal effects now standing in the name of said Joseph Llula were taken possession of by his daughter Louisa, wife of Manuel Suarez-Miranda, the same being the entire property acquired during the existence of the community arising from the effects and business and marriage between the said Joseph Llula and herself. She asserts her rights as the widow in community. In addition she avers that she, during the existence of the marriage with Llula, bought a lottery ticket in the Havana Lottery with her paraphernal funds, which drew a prize of $10,000, which she delivered to said Llula, and which he used for his own personal advantage, and for which she also makes demand. There were exceptions filed, which were overruled, but resulted in an order for the petitioner to amend her petition so as to make her demands more explicit. After complying with the order of court, and perfecting her petition, the defendant filed another exception, which was also overruled, and, in our opinion, correctly. The defendant answered, pleading a general denial. The plea of prescription of 3, 5, and 10 years was filed by the defendant. There was judgment for the defendant, and the plaintiff has appealed.

The facts in the case are that the plaintiff was a married woman when she went to live with Llula. She was married to

one Dunker, and three weeks thereafter took up with Llula. Her husband was living in New Orleans at the time, and only a short distance from the house where she lived with Llula. Her husband afterwards joined the Confederate army, and, it is believed, was killed or died in the service of the Confederate government. He never, after he joined the army, returned to the city of New Orleans. Llula lived with the plaintiff until three and a half years before he died. After his separation from her, he paid her regularly five dollars per week. This amount was paid to her regularly until provision was made for her by the universal legatee under the will. She lived with Llula as wife, and he provided for her as such as liberally as his means would permit. She brought no money or property to the establishment, and there is no proof that by her industry she aided and assisted in the acquisition of property. It makes no difference, however, in what light he regarded the relations between him and plaintiff.

The law considers marriage in no other view than as a civil contract. Article 86, Rev. Civil Code; Cole v. Langley, 14 La. Ann. 770. But it is a contract which must be solemnized according to the rules which the Code prescribes. Like all other contracts, it may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party; and cohabitation, and the reputation of man and wife, are presumptive evidence of a preceding marriage. Hobdy v. Jones, 2 La. Ann. 944; Succession of Hubee, 20 La. Ann. 97. But presumption arising from facts which tend to establish the solemnization of the contract of marriage is not conclusive, but is subject to be rebutted by testimony negativing the fact of marriage. Philbrick v. Spangler, 15 La. Ann. 46; Hubbell v. Inkstein, 7 La. Ann. 252. The plaintiff and her alleged husband entered into an adulterous connection, and the relation between the parties was such that no marriage could have been contracted between them when they first assumed this relationship to each other. The fact that the husband died during this illicit connection cannot give a character to it which it did not have when it was first formed. It continued as it had begun. The fact that he treated the plaintiff as his wife, and introduced her as such in the community, could not destroy or do away with the actual truth of their relationship. Nor could it remove from the plaintiff the knowledge that she was a married woman when she deserted her husband, and went to live with Llula. She was not in good faith, as she knew that her husband was living, and that she could not become the wife of Llula. It was not possible for her to be imposed upon. She was his concubine, and can assert her rights only in that capacity. Where the relationship of concubinage is incidental, and is not the motive and cause of the parties living together, the concubine can recover from the estate of the deceased, if it has been enriched by her industry. There is a *quasi* contract on the part of the deceased to make compensation. Succession of Pereuilhet, 23 La. Ann. 294; Delamour v. Roger, 7 La. Ann. 152.

The relation of concubinage does not prevent the concubine from demanding a settlement of the affairs during its existence, and a participation in profits derived from capital and labor which she contributed, although the property is immovable, and stands in the name of the deceased. The plaintiff did not contribute in capital and labor to the acquisition of the property left by the deceased. The adulterous connection was the motive and prime cause of the concubinage. She was in fact the mistress of Llula, although he seems to have provided liberally for her as wife, and respected her as such. After the death of Llula, on July 17, 1888, an agreement was made by plaintiff and Louisa Suarez, the universal legatee and heir of Llula, by which the plaintiff received certain property of the succession for services rendered the deceased, as a gift and gratuity, in full for all claims against the succession. She has been placed in possession of this property, and has collected the rents. Alleging that the universal legatee and heir has failed to comply with it, she rejected it, and brought this suit. The legatee has not been put in default, and no demand has been made for the execution of the deed to the property. This agreement is a complete estoppel to plaintiff's demand. During the time plaintiff and Llula were living together, Llula purchased and gave to plaintiff a lottery ticket in the Havana Lottery which drew a prize of $10,000, upon which was realized $2,500. This ticket Llula collected, and used the money. He collected the money in September, 1884. The relation between the parties was not that of husband and wife, and prescription was not, therefore, suspended. The prescription pleaded by defendant must therefore prevail. Judgment affirmed.

(44 La. Ann. 99)

MOORE *et al.* v. LOUISIANA NAT. BANK.

(No. 10,892.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

BANKS — COLLECTIONS — ACCEPTANCE OF DRAFT — DELIVERY OF WAREHOUSE RECEIPT.

1. In the absence of instructions, the collecting agent was authorized to infer that the warehouse receipts were annexed to the draft to secure its acceptance, and were to be surrendered on acceptance.

2. The duty of the collecting banks was to obtain the acceptance of the bill.

3. The acceptor, being a purchaser, was entitled to the goods on his accepting the bill.

4. The sale was a credit sale.

5. It was not proven that the defendant had any notice of any condition made to retain the warehouse certificates until payment, or that the insolvency of the drawees was imminent.

6. The instruction "for collection," in sending a draft to a collecting agent, does not relieve him from the duty of obtaining acceptance of the draft, and the delivery, if required by the drawees, of the warehouse certificates attached.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Action by Moore & Sinnott against the Louisiana National Bank to recover the

value of certain property. Judgment for defendant. Plaintiffs appeal. Affirmed.

W. S. Benedict, for appellants. *Branch K. Miller* and *Henry C. Miller*, for appellee.

BREAUX, J. This is an action by plaintiffs, a firm in Philadelphia, against the defendant, to recover the value of 50 barrels of whisky, sold by them to Oppenheimer & Co. The latter directed the plaintiffs to draw on them, payable in New Orleans, at one day's sight, for the purchase price. The whisky was in a bonded warehouse, for which plaintiffs held certificates. They drew on the purchasers, and attached their warehouse receipts, indorsed by them, to the bill, which was handed to the First National Bank of Philadelphia, which sent it, with the receipts, to the defendant for collection. The letter was brief, and did not notify the collecting agents to retain the receipts on acceptance of the draft. In compliance with usage, the draft was left with the drawees for examination. It was returned by them with their acceptance, and they retained the warehouse receipts. The acceptors sold these receipts. The draft was returned by the collecting agent to the Philadelphia bank, unpaid. Plaintiffs allege that the illegal delivery of the warehouse certificates by the defendant enabled the drawees to perpetrate a fraud upon their rights. Testimony was admitted for the purpose of proving the local usage and custom of collecting banks in matter of retaining or delivering, after the acceptance, of drafts, bills of lading, or warehouse certificates attached. Two of the witnesses, cashiers, testified that it is the custom of business houses to surrender all evidences of ownership annexed to the draft, immediately after its acceptance, unless instruction is given not to deliver them before its payment. Three other witnesses, also cashiers, testify that their respective banks would not deliver the warehouse certificates or bills of lading attached, on the acceptance of the draft, unless so instructed by the party by whom sent. The sale had been agreed upon. The remaining conditions to perfect it were the acceptance of the draft by the drawee, and the transfer of the thing sold into the possession of the buyer. The seller is bound to deliver the thing which he sells, whether sold for cash or on credit; in case of non-delivery, the seller is liable to damages, if any be thereby occasioned. The term given for payment will not release the vendor from his obligation, unless since the sale the buyer has become a bankrupt, or is in a state of insolvency. The insolvency of the drawees, at the time of the acceptance of the drafts, is not an issue of the case. The allegation and the proof do not raise that question. It is the duty of the collecting agent, immediately after receiving a bill for collection, to take the steps necessary to its prompt acceptance, and, if the instrument be not accepted, he must take the necessary step to fix the liability of the drawee. If he fails, he becomes liable. In order to obtain the acceptance of the drawee, should he decline, unless there are conditions to the contrary, of which he is advised, he must deliver the warehouse receipts attached. If he retains them, he fails to make the delivery of the property the seller is bound to make. He retains the property without any instructions from the seller. Without delivery of the property, the drawee's acceptance would be without consideration, and his draft would be placed in commerce without his having received anything. The acceptance of the draft makes the drawee the principal debtor. As this draft was made payable one day after sight, with the three days of grace, it was demandable, as to its payment, in four days. It was not a cash sale; the records do not disclose that the contract implied a sale for cash. Plaintiffs' counsel argues as if it was an unavoidable inference, that should have controlled the action of the defendant. The general purpose of the law of negotiable paper and the good of commerce require exactness and certainty. The contract is well defined. It must be executed promptly and accurately. A sale on credit will not give rise to the presumption of any intended cash sale.

The restricted indorsement is relied upon by plaintiffs. The indorsement "for collection" does not pass the title or the right to the proceeds of the paper, but it makes the indorsee or collecting agent the trustee of the holder, and as such he cannot be rendered liable if he complies with an agreement made manifest by the contract. From Tiedman on Commercial Paper (page 494) we copy: "But where the bill of exchange is payable in the future, in absence of special agreement, the bill of lading is to be delivered to the vendee upon his acceptance of the bill of exchange according to its tenor, and the holder cannot insist upon holding it until the bill of exchange is paid. The drawee of the bill of exchange may refuse to accept, unless the bill of lading is surrendered to him." It was held in National Bank v. Merchants' Bank, 91 U. S. 92,—an analogous case,—that, in the absence of instructions, the plaintiff in error was justifiable in having surrendered the bill of lading annexed to the bill of acceptance. It is difficult to conceive of any other meaning of the bill. We abbreviate from that opinion: If the drawee had given a promissory note for the goods, payable at the expiration of the stipulated credit, it is clear that the vendor could not retain possession of the property, after receiving the note for the price. The consideration of the sale is the note. The acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he is denied possession until payment, the transaction ceases to be what it was intended, and is converted into a cash sale. The purchaser of property on credit has a right to immediate possession, unless there be a special agreement that it shall be retained by the vendor. Such an agreement is not to be presumed. The collecting agent has no right to assume that the vendee's term of credit expires before he has the goods, and require him to accept the vendor's draft, and only upon his engagement to deliver at a future time. With reference to the

authority of the agent, who was intrusted (as was the agent in the case at bar) with a draft "for collection," the court holds that the instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft; that the instructions were to collect the money; and, if the drawee is not bound to accept without surrender, it is the duty of the agent to make the surrender. "The drafts were all time drafts." One was drawn at sight; but in Massachusetts, says the court, such drafts are entitled to grace, and in consequence the court classes it as a "time draft." In Lanfear v. Blossman, 1 La. Ann. 148, it was decided that the holder of a bill of exchange cannot, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, and he, as holder, retain the bill of lading attached. This decision is favorably commented upon by Justice STRONG, the organ of the court, in the case to which we have just referred. It is pleaded that plaintiffs' claim is sustained by the local custom of merchants, and testimony was heard in support of the plea. The principle upon which such evidence is to be considered is that the parties meant, when they sent the draft, to let the collecting bank follow the local custom and usage, and that, therefore, instructions were unnecessary It is not proven that plaintiffs knew of any such local usage and custom, nor is it at all manifest that there is any local custom as contended by plaintiffs. Analysis of the testimony leads to the conclusion that it is not customary to retain warehouse receipts and bills of lading attached to time drafts, after acceptance. The individual instances proven do not have the force of custom. They are not the result of acts repeated, "which have acquired the force of a tacit and common consent." Civil Code, art. 3. It is not the settled custom. If it were, it would be inconsistent with jurisprudence established by a number of trustworthy decisions which exclude such a custom. The judgment appealed from is affirmed, at plaintiffs' costs.

(44 La. Ann. 106)

STATE v. LYONS *et al.* (No. 10,940.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

EXAMINATION OF WITNESSES — REBUTTING TESTIMONY.

1. After the testimony in chief for the state and the defense had been taken, and a witness for the state had testified in rebuttal, the defendant did not have the legal right to offer witnesses to rebut the testimony given in rebuttal by the state, unless in exceptional cases.

2. It is a matter in the discretion of the judge. It was a privilege asked, which the court could refuse.

(*Syllabus by the Court.*)

Appeal from district court, parish of Acadia; EDWARD T. LEWIS, Judge.

Indictment against James Lyons, Moses Wilson, and Scott Wilson, for robbery. Lyons and Scott Wilson were convicted, and appeal. Affirmed.

Walter H. Rogers, Atty. Gen., for the State.

BREAUX, J. James Lyons, Moses Wilson, and Scott Wilson were indicted for robbery. Scott Wilson and James Lyons were convicted, and from a judgment sentencing them to seven years' imprisonment in the penitentiary they prosecute this appeal. The case comes up on one bill of exceptions. During the progress of the trial a *nolle prosequi* was entered as to Moses Wilson. Subsequently he was called to the witness stand as a state witness, and testified in chief that he was not present at the robbery charged in the indictments, and did not participate in the crime charged. After this witness had been examined, the accused, in rebuttal of said testimony, called the prosecuting witness—the one upon whom it was charged the robbery had been committed—for the purpose of showing that Moses Wilson was present, and assisted in robbing witness, and that he had sworn falsely. The witness was not permitted to answer the questions propounded. The defendants, through counsel, reserved a bill on the ground that the testimony was admissible, as it was in rebuttal. The trial judge's statement shows that the state had closed its case in chief against all of the accused; that the accused had testified and closed their case; that it was at that time the district attorney entered a *nolle prosequi* as to Moses Wilson, one of the defendants, and placed him on the stand as a witness for the state in rebuttal of the evidence given by the other two defendants; that after he had testified the defendants called the prosecuting witness for the purpose of impeaching the testimony of Moses Wilson; that the witness had stated three or four times in his examination in chief that Moses Wilson was present, and took part in committing the robbery; that the contradiction was plain; and the witness was questioned, says the trial judge, for no other purpose than to make him repeat a declaration he had previously made several times before the jury, and that it was not in rebuttal, but a useless repetition of the testimony. The defendants had no legal right to examine witnesses for the purpose of rebutting the testimony given in rebuttal by the state. The trial judge properly exercised the discretion with which he is intrusted. The defendants have not been deprived of any of their legal rights by refusing to hear evidence already heard. The accused have not shown any ground upon which they can be relieved. Judgment affirmed.

(44 La. Ann. 85)

STATE v. CLESI. (No. 10,890.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

OBJECTIONS TO JURISDICTION—REVIEW ON APPEAL.

1. In case the record discloses that there was raised in a recorder's court no contestation as to the jurisdiction of the court, nor as to the constitutionality or legality of the city ordinance under which the appellant is prosecuted, the appellate jurisdiction of this court does not attach.

2. In the absence from the transcript of the city ordinance involved, this court has no power to revise the judgment appealed from.

(*Syllabus by the Court.*)

Appeal from recorder's court of New Orleans; SMITH, Judge.

Prosecution against Frank Clesi for selling goods within the prohibited radius from a public market. From a judgment on conviction he appeals. Affirmed.

Thomas F. Maher, for appellant. *Henry Renshaw*, Asst. City Atty., and *Carleton Hunt*, City Atty., for the City of New Orleans.

WATKINS, J. Defendant being charged with selling and peddling goods within the prohibited radius from a public market of the city, and having been duly convicted and sentenced to pay a fine of $10, or, in default thereof, to be imprisoned 20 days in the parish prison, prosecutes the present appeal therefrom. The prosecution arises under the provisions of city ordinance No. 4,274, relative to peddling within six squares of the public markets, and it was commenced and prosecuted in the name of the state. The affidavit is in the usual form. The defendant appeared, and filed a demurrer and exception to the proceedings, on the following grounds, viz.: (1) That the prosecuting witness is not authorized by any law or ordinance to represent the city of New Orleans, wherein said city is an interested party, nor the right to sue for the enforcement of the ordinances of the city; (2) that the ordinance under which the prosecution is taken provides who are the proper officers to conduct the proceedings for its violation; (3) that he is not a peddler, either within the spirit or the letter of the ordinance 4274; (4) that his prosecution, by an unauthorized person under this ordinance, violates article 1 of the constitution; (5) that said ordinance is "unreasonable, and * * * not impartial." It appears from the foregoing that in the court below there was no contestation as to the jurisdiction of the court, or as to the constitutionality or legality of the ordinance, for a violation of which he is being prosecuted. In State v. Tsni Ho, 37 La. Ann. 50, this court said: "It is obvious that the 'contestation' referred to in the constitution must have existed in the lower court, and the fact of its existence must affirmatively appear on the face of the record." The same principle is recognized in City of New Orleans v. Hill, 32 La. Ann. 1161. The converse of the same is announced in State v. Murphy, 41 La. Ann. 526, 6 South. Rep. 816. This being the case, defendant has disclosed no appealable interest in the premises. Furthermore, the city ordinance under which the defendant is prosecuted was not offered in evidence in the court below, and was not incorporated in the record brought up here; hence, if the case was jurisdictionally well grounded, this court is powerless to revise the judgment appealed from in its absence. It has so decided frequently. City of New Orleans v. Hill, 32 La. Ann. 1161; City of New Orleans v. Labatt, 33 La. Ann. 107. But it appears, from an examination of an *ex parte* motion filed in this court by counsel for the appellant since the date of submission, that the ordinance is now presented for our consideration. It would be altogether irregular to take any notice of it without resort being had to *certiorari*, and in the absence of a consent obtained from the appellee. There is nothing left for us to do but to affirm the judgment appealed from, and it is so ordered.

(44 La. Ann. 30)

Succession of HARVEY *et al.* v. HARVEY *et al.* (No. 10,775.)[1]

(*Supreme Court of Louisiana.* Nov. 30, 1891. 44 La. Ann.)

ACCOUNTING BY TUTOR—PRESCRIPTION—WAIVER ON MOTION TO DISMISS.

1. In case an appellant procures *certiorari* and brings up documents in the original which are missing from the transcript, and also a supplemental transcript, during the pendency of appellee's motion to dismiss, and under a reservation by the court, the motion will be denied, inasmuch as such records satisfy all of the appellee's reasonable requirements.

2. Where the objection taken is that a transcript of appeal improperly includes two different and distinct records, incompatible with each other, it will not be entertained, the transcript disclosing the cumulation of the two causes in the district court by consent.

ON THE MERITS.

Notwithstanding the action of an emancipated minor against her tutor, respecting acts of tutorship, is prescribed by four years, to begin from the date of his majority, if the tutor take the initiative, and file an account of his acts of tutorship, to which his former ward makes opposition, the plea cannot be made available to the tutor. In such case the accountant's act, in submitting his gestion to judicial investigation and judgment, is tantamount to an abandonment of the benefit of the bar of the statute.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Mary Harvey, as tutrix of the succession of Harry Harvey, deceased, filed her final account, to which J. J. Culligan, as tutor of his minor children, made opposition. To this opposition the tutrix and her son Harry Harvey filed a plea of prescription. Judgment sustaining the plea. Suit by Mary Harvey against William Harvey and others for partition. Opposition by defendant J. J. Culligan, as tutor. Judgment for plaintiff. From the two judgments Culligan appeals. Reversed, and rehearing refused.

B. R. Forman, for appellant. *Gibson & Hall* and *R. L. Tullis*, for appellees.

ON MOTION TO DISMISS APPEAL.

WATKINS, J. The grounds assigned are: (1) That the transcript is insufficient and incomplete, not containing many of the most important documents filed in and used by the lower court on the trial, and which are essential to a trial of the case in this court on appeal; (2) that the transcript contains two different and antagonistic cases, which should have been brought up separately.

Since the filing of the motion to dismiss appeal, under a special reserve by this court, counsel for appellant procured *certiorari*, and thereunder has brought up a supplemental transcript, said to contain the missing documents. He has also brought up in the original a large bundle

[1] Rehearing refused, January 18, 1892.

of papers from the files of the civil district court, as an additional supplement to the transcript. As the case is undisposed of, and the production of these copies and originals appears to satisfy all the reasonable requirements of the appellee's motion, this ground may be dismissed without further consideration.

On the other branch of the motion it will suffice to state that the two cases, respectively entitled, in the civil district court, "Succession of Harry Harvey, No. 19,508," and "Mary Harvey v. Harry Harvey, Wm. H. Harvey, et als., No. 20,017," which are included in one transcript, are germane to each other, and form essential parts of identically the same litigation. The original suit was for a partition of the succession of Harry Harvey between the surviving widow and heirs of deceased. The other proceeding is merely a demand by the tutor of certain of the grandchildren upon the grandmother for an accounting and settlement of the proceeds of property sold, rents and revenues collected, and of his disposition of certain movables, left in possession, the aggregate value of which is placed at some $43,000. It appears that the Succession of Harvey, No. 19,508, was allotted to division E, and the partition suit was improperly allotted to division C, and by consent of parties the latter was transferred to division E, and thereafter all proceedings were conducted before division E under double titles and numbers, as one case, and without objection. On this state of facts, we are of opinion that the transcript was correctly made and brought up, and would have been defective otherwise. Vascocu v. Woodward, 35 La. Ann. 555. Motion denied.

ON THE MERITS.

Harry Harvey died in April of 1872, leaving Mary Harvey, his widow, surviving, and seven children, only one of whom, Josephine, was of full age, and who subsequently married. William F. Blakemore, deceased, left a will, in which he bequeathed in favor of his widow and seven children all of his property, share and share alike. In the will no designation of an executor was made, and there was no dative testamentary executor appointed. The widow qualified as natural tutrix, and, as such, administered the succession of the deceased, after having caused the last will of her husband to be probated. No account of her gestion was filed until January 1, 1887, at which time her youngest child, Harry, became of full age. That was a final account, or purported to be; and on the 10th of June, 1889, she filed a supplemental account. Mrs. Harvey's daughter Alice married J. J. Culligan on June 15, 1881, and died in 1885, leaving her husband and two minor children surviving. She came of full age on the 10th of January, 1875, five years before her marriage, and two years after her father's death. Representing his two surviving children,—grandchildren of Mary and Harry Harvey,—Culligan, tutor, opposed the first account on various grounds; all of the other heirs having consented to their mother's management, administration, and account. During all of those years Alice Harvey resided in and made the family domicile her home until a year had elapsed after her marriage. During this time she apparently acquiesced in all that her mother had done, and she was furnished from the revenues and resources of the common property the means of support and a livelihood. In 1879, nearly four years after she became of age, she voluntarily joined the other children and her mother in an act of sale of a piece of the common property, in order to raise money wherewith to pay taxes and debts incurred in the support of the family, herself among the number. To the opposition of Culligan, tutor, to the original account, a plea of four years' prescription was filed by Mrs. Mary Harvey, acountant, and Harry Harvey. There was judgment sustaining this plea of prescription, and the supplemental account, not having been opposed, was duly homologated, as of course. Widow Mary Harvey brought a suit for a partition of the common property, on the 28th of January, 1887, to which all of the children consented; the tutor, Culligan, alone making opposition. This suit was subsequently transferred to the *mortuaria*. There was a judgment awarding a partition, and Culligan, tutor, made opposition to its homologation; but it was unavailing. The property was sold for the purpose of effecting a partition, and the proceeds of sale were deposited in bank, to await the issue. Those are the two judgments from which Culligan, tutor, has appealed.

In regard to the prescription of four years, the claim of the exceptants is that Alice Harvey survived her father's death, in 1872; became of full age on the 10th of January, 1875; was married on the 15th of June, 1881; and died on the 10th of September, 1885; hence, the two children born of that marriage inherited her succession as beneficiary heirs, and succeeded to her rights, just in the same situation they were in at her death; they participating in their grandfather's succession by representation. Rev. Civil Code, art. 894 et seq. The plea is urged against the opposition of Culligan, tutor, as the legal representative of Alice Harvey, his deceased wife, treating her as an emancipated minor, of whom his minor children were only representatives. The article of the Code relied upon as sustaining the plea is couched in the following words, to-wit: "The action of the minor against his tutor, respecting the acts of his tutorship, is prescribed by four years, to begin from the date of his majority." Rev. Civil Code, art. 362. While an opposition to an account is not an action, but an answer, yet, as the plea of the accountant has treated it as such, for the purpose of argument we may so consider it. Essentially, the account and opposition, considered together, constitute an action "respecting the acts of the tutorship." This action was instituted long since the expiration of the four-year limit, counting from the date of the majority of Alice Harvey, mother of opponents. It was during the progress of the trial of the account that Mrs. Harvey tendered the plea of four

years' prescription. The contention of the opponent is that, while the tutrix of an emancipated minor cannot be compelled to render an account "respecting the acts of her tutorship after the lapse of four years, to begin from the date of her majority," yet, if such tutrix does file an account, in which she deals with the acts of her tutorship, and it is opposed by the ward, she is judicially estopped, at this stage of the proceedings, from availing herself of this prescription. The learned judge of the lower court maintained the plea, but we cannot concur in his ruling. As there appears to be no case in which the question has been adjudicated, he evidently treated it as *res nova*, as we shall be necessitated to do. To sustain the plea of the accountant, under existing circumstances, would, in our opinion, be equivalent to allowing her to first inaugurate a judicial proceeding, and, finding it opposed, to defeat any investigation, by use of the bar of prescription. This she evidently cannot be permitted to do. The doctrine, which permits one to employ as a shield that which he cannot use as a sword, would, in this manner, be reversed, so as to allow an accountant to use as a sword that which she cannot employ as a shield. If, however, the plea should be maintained, it would only cut off inquiry in respect to the acts of Mrs. Harvey as tutrix between the year 1872, when Mr. Harvey died, and 1875, when Alice became of age; because since then Mrs. Harvey has possessed and administered the common property, for which she must account in the partition suit. By remanding the case, the whole matter can be tried and decided together. It is therefore ordered and decreed that both judgments appealed from be annulled and reversed; that the plea of four years' prescription be avoided; and the whole litigation remanded for further and final disposition and decree; the costs of appeal to be taxed against the succession, and other costs to await the final termination of the litigation.

(44 La. Ann. 46)

Successions of THEZE *et al.* (No. 10,905.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

JUDICIAL SALES—JURISDICTION OF COURT—DISPUTING RECORDS.

It has long been the settled jurisprudence of this court that a purchaser at a judicial sale is held bound to look to the jurisdiction of the court granting the order of sale, but the truth of the record concerning matters within its jurisdiction cannot be disputed; and it has been sanctioned in many recent cases, and must be adhered to as a rule of property.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Successions of Auguste Theze and Marcel Theze, deceased, consolidated. On sale of the property it was adjudicated to George Sick, who declined to accept title, and was ruled to show cause why he should not comply with the adjudication. His objections being adjudged untenable, he appeals. Judgment affirmed.

Ernest J. Wenck, for appellant. *Augustus Bernau*, for appellee.

WATKINS, J. Auguste Theze and Marcel Theze, being joint owners of the lot and property, with improvements, situated at No. 308 Decatur street, city of New Orleans, a one-half undivided interest was inventoried in each of their successions, which were separately administered,—one by an executor, and the other by an administrator. Upon proper representations of the respective legal representatives of said successions, the proper judge granted two separate orders for the sale of said respective interests in said property, to pay debts of said successions; said sales being fixed for the same date, and were to be made on like terms. Subsequently the two *mortuariæ* were cumulated, and afterwards treated and dealt with as one succession; and in this situation the sale was made, and the property adjudicated to George Sick, at the price of $3,400. He having declined to accept title, said representatives ruled him to show cause why he should not comply with the terms of the adjudication; and on the trial, his objections being found and adjudged untenable, said adjudicatee has appealed. The grounds relied upon by defendant in rule are that the said successions, nor either of them, owed any debts, and there was no necessity for either an administration thereof or for the sale of said property. As a fact it appears that the public administrator petitioned the court to be appointed administrator of one of said successions and dative testamentary executor of the other. That this application was opposed by Henry Theze, an heir of deceased; the ground of his resistance being that said deceased, nor their successions, owed any debts, and there was no necessity for an administration thereof; and, if an administration was deemed necessary, opponent was entitled to be preferred in receiving appointment. His opposition appears to have been overruled on the ground first stated, and sustained on the other; he having been qualified and confirmed, and is now acting as administrator and executor. As the proceedings appear to have been perfectly regular, and as the court evidently had jurisdiction of the *res*, the objections of the adjudicatee do not appear to be jurisdictional and are therefore unavailing to him. We have so decided in many cases. It has long been the settled jurisprudence of this court that a purchaser at a judicial sale is held bound to "look to the jurisdiction of the court granting the order of sale, but the truth of the record concerning matters within its jurisdiction cannot be disputed." Graham's Heirs v. Gibson, 14 La. 146; Ball v. Ball, 15 La. 182; Rhodes v. Bank, 7 Rob. (La.) 66; McCullough v. Minor, 2 La. Ann. 468; Shaffet v. Jackson, 14 La. Ann. 154; Webb v. Keller, 26 La. Ann. 596; Fraser v. Zylicz, 29 La. Ann. 536; Herriman v. Janney, 31 La. Ann. 280. Also that the "purchaser at a judicial sale of property of the succession is not bound to look further back than the order of the court directing the sale." Succession of Hebrard, 18 La. Ann. 485; Woods v. Lee, 21 La. Ann. 505; Beale v. Walden, 11 Rob. (La.) 72; Brosnaham v. Turner, 16 La. 440; Nesom v. Weis, 34

La. Ann. 1004. This doctrine has been repeatedly affirmed in more recent cases. Webb v. Keller, 39 La. Ann. 55, 1 South. Rep. 423; Linman v. Riggins, 40 La. Ann. 761, 5 South. Rep. 49; Succession of Lehmann, 41 La. Ann. 987, 7 South. Rep. 33; Gale v. O'Connor, 43 La. Ann. 717, 9 South. Rep. 557. Our understanding of the adjudicatee's defense is that the record is, in effect, untrue in its statement that the successions of the two decedents owed debts necessitating an administration and sale. As such it certainly and evidently invades the rule just announced, —that "the truth of the record concerning matters within the jurisdiction of the court" granting the order of sale "cannot be disputed." In Webb v. Keller, 39 La. Ann. 55, 1 South. Rep. 423, we maintained the validity of a sale made under an order of court which had not been preceded by a tableau or statement of debts, and held that debts placed upon a tableau subsequently filed, and homologated by the judgment of a competent court, were sufficient, because that was "a mere irregularity, and did not challenge the proceedings as null and void." It is true that that suit was a revocatory action against an adjudicatee in possession; but, in Succession of Byrne, 38 La. Ann. 518,—a suit like the instant one,—we made a similar ruling, stating: "We do not regard the alleged irregularities in the partition of such a character as to cast a cloud upon the title of Madeline and John Bligh Byrne in the sense of Gassen v. Palfrey, 9 La. Ann. 560, and Succession of Weber, 16 La. Ann. 420. Indeed, the respondent urges no complaint of their title at all. His complaints are of irregularities in the partition proceedings alone." True it is that this court did hold in Succession of Domestre, 40 La. Ann. 571, 4 South. Rep. 328, that, athough a purchaser may be protected by the order of court directing a sale in a matter over which it had jurisdiction, yet he has the right to inquire into the validity of the proceedings conducive to the order of sale, to ascertain whether, under the showing made, the court had the power to make the order." But we had occasion in a subsequent case to examine that decision in reference to a suit like the instant one, and we said of it that it appeared that "minors had an interest in the property," and that, therefore, "we viewed it as a partition proceeding in disguise, without the prescribed forms of law having been attended to, and that its covert purpose was to divest illegally the title of the minors." Succession of Lehmann, 41 La. Ann. 987, 7 South. Rep. 33. Of course, the judge had no authority to thus order a sale *in globo* of minor's property for the purpose of the partition of a succession composed of sundry properties, the proceeds of the sale largely exceeding the debts due, and the result of which was to leave the surplus in the hands of a tutor dispensed from bond. That was an extreme case,—one *sui generis*. But in the successions of Auguste and Marcel These there was but a single piece of property,—that under consideration,—which owed some small debts and the costs of administration. There is not shown to have been any cash in the hands of the legal representatives thereof, nor any revenues wherewith to discharge the same; and the heirs were of full age. There exists no parallel between the two cases. After looking into the question very carefully, our judgment is convinced that the district judge correctly made the rule on the adjudicatee absolute. Judgment affirmed.

(44 La. Ann. 51)

SMITH *et al.* v. SINNOTT. (No. 10,894.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

EXECUTORS—RIGHT TO SUE—RECOVERY OF ASSETS —PARTIES.

An executor has capacity to institute and prosecute to judgment real actions for recovery, into the succession of the testator, of property in the hands of strangers, without joining his universal legatees as plaintiff; and for like purpose to sue for the partition of partnership property.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge.

Suit by Thomas Smith and the executors of Charles Smith against James B. Sinnott for partition. Rule to compel Thomas Eagan, the purchaser, to take title of the property adjudicated to him on the sale thereof. From a judgment discharging the rule plaintiffs appeal. Reversed, and rule made absolute.

J. C. Gilmore and *S. L. Gilmore*, for appellants. *Benjamin Ory*, for appellee.

WATKINS, J. This is a proceeding by rule, taken on the part of plaintiffs in the suit entitled "Thomas Smith and Executors of Charles Smith v. James B. Sinnott," it being a suit for the partition of the property situated at the corner of Perdido and Howard streets, in the city of New Orleans, to compel Thomas Eagan, purchaser, to take title thereto; same having been adjudicated to him at the price of $3,000. The two grounds of objection urged to the title are (1) that all parties in interest were not cited as defendants in said partition suit; and (2) that the executors of Charles Smith—one of the joint co-proprietors—were incapacitated in law to prosecute said suit, and stand in judgment therein without being joined and authorized by the heirs of the deceased testator. On the trial the lower judge discharged the rule, and plaintiffs have appealed. The facts are as follows, viz.: At an auction sale, made in the succession of James Cousley, the property sought to be partitioned was adjudicated to Smith Bros. & Co. in the foreclosure of a special mortgage. Succession of Cousley, 39 La Ann. 570, 2 South. Rep. 544. Smith Bros. & Co. was a commercial partnership, composed of Charles Smith, Thomas Smith, and James B. Sinnott. In the partition suit, Thomas Smith and the executors of Charles Smith, deceased, were plaintiffs, and James B. Sinnott, the other and third co-proprietor, was cited and made defendant; the plaintiffs alleging themselves to be the joint owners of two-thirds, and defendant of one-third, of the property, and they being unwilling any longer to hold same in indivision. There

was no dispute about facts in that case, the defendant appearing *in propria persona*, admitting the joint ownership of the property, and submitting himself to the jurisdiction and judgment of the court. Under the judgment therein rendered, the property was adjudicated to the defendant in rule, and *procès-verbal* duly executed. There are no forced heirs to the succession of Charles Smith, but there are testamentary heirs or universal legatees under his will. Rev. Civil Code, art. 1609; Succession of Dupuy, 4 La. Ann. 570. Some of the legatees are present, or represented in the state, who were not joined as plaintiffs in the partition suit, and who are not made parties defendant. The proof shows that the administration of his estate has not been closed, and said legatees have not been put in possession of their inheritance. The testator owed no debts, and the only sums there are to be disbursed by his executors are the expenses of administration, and one special legacy, for the payment of which, it is admitted, there has been, at all times, a sufficiency of cash on hand. Therefore the question for decision is whether, under the circumstances related, there were proper and sufficient parties plaintiff to authorize the judge *a qua* to render a valid judgment decreeing a partition of the common property; or, in other words, did the executors of Charles Smith have the capacity to institute and prosecute the suit, and stand in judgment, the defendant urging no objection? These are the questions propounded by a purchaser at a public judicial sale, who alleges the incapacity of said executors on that account, and declines to take title. The property sought to be partitioned was undoubtedly held and owned in indivision by the three members of the commercial firm of Smith Bros. & Co., notwithstanding the title was taken in the partnership name, because a commercial partnership cannot deal in or acquire ownership of real estate. Rev. Civil Code, art. 2825; Skillman v. Purnell, 3 La. 494; McKee v. Griffin, 23 La. Ann. 419; Baca v. Ramos, 10 La. 420; Hall v. Sprigg, 7 Mart. (La.) 244; Thomas v. Scott, 3 Rob. (La.) 256; Tippett v. Jett, Id. 313; Millaudon v. Railroad Co., Id. 488.

Under the law, it is the duty of the curator of a vacant succession, or of absent heirs, to institute suit for the partition of property held in joint ownership by the deceased and third persons, in order that the part belonging to the deceased in the partnership property be ascertained. Succession of Dumestre, 42 La. Ann. 411, 7 South. Rep. 624; Rev. Civil Code, art. 1135. But, those principles of law being conceded, the question yet remains for ascertainment, had the executors of Charles Smith capacity to bring the partition suit and stand in judgment? Conceding for the argument, and nothing more, that article 123 of the Code of Practice has equal application to suits brought by, as to those brought against, executors,—which we do not undertake to decide,—it is evident to our minds that the "heirs" therein referred to are legal heirs, or heirs of the blood, (Rev. Civil Code, art. 879,) and not "the universal successors of the deceased," (Id. arts. 884, 1607.) In the former article it is provided "that the person who has become the universal successor of the deceased, who is possessed of all of his property and rights, and who is subject to all the charges for which the estate is responsible, is called the 'heir,'" etc. The latter provides that "the universal legatee is bound to demand * * * the delivery of the effects included in the testament." In this case the will was not introduced in evidence, and, presumably, it gave to the executors full seisin of the testator's effects. Id. art. 1659. But if they were not given full seisin, they were entitled "to execute the legacies contained in the will, and to cause any other conservatory acts of the property to be made." Id. art. 1660. To eliminate from the property of a succession the interest of a stranger is a matter of administration, and a suit for that purpose is such a "conservatory act of the property" as an executor may do in his own right and capacity. Id. arts. 1135, 1660. The universal legatees of the deceased have not been placed in possession of their inheritance. Until the partition was perfected, they could not be placed in possession of the testator's property and rights, nor could they legally become subject to the charges for which his estate is responsible. The executors have not discharged the special legacies. The contingency has not arisen in this case in which the universal legatees are entitled to be called "heirs" of the deceased. The defendant, Sinnott, filed an answer in the partition proceedings, admitted the joint ownership of the plaintiffs in the property, and submitted himself to the jurisdiction of the court. That the executors of Charles Smith had capacity to sue and stand in judgment, and that the court had jurisdiction *ratione materiæ et personæ*, there is in our minds no doubt; at least, in a case like this, where there are no forced heirs, and when the execution of the will involves the administration and disposition of the whole estate. Entertaining this view, we must reverse the judgment. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that the rule taken to compel the adjudicatee to accept title and complete the adjudication be made absolute, at the defendant's cost in both courts.

(44 La. Ann. 41)

Succession of VIDAL. (No. 10,893.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

ACTION TO ANNUL WILL—RIGHTS OF HEIR—VALIDITY OF TESTAMENT—EXECUTION—RECITATION IN WILL.

1. In a proceeding, in a succession under administration by a testamentary executor, by an heir to annul the will and the probate thereof, and to be recognized as sole legal heir, and as such to be put in possession of the succession, questions of title to specific property are foreign to the issue, and should not be ingrafted on such a proceeding. The heir, when recognized, takes the rights of the succession as they are; no more, no less.

2. Under the law of Louisiana a testament is

a solemn act, dependent for existence upon compliance with the forms prescribed by law.

3. The Code requires that a testament by public nuncupative act shall be received by the notary, dictated by the testator, written down by the notary, and read to the testator, all in the presence of the witnesses; and that express mention must be made in the will itself that all the foregoing requirements have been complied with.

4. Where such a will only recites that the will was read in the presence of the witnesses, and does not declare that it was dictated and written down in their presence, the omission is fatal.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Petition of Antonio Bilbenny against Francisco Bilbenny, executor of the succession of Rosa Vidal, to set aside the will. Judgment for petitioner. The executor appeals. Affirmed.

W. S. Benedict, for appellant. *Merrick & Merrick*, for appellee.

FENNER, J. After the death of Rosa Vidal one Francisco Bilbenny, her cousin, presented to the court a notarial document, purporting to be the testament of deceased by public nuncupative act, by which he was constituted her universal legatee, and alleging that he was also her heir at law; prayed that the will be probated and ordered for execution; that an inventory be taken, and that he be appointed and qualified as testamentary executor. The will was accordingly probated. Francisco Bilbenny was appointed and qualified as executor, and an inventory was taken, exhibiting, as the only property of the succession, certain real estate, therein fully described, and valued at $3,000. No further proceedings had been taken when one Antonio Bilbenny, a resident of Barcelona, Spain, appeared, and filed a petition, in which he averred that he was the legitimate uncle of deceased, and her nearest of kin and sole legal heir; that the will which had been probated was null and void; that the succession owed no debts, and that, as sole heir, he accepts the same purely and simply; that the succession property consisted of the real estate which had been described in the inventory, together with the fixtures and stock in trade of the business therein conducted; that he was entitled to the recovery and possession of all said property; and he prayed for judgment annulling the will and the probate thereof, and recognizing him as sole heir of deceased, and, as such, entitled to recover and to be put in possession of all her estate, real and personal; and that Francisco Bilbenny, "so-called testamentary executor," be cited and be decreed to deliver the real and personal property belonging to the succession, and to account for the same and for the rents and revenues thereof. Francisco Bilbenny answered, pleading, first, the general denial, and further averring "that he is the owner in possession of the property referred to in good faith, and by just title and by right of law, * * * all of which he is ready to verify by proceedings at law in this honorable court as well as by fact." In the course of the trial under these issues the defendant sought to introduce certain evidence tending to show an independent title to the property not derived from the succession; to which the counsel for plaintiff objected on the ground (substantially) that Francisco Bilbenny was estopped from claiming adverse title to property which the inventory, taken and homologated at his own instance, declared to be the property of the succession. The judge *a qua* ruled out the testimony, but on grounds different from that stated in plaintiff's objection, viz.: "That the only question before the court here is as to heirship *vel non*, and not as to ownership of property, * * * and no evidence is admissible here as to ownership of any specific piece of property claimed to belong to the succession of Rosa Vidal." To this ruling the counsel for both sides excepted. Counsel for Antonio claims that by his answer Francisco had put at issue the title to specific property, and had propounded a title in himself, resting on nothing but his denial of Antonio's allegations, and that his title must stand or fall by the decision of the issues as to the nullity of the will and heirship. Counsel for Francisco contends that he has set up an adverse title generally, based on law and fact, and had the right to establish such title by all appropriate evidence. The judge concluded, as we think, rightly, that this is an action by an heir to annul a will and the probate thereof, and to be recognized as sole heir of deceased, and as such to be put in possession of her estate, and authorized to recover the same. Such is the obvious purport of the petition of plaintiff, as indicated by the prayer thereof, which we have epitomized above, and which, as we have often held, determines the character of the action. The obscure and vague assertion of adverse ownership contained in Francisco's answer cannot be permitted to ingraft upon such an action the features of a petitory action involving title to specific property, which features are entirely foreign to the relief sought. An heir, when recognized and put in possession, succeeds to the rights of the *de cujus*, whatever they may be, and must assert those rights against adverse claimants by independent proceeding after the decree recognizing his heirship and putting him in possession. We do not indicate what further proceedings may be proper in this particular case by reason of Francisco's relation as executor; and still less do we determine the soundness of the estoppel set up in the objection to evidence. This brings us to the consideration of the vital questions involved in the case.

1. As to the nullity of the testament. The instrument, which is intended as a will by public nuncupative act, is in the following words, (omitting the dispositions:) "Be it known that on this 20th day of March, 1888, I, R. H. Dowing, a notary public in and for the parish and state aforesaid, did repair to the house of Miss Rosa Vidal, inhabitant of the said parish of Orleans and state of Louisiana, where, at her request and dictation, the following instrument was written by me, the said notary, and declared by the said Miss Rosa Vidal to be her last will and

testament. * * * In faith whereof said Rosa Vidal has signed or affixed her mark, she hereby declaring to me, notary, that, being unable to sign the foregoing instrument, owing to the fact that she was and has been for some time suffering from paralysis, she has hereto affixed her mark in presence of Messieurs Jacinto Bunal, P. Barrere, and Louis Macardby, witnesses of lawful age, residing in this parish, and me, said notary, after having read the same in a loud and audible voice in the presence of the said witnesses and the testator, and without turning aside to other acts, this 20th day of March, 1888." A comparison of this instrument with the one recited at length in the decision in the case of Succession of Wilkin, 21 La. Ann. 115, will exhibit a complete identity in every feature having the slightest bearing on the question. In that case the will was pronounced void because it contained no "express mention" that the will was "received," "dictated by the testator," and "written by the notary as dictated" in the presence of the witnesses. A like conclusion was reached in two other undistinguishable cases: Christine v. Verbois, 11 La. Ann. 108; Devall v. Palms, 20 La. Ann. 203. In presence of such perfect precedents, it is needless to cite others announcing similar principles in cases only analogous. *Stare decisis* would sufficiently support a similar ruling in this case, even if the principle were doubtful, but we consider it, beyond question, sound. Testaments, like donations *inter vivos*, belong, under our law, to the class of solemn acts; that is, acts that depend for their existence upon compliance with the forms prescribed by law. Our Code requires that the will by public nuncupative act shall be received by the notary, dictated by the testator, written down by the notary, and read to the testator, all in presence of the witnesses; and that "express mention" must be made in the will itself that the foregoing requirements have been complied with. No proof of the most scrupulous fulfillment of every formality would suffice without this "express mention." No particular form of words is required. They must be such as expressly declare in substance that the foregoing requirements were fulfilled. Implication cannot be resorted to, unless at least it be an implication necessarily involved in the meaning of the express words used. In this case it is apparent that there is no "express mention" that the dictation and writing down of the will took place in the presence of the witnesses. The only thing which the instrument mentions as having been done in the presence of the witnesses is the reading of the will. It does not follow by any necessary implication from the statement that the will was "read in the presence of the witnesses" that, therefore, it has been dictated and written down in their presence. Those acts succeed each other in point of time, and it might well be that the witnesses who were absent when the will was dictated and written might have been introduced in time to hear it read. The judge rightly annulled the will and the probate thereof.

2. The sufficiency of the proof of the sole heirship of Antonio Bilbenny is not questioned, and does not admit of question. The judgment of the court conforms substantially to the prayer of Antonio's petition, and is not subject to any complaint, because it reserves the right to all parties to contest the ownership of specific property in appropriate form of action. This reservation conforms to the ruling made on the evidence, which we have already approved. It passes on nothing, and reserves nothing beyond what would have been reserved by law without mention. Judgment affirmed.

(44 La. Ann. 35)

WEINTZ *et al.* v. KRAMER *et al.* (No. 10,911.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)

NOTARY PUBLIC — NEGLIGENCE — CONFECTION OF TESTAMENT—ACTION ON BOND—PRESCRIPTION.

1. The prescription of one year is not applicable to an action brought upon the bond of a notary public for failure to perform the duties incumbent upon him.

2. The obligations of the bond of a notary public in New Orleans are governed by section 2521, Rev. St., which is a special statute with reference to notaries of this parish, and which has heretofore been construed by this court to extend liability in favor of persons other than those who actually employ the notary.

3. A bond for the "faithful performance" of duties voluntarily assumed and done for personal profit involves something more than mere honesty; it involves care, attention, diligence, and reasonable competency.

4. The decision in Weick v. Henne, 41 La. Ann. 1153, 5 South. Rep. 528, is vindicated and approved.

5. A notary undertakes the confection of a testament by public act with full knowledge that its validity depends on the most exact fulfillment of the formalities required by law. He is reminded of this and guarded by the requirement to make "express mention" of these formalities, and that they have been complied with. The formalities are clearly and plainly stated, and the notary has only to follow the language of the law to be safe. If he chooses to deviate from the law, and to substitute language of his own choice to convey the same meaning, he does so at his own risk, and cannot throw resulting loss on innocent persons.

6. The measure of plaintiff's loss is the amount which she would have received on her legacy after payment of succession debts and privileges. Where the succession has been administered, and an account rendered and homologated, such judgment must be accepted as *prima facie* correct, and throws upon plaintiff the burden of proof in any attack on the items of the account.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge.

Action by Maria Weintz and others against Peter J. Kramer and the sureties on his official bond as notary public to recover for the loss of a legacy, resulting from Kramer's fault in failing to properly execute the will, by reason of which it was annulled. Judgment for plaintiff Weintz. Defendants appeal. Modified.

W. S. Benedict, H. Heidenhain, A. J. Lewis, and *E. Warren*, for appellants. *A. L. Tissot* and *Henry P. Dart*, for appellees.

FENNER, J. The plaintiff was a legatee of the late Frank P. Burger, who be-

queathed her two lots of ground, with the improvements, in New Orleans. Burger's will was taken in nuncupative form by public act before Peter J. Kramer, Esq., notary public. The will was subsequently attacked by certain of the heirs, and the same was annulled by this court upon the express ground "that the notary who executed it failed to state that the attesting witnesses were residents of the parish of Orleans,—the place where the same was executed." See 41 La. Ann. 1153, 5 South. Rep. 528. Being ousted of the legacy under this decision, she brings an action against Kramer and his sureties for the value of said legacy, alleging that she has lost the same by reason of the fault, negligence, imprudence, and want of skill and inattention to his business of the said notary. There is no dispute that Kramer was regularly appointed a notary public by the governor; that Thuem and Hassinger were his sureties on his official bond. The condition of this bond is that the notary "shall well and faithfully discharge and perform all the duties incumbent upon him in and for the parish of Orleans, and for the faithful performance of all duties required by law towards all persons who may employ him in his profession as notary in accordance with the act relative to notaries." The petition was met by exceptions of prescription of one year and no cause of action.

The plea of prescription is disposed of by our decision in a like action upon the bond of a notary, where we said: "The prescription of one year is based on the hypothesis that the action is one for damages for a *quasi* offense. We are not concerned here with the question as to whether defendant's breach of duty was or not technically a *quasi* offense. The action is on a bond, and therefore *ex contractu*, to which the prescription invoked is not applicable. Brigham v. Bussey, 26 La. Ann. 676." Fox v. Thibault, 33 La. Ann. 33.

The exception of no cause of action is based upon the idea that the obligations under the bond are governed exclusively by the terms of section 2503 of the Revised Statutes, which provides that the notary's bond shall be "conditioned for the faithful performance of all duties required by the law towards all persons who may employ him in his profession of notary," and therefore that, as plaintiff did not employ this notary, and the petition does not so allege, it sets forth no breach of the bond, and no cause of action thereon. Without deciding that this would be a proper construction of this statute, it is sufficient to say that, with reference to notaries in the parish of Orleans, the broader requirement of Act No. 109 of 1857 is reproduced and held in force by section 2521 of the Revised Statutes, which exacts a bond conditioned "for the faithful performance of his duties." The bond in this case, as shown by our above quotation of its terms, was evidently framed to comply with requirements of both these sections. The effect of the condition prescribed by the act of 1857 and section 2521, Rev. St., has already been construed by this court. The suggestion that it applied only in favor of persons employing the notary was repudiated, and the court said: "The act of 1857 fixes, as the broad and legitimate condition of the notary's bond, that he shall faithfully perform his duties in that capacity." Rochereau v. Jones, 29 La. Ann. 84. There can be no doubt that this bond, given by a notary of New Orleans, is governed by section 2521, Rev. St., which is a special statute, applying exclusively to notaries of this parish, and must prevail over the general provision of section 2503, which applies to the notaries of the state generally. We observe that section 2521 has been again reproduced in the latest act touching notaries in New Orleans, Act No. 42 of 1890. If the contention of defendants were well founded, there would be no liability under the notary's bond for any fault or misconduct, however gross, in that most important of all notarial functions, the confection of testaments. No one could be injured by the nullity of the testament except the legatees, and, as they are not the persons who employed the notary, they would have no recourse.

The further legal defense is interposed that the bond does not guaranty the competency of the notary, but only his fidelity and honesty. Such is not the tenor of the bond, which is conditioned that the notary "shall well and faithfully discharge and perform all the duties incumbent upon him," etc. Our jurisprudence recognizes no such restriction, but has held the notary and his sureties responsible for faults of omission or commission, unattended with any suggestion of fraud or dishonest intent. Brigham v. Bussey, 26 La. Ann. 676; Fox v. Thibault, 33 La. Ann. 33. In a later case we distinctly said. "The stipulations which the bond contains constitute the contract entered into, and must be strictly construed. The object contemplated was to make certain that the notary would discharge well and faithfully all the duties incumbent upon him, and, in case of his failure to do so, and loss was sustained thereby, to hold the surety liable. * * * Before the notary and his surety can be held, it is necessary to inquire whether the act done or not done, committed or omitted, was or was not authorized by law, was or was not incumbent upon him, was or was not required of him, whether he was directed to do it, whether he has failed to discharge the duty, and whether injury has been sustained." Schmitt v. Drouet, 42 La. Ann. 1064, 8 South. Rep. 396. It is true, the state takes certain other precautions to secure the competency of notaries by having them examined, etc., but, not content with these, it adds the obligation of the bond to protect people who are interested in the due and proper performance of their duties. That protection would amount to little if it only guarded against intentional dishonesty and fraud. Although the statute only requires a bond for "faithful performance," such "faithful performance" of duties voluntarily assumed and carried on for personal profit involves more than mere honesty; it involves care, diligence, attention, and reasonable competency.

The defendants next deny that the no-

tary here committed any fault, and they assail the correctness of the decision of this court in Welck v. Henne, 41 La. Ann. 1153, 5 South. Rep. 528, which annulled the will. As defendants were not parties to that suit, they are not technically bound by the judgment. But we see no reason to change the conclusion therein reached. If it was a strict application of the law, it was made in a matter in which, above all others, the law enjoins and requires the utmost strictness. Baudry-La Cantinerie, in his admirable commentary on the French Code, says: "The most common cause for annulling testaments by public act is for want of or defect in the express mention [of fulfillment of the forms required.] It would be wrong to blame the courts for the severity with which they enforce this requirement, because that only manifests the respect for the authority of the law which inspires their decisions. The blame, if any, ought to rest upon the legislator, who has perhaps exceeded the just measure of rigor in regard to these formalities." Baudry-La Cantinerie Droit Civil, No. 561. We rest our decision in the case referred to upon our respect for the authority of the law which requires that express mention should be made that the witnesses were persons "residing in the place where the will was received," meaning thereby residing in the same parish. To say that they were "witnesses residing in the neighborhood" certainly does not fill the requirements, and the reasons are sufficiently given in the opinion. Finally, it is contended that such an error on the part of the notary is not a fault of so grave a character as to subject him to responsibility, being a mere error of judgment which a discreet and diligent man might have committed. We have no desire to exaggerate the fault of the respectable notary who acted in this case; but his error was sufficiently grave to entail the nullity of the will, and to subject the plaintiff here to the loss of her legacy. He knew that the validity of the will depended upon the most exact and scrupulous fulfillment of the formalities prescribed by law. The directions of the law are precise and unambiguous. He had only to use the terms of the law itself to be absolutely safe. If he chose to substitute other terms, he did so of his own motion, and at his own risk, and cannot throw the resulting loss on innocent persons, who had the right to rely upon his proper performance of the duties incumbent on him. The words of the statute are not sacramental; but the words used must be such as expressly declare fulfillment of the formalities. "Implication is not to be resorted to, unless, at least, it be an implication necessarily involved in the meaning of the express words used." Succession of Vidal, 44 La. Ann. ——, 10 South. Rep. 414. It is important that notaries should be impressed with the gravity of their responsibility when they undertake the confection of testaments, which involve the devolution of entire estates, and the execution of the final wishes of the *de cujus* with regard to those who come after him. They know that their validity depends on the strictest compliance with the law, and they should follow the plain letter of the law, or assume the responsibility of any deviation. The very object of the requirement of "express mention" is to guard them against neglect or forgetfulness, and to fix their responsibility. Under the French law, from which our system is derived, we are referred to many authorities unequivocally upholding the responsibility of notaries for such errors. 39 Dalloz, Repertoire, Nos. 302, 307, 339, 424, et seq.; 8 Dalloz, Repertoire, pars. 1, 26, 29; where the authorities and decisions are referred to. We conclude, therefore, that the judge *a quo* did not err in holding defendants responsible for the damage suffered by plaintiff.

The measure of this loss is the amount which plaintiff would have received had the will been valid. It appears that the succession of Burger (the *de cujus*) was duly administered. It consisted exclusively of real estate bequeathed to plaintiff and to another legatee, which was sold under order of court, and realized (with some rentals) the sum of $2,505. The administrator filed an account showing disbursements on account of taxes, privileges, costs, etc., and leaving a net balance of $939.55. Among the liabilities on the account allowed by the court was an item of $500, paid to the widow "as per compromise." The judge *a quo* thought the defendants carried the burden of proof to show the correctness of this payment. We consider it fairly presumable that the court allowed the item as due to the widow, either in payment of a debt due or of her privilege as widow in necessitous circumstances, in either of which cases the claim would prime the legacies. The defendants are entitled to the benefit of the presumption that this judgment of the court was correct, and, if plaintiff desired to attack it, the burden of proof was on her. We must, on this ground, amend the judgment. It is therefore adjudged and decreed that the judgment appealed from be amended by reducing the amount thereof from $824.99 to $626.36, and, as thus amended, the same is now affirmed; appellee to pay costs of appeal.

(44 La. Ann. 1)

Succession of BORGE. (No. 10,880.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)

ACCOUNTING BY MANDATORY—STALE CLAIM—EVIDENCE—PRESUMPTIONS.

1. A mandatary, who has acted as such continuously for a long period of years, without being called upon for an account, and who then renders an account, showing a balance in his favor, does not subject his demand to a charge of staleness because the credits giving rise to the balance arose in the first years of the mandate.

2. Presumptions of fact are not, like presumptions of law, governed by fixed rules. They are mere inferences, drawn by the judicial mind from the facts and circumstances of each particular case, dependent on their own natural efficacy in generating belief or conviction. Slight variations in the facts of any particular case alter the force of such presumptions, and all the facts must be considered together in determining their application.

3. The facts of this case are anomalous and peculiar, and, considering them all together, the

presumptions invoked do not suffice to destroy the positive evidence to the contrary, or to justify a reversal of the judgment appealed from; which, however, is amended by reduction of amount.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Application of the succession of Frank Borge for a rule on William C. Faust to show cause why he should not pay over certain money. Judgment for Faust. Plaintiff in the rule appeals. Modified.

F. Michinard and *J. P. Blair*, for appellant. *Harry H. Hall*, for appellee.

FENNER, J. The controversy in this case arises out of the following facts: William C. Faust was the son-in-law of the decedent, Frank Borge. In 1872 and 1874 Borge became the purchaser of a certain business known as the "New Orleans Transfer Company," and of the property engaged therein, consisting of coaches, wagons, horses, harness, office furniture, fixtures, etc. The purchases, however, were made by Borge through and in the name of William C. Faust, who alone appears as actor in the transaction, who paid the cash portion of the price, and who gave his individual notes for the deferred payments, all of which appears from the notarial acts of sale extant on the record. Borge was not known in the transaction, and was obviously solicitous of concealing his interest therein. His reason, as indicated by the testimony, was the embarrassed condition of his personal financial affairs. He took no counter-letter. The business was conducted entirely in the name and for the apparent account of Faust. Regular books were kept of the transfer business, which was a very lucrative one. At the end of each month these books were balanced, the net earnings were ascertained, and the amount thereof was paid over to Faust, who passed them to his individual credit in bank. These funds were disbursed by Faust either to Borge personally, or by his orders, or for his account. From 1875 to 1885 Faust worked for a salary. After the 1st of January, 1885, Borge allowed him an interest of one-fourth the net earnings. As Faust figured in the transfer business as sole owner, and received the whole earnings, of course the account of his salary and interest makes no appearance on the books of the transfer; and, as Borge did not appear in the business at all, the books are equally silent as to him. All the accounts of Faust's salary and interest, as well as of all payments between him and Borge, are outside of the books of the transfer, and are involved in the settlement of the account between the two touching the funds realized as net profits of the business, and paid over to Faust as apparent owner. Faust drew on account of the salary and share of profits due him as he saw fit, and he made payments to Borge or for his account, as directed. Borge forbade him to keep any regular accounts of the dealings between them, assigning as a reason that their production might show his ownership of the business, which he desired to conceal. Therefore Faust's accounts were kept solely in the shape of checks and private memoranda. This account remained entirely open and unsettled during the whole life-time of Borge, who died in March, 1889. It does not appear that Borge at any time ever demanded any account or settlement whatever. We have rarely encountered an instance of such unlimited confidence reposed by one person in another. Borge placed the legal title to his business and property in the name of Faust without a counter-letter. He placed the large revenues of the business in the possession and absolute control of Faust, intrusting him with their custody and disbursement, never exacting an account from him, and even forbidding him from keeping any regular books of the account. As late as March, 1888, Borge placed in the name of Faust two pieces of real estate which he owned and used in the transfer business, without requiring a counter-letter. In the mean time Borge's daughter, the wife of Faust, had died; and in September, 1888, Faust was about to contract a second marriage. At that time, and in view of that fact, two counter-letters were executed on September 26, 1888,—one acknowledging Borge's ownership of the real estate just referred to, and the other acknowledging his ownership of the transfer business and property. The last was executed in duplicate, and one was left in the possession of Borge and the other in that of Faust. Even after this Borge returned to Faust his copy, and told him to destroy it; but Faust, after consulting with Borge's confidential attorney, on his advice, determined not to destroy it.

In the latter part of 1888 Borge's state of health portended dissolution, and rumors reached Faust's ears that the widow and heirs would require of him a strict accounting. Then for the first time Faust undertook the task of compiling from his check-books and memoranda a statement of his receipts and expenditures of moneys for account of Borge during the long period of time covered by their peculiar relations. This statement was not concluded until shortly after the death of Borge. The statement is contained in a book, and includes many separate accounts. We find in it an itemized statement of the monthly profits of the transfer business, which were passed to his individual credit, and which, in absence of any suggestion to the contrary, we assume is correct, and corresponds with the transfer books. We find a long itemized statement of all moneys paid to or for the personal account of Frank Borge, covering many pages, and aggregating a sum of $87,257; also a like itemized statement of Faust's personal account, showing all moneys drawn by him against his salary and interest in profits from the beginning to the end of his employment, and crediting him with salary for the first 10 years at the rate of $1,500 per annum, and with interest of one-fourth of the profits after 1884. The account is closed by a balance struck in his favor of $5,000 as due to him at the date of Borge's death. The succession of Borge was opened, and the above book containing Faust's account and

showing the balance due was handed to the attorney of the widow and heirs shortly after Borge's death. An arrangement was effected between Faust and the widow and heirs by which the transfer business was continued for account of the widow and heirs, with Faust as manager at a salary of $250 per month. In that capacity he not only conducted the new business in which he was employed only at a salary, but liquidated the old in which he had an interest of one-fourth in the earnings. At the instance of the administering tutor of minor heirs an expert was employed to investigate the books of the transfer business. The expert swears that he was expressly charged to examine into the account of Faust, but this is denied. At all events, he received not only the transfer books, but also the book containing Faust's statement of the account between himself and Borge, and seems to have acted under the belief that it was his duty to examine and report upon the whole. Accordingly he formulated and presented to the attorney of the widow and heirs a report which, besides other matters, included and approved Faust's account, and the balance due him. The widow and heirs claimed that in this respect the expert exceeded his authority, and the report was never filed. When offered in evidence in this case it was objected to, and excluded by the court, to which ruling a bill of exceptions was reserved, and the report is brought up as part thereof. We think it should have been admitted to prove *rem ipsam* that such a report was made; but the matter is of trifling consequence, as the testimony of the expert attesting that fact is in the record. After this examination and report by an expert selected by the widow and heirs, Faust considered that he had the right to pay himself out of the collections made under his management of the transfer business. He consulted his attorney, who advised him that, if the money was due to him, he had the right to pay himself, but not to act without informing opposite counsel. He then mentioned the subject to the attorney of the widow and heirs, who seems to have stated generally that, if the money was due to him, it should be paid. Faust drew out the money. This the widow and heirs strenuously objected to. Upon notice of this objection, Faust's counsel met the attorney of the widow and heirs, and an agreement was reached by which Faust made a special deposit of the $5,000 in bank, to be held subject to the joint order of the two attorneys. Thereupon the administering tutor took a rule upon Faust to show cause why the said fund should not be forthwith paid over to the succession of Borge, on two grounds, viz.: (1) That, even if the debt claimed by Faust were due, it formed no justification in law for the retention of the funds which had been collected by him in a fiduciary capacity, and which he was bound to pay over to the succession. (2) That the debt claimed was not due. No objection was made to the form of proceeding, and Faust filed an answer, squarely joining issue on both grounds of the rule.

1. It is evident there were two distinct businesses requiring separate settlements, viz.: (1) The business of the transfer company down to the death of Borge, in which Faust had an interest of one-fourth in the profits; (2) the business after the death, which, by agreement, was conducted for the exclusive benefit of the widow and heirs, Faust managing the same only as a salaried employe. We have critically examined the agreement between Faust and the widow and heirs, and it certainly seems to us to relate exclusively to the future business. Whether Faust was a technical partner or not in the old business, he was its manager, entitled to one-fourth of the profits, and had the right to have it liquidated in order that his interest might be ascertained and settled. He charged himself with its liquidation, collected its credits, and paid its debts, with the full knowledge and approval of the widow and heirs; and, conceding the debt claimed by him to be due, we think he had the same right to pay it from the collections of that business as to pay any other debt. This matter, however, is of slight consequence. The succession is abundantly solvent; the fund in controversy is intact and secure; the question of debt *vel non* is fairly at issue, and has been the subject of exhaustive evidence; and it is in the interest of all that it should be now disposed of.

2. The facts of this case, as we have detailed them, are anomalous and peculiar. Faust cannot be charged with laches in suffering the accounts between him and Borge to remain unsettled down to the day of the latter's death. Borge never demanded any account, and the evidence shows that he never desired one, and even objected to such an account being kept. The suggestion that he waited until Borge's death, and then rendered an account, which nobody but Borge could contradict, thus loses all force. If Borge chose that matters should be left in this shape, it does not lie in the mouths of his widow and heirs to complain or claim any advantage from it. If Borge's confidence in Faust was such that he intrusted him with uncontrolled powers, dispensed with all checks and safeguards, exacted no accounting, and left him at the end to make up his accounts according to his own conscience, the widow and heirs must abide by the result, unless they can prove unfaithfulness or fraud. Faust has rendered an elaborate and itemized statement of his dealings, presenting a full statement of all sums received by him, and how they were disbursed. These accounts, together with the books of the transfer company and Faust's check-books, etc., have been in the possession or under the control of adverse parties, and they have had ample opportunity to examine and investigate them. In all the evidence in the case we do not discover a suggestion that Faust ever received a dollar more than is shown in his statement, or that the disbursements reported by him do not cover the whole amount received. Neither do we discover any question made as to the correctness of any single item of the disbursements reported. Indeed, the only item in

the whole of Faust's account upon which any attack is made is the entry crediting himself with $15,000 as the amount of his salary during the first 10 years of his agency. Now, it is evident that in making up his individual account covering the whole period of his employment, and purporting to charge himself with all that he received for himself, and crediting himself with all that was due to him, an entry of the amount due for his salary during the first 10 years was a necessary and proper entry. The only question that could possibly arise is whether the amount so entered is the true and correct amount. The evidence, not only of Faust himself, but of several other disinterested witnesses who learned the fact from Borge, establishes incontestably that his salary was $1,500 per annum, and this is corroborated by every fact in the case. The correctness of this entry being thus fixed, the resulting balance in his favor cannot be disputed, unless other entries in the account are falsified. This has not been done by any evidence, but plaintiffs invoke certain legal presumptions to throw discredit on the account. It appears that the balance claimed as due results entirely from Faust's having drawn less than his salary during the first 10 years of his employment. From this fact the charge is made that the claim is a stale demand. Under the facts of this case, such a charge has no basis. The whole fund out of which Faust was entitled to be paid was in his own hands. What he did not draw he held in his own name, and under his own control. It passed into the general account between him and Borge, which he was not required to render until it was demanded; and in now rendering his account his assertion of his claim, as a resulting balance of the whole, is timely, and free from any taint of staleness. The same considerations destroy the plea of prescription. Much stress is laid upon the improbability that Faust should have drawn so small a part of his salary during these years. We admit that, *prima facie*, it is improbable; but it is explained, and, while the explanation is not absolutely satisfactory, it is plausible, and leaves the presumption too weak to support judicial action.

The ingenious counsel for plaintiffs refer to other circumstances giving rise to adverse presumptions and discrediting Faust's claim. We have considered them very carefully, and, while not unimpressed, we can find in them nothing of sufficient strength to justify us in reversing the conclusions of the district judge, and in stamping as a thief and a cheat a man whose character is not otherwise impeached, who enjoyed the unlimited confidence of Borge, and who is further accredited by the trust which the parties assailing him have continued to repose in him. In the language of Mr. Greenleaf, presumptions of this kind "are, in truth, but mere arguments, of which the major premise is not a rule of law. They belong equally to each and every subject-matter; and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect: that, while those are reduced to fixed rules and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever." 1 Greenl. Ev. § 44; Best, Ev. § 317 et seq. Cases do unquestionably arise in which such presumptions control the mind with such power of conviction as to undermine and destroy the effect of positive evidence to the contrary. Instances are presented in the cases quoted by appellants: Quock Ting v. U. S., 140 U. S. 420, 11 Sup. Ct. Rep. 733, 851; Wood v. Egan, 39 La. Ann. 684, 2 South. Rep. 191; Cutler v. Collins, 37 La. Ann. 95. Slight variations in the facts of any particular case alter the force of such presumptions, and inflexible rules cannot be prescribed for their application. Considering all the facts of this peculiar case together, we find no sufficient reason to disturb the conclusion reached by the district judge except in one respect. Faust's own testimony leaves us unsatisfied as to whether his salary of $125 per month began on the 1st of January or 1st of July, 1875. Up to the 1st of July, 1875, he was engaged in the warehouse business on his own account, and only kept the books of the transfer company. He himself says: "I continued the warehouse business for my own account until July, 1875. From January, 1875, to July, 1875, I kept the transfer company's books. Then, as Borge said it did not look well for me to be in the warehouse business, as I had the transfer business in my name, I went to work in the transfer business for $125 a month." He was doubtless entitled to something for prior services, but his salary of $125 a month is only shown to have begun in July. A reduction of $500 in the amount allowed him will do justice. It is therefore adjudged and decreed that the judgment appealed from be amended by reducing the amount allowed in favor of Faust from $5,000 to $4,500, and by ordering the difference to be paid over to plaintiffs in rule; and that, as thus amended, the judgment be now affirmed, appellees to pay costs of appeal.

(94 Ala. 476)

SAYRE *et al.* v. WESCOTT.

(*Supreme Court of Alabama.* Jan. 13, 1892.)

SALE OF LAND BY TRUSTEE—ALLOWANCE OF DEBT AGAINST CESTUI QUE TRUST IN PAYMENT—FAILURE OF CONSIDERATION—VENDOR'S LIEN.

Where vendees buy land from a trustee, and, according to the contract, to which the *cestui que trust* is a party, pay merely half the stipulated price by allowing a credit on a supposed debt against the *cestui que trust*, and it subsequently turns out that the debt does not exist, a bill by the administrator of the *cestui que trust* to enforce a vendor's lien for purchase money to the amount of the supposed debt is without equity, since it seeks to enforce a money payment, which was never agreed to.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Action to enforce a vendor's lien, by W. D. Wescott, administrator, against H. A. Sayre and another. Judgment for plaintiff. Defendants appeal. Reversed.

Tompkins & Troy and *Stringfellow & Le Grand*, for appellants. *W. A. Gunter*, for appellee.

WALKER, J. Moses Bros. purchased certain real estate in the city of Montgomery at the price of $10,000, upon the agreement and understanding that $3,950 of the stipulated price should be paid by a credit of that amount upon an indebtedness then supposed to exist in their favor against Lucy B. Noble, who was interested as a *cestui que trust* in the property sold, and who was a party to the agreement for the partial payment of the purchase price by the credit on the claim against her. This contract of purchase was carried out according to its terms. Moses Bros. received a deed to the property on allowing the credit as agreed, and paying the remainder of the price in money. Afterwards it turned out that the supposed indebtedness upon which the credit was allowed did not really exist. Lucy B. Noble having died, the bill in this case was filed by the administrator *de bonis non* of her estate to enforce a lien upon the property for $3,950 and interest, as a balance of the purchase money still due and unpaid. The claim is that the allowance of a credit on a debt which did not exist was no payment at all, and that the result is that the amount of the credit is still due on the purchase, and is secured by a vendor's lien on the property. The recognition of this claim would involve the enforcement of a contract which the averments of the bill show was never made. The stipulation as to the mode in which $3,950 of the purchase price was to be satisfied was a material feature of the contract of purchase. The bill does not show that Moses Bros. agreed to pay $10,000 in money for the property. They only agreed to pay in money the difference between that sum and the amount of the stipulated credit. It may very well be that the sale could not have been made except upon the condition of allowing the purchasers to use their claim in paying part of the agreed price. The opportunity of realizing on the claim may have been the principal inducement which influenced them to make the trade. The fact that, as a result of a mistake of the parties, a part of the consideration for the sale and conveyance turned out to be no consideration at all, cannot be allowed to have the effect of binding the parties to a contract different from the one they entered into. There cannot be a lien for purchase money which was never due or payable under the contract of purchase. The implied lien of a vendor of real estate is an incident of a debt for unpaid purchase money. Though the lien survives, and may be enforced after an action on the debt is barred, yet the existence of the lien presupposes a debt to be secured thereby. 2 Warv. Vend. 706. Where the sale is valid, though the vendee is not *sui juris*, so as to be personally bound for the payment of the purchase money, there is a lien in favor of the vendor, but it is only to secure the payment of the purchase money according to the terms of the sale. McDonald v. Land Co., 78 Ala. 382. In this case the lien is sought to be enforced for a debt not created by the terms of the contract of sale, as the purchasers did not agree to pay in money the amount for which a lien is claimed. There has been no failure on their part to comply with the contract as it was made. The court cannot change the contract of the parties so as to make all of the purchase price payable in money. The non-existence of the supposed debt upon which the credit was allowed may have conferred upon the seller the right to demand a rescission of the contract of sale upon offering to make restitution of what the purchaser had actually paid. Whatever rights Lucy B. Noble may have had against Moses Bros. as the result of other dealings between them, she was not entitled to a lien for purchase money which was never agreed to be paid for the land. The fifth and sixth grounds of demurrer interposed by the appellants pointed out the fatal defect in the claim to a lien. The bill was without equity, and should have been dismissed A decree to that effect will be rendered in this court Reversed and rendered.

(95 Ala. 343)

DAVIS *et al.* v. BADDERS *et al.*

(*Supreme Court of Alabama.* Jan. 6, 1892.)

ARBITRATION—POWER OF COURT—BUILDING CONTRACT—ARCHITECT'S CERTIFICATE—IMPLIED CONTRACT—ASSUMPSIT.

1. Under Code, § 3221, providing for submission to arbitration and for a continuance, but not "beyond one term, unless for good cause shown," it is within the discretion of the court, more than two years after submission to arbitration, to disregard the order of reference and try the case.

2. Where a building contract provides that no extra work shall be paid for, unless a separate estimate in writing shall have been submitted prior thereto, the contractors can recover for extra work furnished under a promise by the owner to pay therefor.

3. Where a contract for a building is not entirely performed, but the owner moves in before completion, and remains in possession after it is finished, he is liable for the labor and materials on an implied contract.

4. Where plaintiffs had contracted to build a house for defendants, payments to be made only on architects' certificates, and sues on the common counts, on an implied contract to pay for the labor and materials, they can recover, although they have not obtained the architects' certificates.

5. Where the evidence is not set out in full in the record, it will be presumed that there was evidence to support the instructions.

Appeal from city court of Anniston; THOMAS R. MATTHEWS, Special Judge.

This was an action brought by Badders & Britt against W. A. Davis and others to recover for the building of a residence for the defendants under a contract. Plaintiffs' evidence was that they had substantially complied with the contract, and that they had done extra work at the instance of the defendants, for which, after the execution of said contract and before said work was done, the defendant W. A. Davis

agreed to pay plaintiffs; that the work on said house was not completed until about January 21, 1888; that defendant, with plaintiffs' permission, had moved into the house in December, 1887, when only two rooms were finished; that the defendant still occupies said house as a residence. Plaintiffs testified that they were entitled to the certificate of the architects, as provided in said contract, and that said certificate was wrongfully withheld by said architects; that after said written contract was entered into there was a subsequent parol contract between the plaintiffs and defendants by which the plans were altered, and that on account of said alteration extra work had to be done on said house, for the doing of which it would take more time to complete said house than was provided for in the written contract; and that the plans and specifications were so altered and extra work done thereunder. Defendants testified plaintiffs had not complied with the contract; that much of the work was poorly done; that inferior material was used; and that plaintiffs had departed from the plans without authority, and had abandoned the work before it was completed, and had never obtained the certificate of the architects. The defendant W. A. Davis denied that he had ever agreed to pay for extra work. The court of its own motion, among other things, charged the jury as follows: "If the plaintiffs did not comply with the original contract sued on in this case, they are not entitled to recover upon it for the work done under it, unless you find from the evidence that a departure from the original plan and specifications was agreed on between the parties before it was made, and the work as done was performed in lieu of that originally contemplated; but it does not necessarily follow that plaintiffs in this action would not be entitled to recover for such work: If plaintiffs did the amount of work they have agreed to do under the contract, and it was of value to and accepted by defendants, although it may not have been done in strict compliance with the original plan and specifications, you may nevertheless, under the principles I have submitted to you, find that plaintiffs are entitled to recover under the common counts of the complaint whatever the evidence shows that the work which was done under the contract is reasonably worth, or, rather, the contract price for the work, less the difference in value of the work as done and what it would have been worth had it been done in compliance with the contract; but in no event would they be entitled to recover more than the contract price, although the work so done may be of greater value than was to be paid for it under the contract. To allow plaintiffs to recover what the work was reasonably worth, regardless of the contract price for the work they were to do, might not be any punishment to them for a violation of the contract, if you should find from the evidence that they violated it." The court refused the following charges of defendants: (1) "If the jury believe from the evidence that the contract between plaintiffs and defendant was for the erection of a building upon the land of defendant, and that performance of the terms of the contract was to precede payment, and was the condition thereof, and that plaintiffs have substantially failed on their part to perform the contract, then plaintiffs cannot recover in this action, notwithstanding defendant has chosen to occupy and enjoy the building." (2) "That, if the jury believe from the evidence that the final payment of the contract price of the building depended upon the plaintiffs obtaining the architects' certificate that the work and building was completed according to the contract, then plaintiffs cannot recover in this action, unless they show such certificate, or such facts are shown by the evidence as to convince the jury that such certificate is obstinately, unreasonably withheld." (3) "That if the jury believe from the evidence that said building is not completed according to the contract, in a workman-like manner, and that the last payment of seven hundred dollars was only to be made on the certificate of the architects, and such certificate is withheld because of the failure to complete the building in a workman-like manner, and according to the contract, then said certificate is not obstinately, unreasonably, or unjustly withheld, and without such certificate plaintiffs cannot recover as to the last payment of seven hundred dollars." (4) "All persons entering into contracts are bound by the terms of the contract, and such contract is the law of the particular case; and if the plaintiffs in this case agreed to do the work strictly in accordance with the plans and specifications in said contract, then they are bound to comply with the requirements of such plans and specifications strictly; and unless the jury is satisfied that said plaintiffs have complied, then they cannot recover without showing to the satisfaction of the jury that such failure to comply on plaintiffs' part has been expressly or impliedly waived by the defendant." (5) "The terms of all contracts, unless waived, must be strictly complied with before any party thereto can have a right of action thereon; and the contract in this case stipulating that 'no new work of any description done on the premises, or any work of any kind whatsoever, shall be considered extra, unless a separate estimate in writing for the same before its commencement shall have been submitted by the contractors to the proprietor, and his signature obtained thereto,' then no charge for extra work under the contract in this case can be made or judgment recovered therefor unless said stipulation in said contract has been complied with by the contractor, or the same has been expressly waived or impliedly by the proprietor, the defendant in this cause." (6) "The mere fact that part performance of the contract has been beneficial to the defendant is not enough to render the party benefited liable to pay for the advantage. It must appear from the evidence that he has taken the benefit under circumstances sufficient to raise an

implied promise to pay for the work done, notwithstanding the non-performance of the special contract. Therefore in a case of building on land, under a contract which the builders fail to complete, or which they complete in a manner not conforming to the contract, so that the owner cannot be charged with the contract price, the mere fact of the building remaining on the land, and the owner moving into and taking possession of it, and enjoying the fruits of the labor, is not such an acceptance as will alone imply a promise to pay for it, and, without more, plaintiffs cannot recover on the common counts in the complaint in this action." (7) "If the jury believe from the evidence that the last payment of seven hundred dollars depended upon the certificate of Chisholm & Green, the architects, that the work was completed in accordance with the drawings, plans, and specifications, and that such certificate has not been obtained, nor unjustly, unreasonably, nor collusively withheld; and they further find that defendant has paid on said contract twenty-six hundred dollars on the contract price of three thousand dollars; and they further find that plaintiffs have done extra work for which defendant is bound to pay under the stipulations of the contract,—then the defendant is entitled to offset such amount for extra work with the three hundred dollars overpaid to such contractors under said contract." (8) "The plaintiffs are not entitled to recover on the common counts in this case unless the jury believe, from all the evidence, that defendant accepted the work, and went into possession and occupied and used the same, under such circumstances as will amount to an express or implied waiver of the failure upon the part of plaintiffs to perform said contract, and the mere fact of moving in and occupying the house alone is not sufficient to amount to an express or implied waiver." (12) "If the evidence shows that the plaintiff asked no further time to do extra work, defendant is entitled to reasonable damages for delay after November 1st, the time of completion, as provided in contract." (14) "The burden of proof is on the plaintiffs, Badders & Britt, to show performance of their contract, or a waiver by the defendant Davis in this case." (16) "The use of a building which has been partially erected, though for the purpose for which it was intended, is not an acceptance of the work, or any part thereof; the duty to pass upon the work does not arise until its completion." (18) "A special contract for work must prevail unless a departure from it has been so general as to render it impossible to connect the contract with the work." (19) "When a building is in process of construction under a special contract, and additions and alterations are to be made, the original contract is held to exist and be binding as far as it can be followed." Judgment for plaintiffs; and defendants appeal. Affirmed.

Blackwell & Keith and *Knox & Bowie*, for appellants. *Brothers, Willett & Willett*, for appellees.

CLOPTON, J. On August 24, 1888, the circuit court, in which the suit was originally instituted, made the following entry: "Came the parties by attorneys, and by agreement this cause is submitted to the arbitration of M. J. Miller and J. B. Goodwin, and they to call in a third man, whose award, when made according to law, to be made the judgment of this court in this case." When the case was called for trial in the city court, to which it had been transferred under the statute, at the January term, 1891, defendants moved to refer it to the arbitrators under the order of the circuit court. The motion was overruled, and the city court proceeded to try and determine the cause. Section 3221 of the Code declares: "It is the duty of all courts to encourage the settlement of controversies pending before them by a reference thereof to arbitrators, chosen by the parties or their attorneys; and, on motion of the parties, must make such order, and continue the cause for award; but such continuance must not extend beyond one term, unless for good cause shown or by consent." While it is made the duty of the court, in pursuance of the legislative policy declared in the statute, to make an order of reference on motion of the parties, such order does not, under the statute, oust the court of jurisdiction of the case. It remains pending in court, subject to be called at each succeeding term for trial. The suspension for award is not indefinite. The statute places a limitation upon the discretion of the court as to continuing the cause,—the continuance must not extend beyond one term, unless good cause be shown or the parties consent. So far as the present record discloses, and we can look no further, no action was taken in execution of the order of reference either by the arbitrators or by the parties, and no cause shown when the case was called for trial why it should longer be continued for award. Several terms having elapsed since the order of reference, and no award made, nor cause shown for a further continuance, it became the duty of the court, unless the parties consented to a further continuance, to disregard the order of reference, and proceed with the trial of the case. Iron Co. v. Cobb, 55 Ala. 636. The complaint contains several counts,—one on a special contract for the erection of a dwelling-house, a common count for materials furnished and work and labor done, and a count for extra materials and extra work. The special contract contains a provision that "no new work of any description done on the premises, or any work of any kind whatsoever, shall be considered as extra, unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractors to the proprietor, and his signature obtained thereto." On the former appeal (88 Ala. 367, 6 South. Rep. 834) this clause of the contract was construed. It was then held that if no estimate in writing for the extra materials and work was submitted to defendant and his signature thereto obtained, and no promise to pay for the

same, no recovery could be had therefor; but if during the progress of the work alterations in the plan were made by mutual assent, and defendant promised to pay for the extra work required by the alterations, plaintiffs, if such work was worth more, considering materials and workmanship, than the work for which it was substituted, are entitled to recover the difference, although no written estimate was submitted and signed. The count contains an averment that, while the building was in course of erection, defendant promised to pay for the extra work and materials, and there is evidence tending to show such promise. Charge 5, requested by defendants, ignores the effect of this evidence, and excludes it from the consideration of the jury. The liability of defendants for the extra work and materials does not rest upon a waiver of the special condition of the contract, but upon a subsequent and distinct agreement to alter or modify the contract, and to pay the increased costs of such alteration or modification. The jury would have understood from the charge that they could not allow for the extra work and materials, unless defendants expressly or impliedly waived the condition, though they may have verbally promised to pay for the same. The charge is misleading.

The part of the general charge excepted to, and several of the charges asked by defendants, relate to the liability of the owner of land for materials furnished and work done in the erection of a building thereon under a special contract, when the contractor has failed to perform it. This has been regarded as a vexed question, growing out of the fact that the building may add to the value of the land, and be of benefit to the owner, in connection with the practical difficulty of enforcing the right of rejection. Whatever contrariety of judicial views may exist, the rule in such cases has been long and well settled in this state. In Thomas v. Ellis, 4 Ala. 108, the rule is thus stated: "Indeed, nothing is more common than to permit a recovery upon an implied contract to pay the value of the labor, although it may not have amounted to a performance of the special contract; and this is always the rule when the defendant has accepted the work, or entered into possession and use of the house actually erected." The same doctrine has been reasserted in the subsequent cases of Merriwether v. Taylor, 15 Ala. 735; English v. Wilson, 34 Ala. 201; Bell v. Teague, 85 Ala. 211, 3 South. Rep. 861. The doctrine practically rests upon the acceptance of the building by the owner of the land, not as finished according to the contract, but in its uncompleted condition, and that in such condition it is of benefit to him. The acceptance need not be express. When there is no gross or fraudulent violation or abandonment of the contract, it may be inferred from the use and enjoyment of the property by the owner of the land upon which value has been conferred by the erection of the building. The charges relating to this matter asked by defendants are defective in this: they assert the proposition that plaintiffs cannot recover, even under the common counts, without showing a strict performance of the contract, or that an acceptance cannot be inferred from merely moving into, taking possession, and using and enjoying the house. It may be that moving into the house before its completion, by consent of plaintiffs, would not, of itself, amount to an acceptance; but it is also shown that defendants remained in possession after the completion of the house, and have used and enjoyed it up to the time of trial. In such case, liability does not rest on strict performance of the provisions of the contract on the part of plaintiffs, or a waiver thereof by defendants; but upon an implied agreement, raised by the law, to pay for labor done and materials furnished, which were of value and benefit, and accepted by them. On these principles, charges 1, 4, 6, 8, 14, and 16 asked by defendants were properly refused. They predicate plaintiffs' right to recover under any count of the complaint on performance of the special contract, or a waiver of performance by defendants, or assume, as matter of law, that moving into the house, taking possession and enjoying the benefit, is not an acceptance. Besides, charge 8 is argumentative. The question of acceptance was properly submitted to the jury. No question is raised as to the measure of recovery in such cases.

By the special contract, defendants agreed to pay for the erection of the house in installments as the work progressed, the fourth and last payment of $700 to be made when the building was completed and the drawings and specifications returned to the architects. The contract contains the provision "that, in case of the final payment, a certificate shall be obtained from and signed by Chisholm & Green, architects, to the effect that the work is done in strict accordance with drawings and specifications, and that they consider the payment as properly due; said certificate, however, in no way lessening the total and final responsibility of the contractor. Neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings or specifications, either in execution or materials."

The fourth count declares specially on the contract, setting it out *in hæc verba*. To this count a demurrer was interposed, assigning as the ground of objection that it did not specifically aver that the certificate of the architects was obtained. It avers that plaintiffs "have complied with all the provisions of the contract on their part, and erected said building according to said contract." The count is substantially in the form of a complaint "on a dependent covenant or agreement," as prescribed by the Code. Under the statutory form, a mere statement of the contract, with a general averment that plaintiffs had complied with all its provisions on their part, and that defendants have failed to comply with specific provisions, is sufficient. These forms have the force of a statute. Insurance Co. v. Bledsoe, 52 Ala. 538.

The question as to the necessity of pro-

ducing the certificate of the architects was also raised by charges 2 and 3 asked by defendants. Counsel for appellants have called our attention to cases decided by the New York court of appeals, in which it was held, under contracts containing similar provisions, that when the parties have made the production of the certificate of the architect, to the effect that the work was completely finished, a condition precedent to final payment, the plaintiff is bound to procure the certificate, if not impracticable to get it without fault on his part; and, if he does get it, the defendant is bound to pay, unless he can show that it was obtained by fraud or mistake. Smith v. Brady, 17 N. Y. 173; Wyckoff v. Meyers, 44 N. Y. 143; Wangler v. Smith, 90 N. Y. 38. Parties competent may fix the terms of their contract as they deem proper, and, in the absence of fraud or mistake, the court is not justified in displacing or altering them, though regarded imprudent or unwise. But whether, under the provisions of the contract, the obtainment of the architects' certificate is a condition precedent to final payment, we deem it unnecessary to decide. If conceded that it is requisite to entitle plaintiffs to recover the final payment under the counts declaring on the special contract, if the contract has not been performed, and defendants have accepted the house, the production of the certificate is not essential to recovery under the common counts on an implied contract to pay the value of the labor done and materials furnished. Charge 2 is too broad, and was properly refused, for the reason that it predicates the production of such certificate, or proof of facts showing that it was obstinately or unreasonably withheld, as an element of plaintiffs' right to recover "in this action;" that is, under both the common and special counts. And charge 3 is obnoxious to the objection that it submits to the jury the construction of the written contract, which it is the province and duty of the court to construe. Bernstein v. Humes, 60 Ala. 582; Claghorn v. Lingo, 62 Ala. 230. Charges 18 and 19 were properly refused, not only because argumentative in their nature, but also on the principle that when the bill of exceptions does not set out all the evidence, if the legal propositions asserted by the charges might be met and avoided by proof of facts which would render the charges erroneous, this court will presume that such other facts were proved. Railway Co. v. Kolb, 73 Ala. 396; McLemore v. Nicholls, 87 Ala. 662. The same observation applies to charge 12, which is to the effect that, if plaintiffs asked no further time to do extra work, defendants are entitled to reasonable damages for delay in finishing the building after the time of completion provided in the contract. If to do the extra work directed by defendants, and for which they promised to pay, necessarily required longer time to complete the building than allowed by the contract, a reasonable extension of the time will be implied, and defendants are not entitled to damages for the delay, under such circumstances. Affirmed.

(94 Ala. 76)

ALLBRITTON v. STATE.

CAFFEY v. SAME.

(*Supreme Court of Alabama.* Jan. 7, 1892.)

CRIMINAL LAW—ALIBI.

1. In a criminal case, where the defense is an *alibi*, it is error to charge that an unsuccessful attempt to prove an *alibi* is always a circumstance of "great weight" against the prisoner, since there is no distinction between the consequent weight of an unsuccessful attempt to establish an *alibi* and of an unsuccessful attempt to prove any other material fact in defense.

2. It is also error to charge that the evidence as to the *alibi* must account for so much of the time of the transaction as would render it "impossible" for defendant to have committed the offense, since such an instruction violates the rule that defendant is entitled to an acquittal if the whole evidence generates a reasonable doubt as to his guilt.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

John Allbritton and Willis Caffey were separately indicted and tried for wantonly and maliciously throwing a stone or rock into a passenger-car of a railroad train. The state's evidence tended to show that the defendants were guilty as charged in the indictment. The defendants "introduced evidence to show an *alibi*." Both defendants were convicted, and now appeal; both cases being submitted together. Reversed.

Sayre & Pearson, for appellants. *Wm. L. Martin*, Atty. Gen., for the State.

CLOPTON, J. At the instance of the prosecution the court gave, in each of these cases, the following charge: "An unsuccessful attempt to prove an *alibi* is always a circumstance of great weight against the prisoner." Speaking in reference to this statement of the principle, in Burrill, Circ. Ev. 519, as quoted from Wills, and from which the charge is copied, it is said in Porter v. State, 55 Ala. 95: "We are inclined to think Mr. Burrill states the principle too strongly. We cannot perceive why a failure in an attempted proof of *alibi* should be visited with severer intendments than a failure in the attempt to prove any other fact in defense. Of course, a fraudulent attempt to prove a simulated *alibi*, sustained by perjury, will, when detected, be a circumstance of great weight against the prisoner. The connection in which Burrill employs the expression above copied tends to show that he had reference to an unsuccessful fraudulent attempt to establish an *alibi*. In that sense, we agree with him." An *alibi* is not, in the strict and accurate sense, a special defense, but a traverse of the material averment in the indictment that the defendant did, or participated in, the particular act charged, and is comprehended in the general plea, "Not guilty." Because susceptible of easy fabrication, and often attempted to be sustained by perjury, whereby the accused endeavors to break the net-work of facts and circumstances surely bringing him to conviction and punishment, the proof of an *alibi* is, and should be, subjected to careful scrutiny; but it is an error to assume that the law looks on such attempt with suspicion. A

general prejudice against such attempt, it must be admitted, has resulted from the unquestioned fact that an *alibi* is often forged, constituting an artifice or contrivance to shield the guilty. Such proof, however, is positive evidence, which, when founded in truth, negatives the defendant's presence at the time and place of the crime, and disproves the *prima facie* case made by the prosecution. In some cases it is the only resort accessible to the innocent for the protection against a false accusation; and, though subjected to more rigid scrutiny, should receive from the jury the same consideration as any other evidence offered in denial or excuse. Being a defense which may be lawfully made, and which in legal contemplation is of the same favor as other lawful defenses, there can be no rule of law, founded on logic or principle, common sense or justice, which recognizes a distinction between the consequent weight of an unsuccessful attempt to establish an *alibi*, and of an unsuccessful attempt to prove any other material fact in defense. In Miller v. People, 39 Ill. 457, BREESE, J., speaking for the court, says: "Failing to prove an *alibi* should have no greater weight to convince a jury of the guilt of the prisoner attempting it than the failure to prove any other important item of defense. A prisoner is entitled to rely on the facts in his favor he may suppose he is able to prove, and if he is so unfortunate as to fail in his proof it should not, generally speaking, operate to his prejudice. Proof of an *alibi* is a defense as legitimate as any other; and the court should not say, lest it prejudice the minds of the jury, that failure to establish it should have great weight against the prisoner." The reason given by Mr. Wills for the principle stated by him—because the resort to that kind of defense implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them, if they remain uncontradicted"—is not logically the nature and effect of such defense. An *alibi* is not a defense of confession and avoidance, but, if established, merely negatives the guilt of the defendant. The charge is not a correct statement of the rule applicable to *alibi* evidence, and is an invasion of the province of the jury.

The court further charged, at the instance of the state: "In order to make the defense of an *alibi* successful and worthy of serious consideration by the jury, it is essential that the evidence to establish this defense should cover and account for the whole time of the transaction in question, or at least so much of it as to render it impossible that the defendant could have committed the offense for which he is indicted." There are respectable authorities holding that to successfully establish an *alibi* the evidence must so cover the time when the offense is shown to have been committed as to preclude the possibility of defendant's presence at the time and place of its commission. In this statement of the rule we do not concur. It is undoubtedly true that the value and effectiveness of the proof of an *alibi* largely depend upon the extent to which it embraces the period of the commission of the crime. In order to be conclusive, the entire time must necessarily be covered; but without such completed extension the evidence is admissible, and, in ordinary cases, worthy of consideration; and, though not conclusive, may be effectual to originate a reasonable doubt, which will entitle the defendant to acquittal. The strong and stringent rule asserted in the charge is not only inconsistent with, but contradictory of, the fundamental rule, founded in justice and humanity, and resting on the presumption of innocence, that an acquittal must follow a reasonable doubt of the guilt of the defendant, engendered by the whole evidence. The proposition of the charge requires the defendant to affirmatively prove that it was impossible for him to have been present at the scene of the crime,—tantamount, when proof of an *alibi* is attempted, to a requirement of proof of his innocence beyond a reasonable doubt. Evidence of an *alibi*, though insufficient of itself to establish that defense, should not be excluded from the consideration of the jury, nor should they be instructed, unless satisfied that it is simulated, that the defense is not worthy of serious consideration. Though it may not cover the entire time during which the crime may be shown to have been committed, or so much as to render it impossible that defendant could have committed the offense, it is sufficient, if it reasonably satisfies the minds of the jury, or, in connection with the other evidence, generates a reasonable doubt, that the prisoner committed the act. This rule is consistent with other universally recognized principles of the criminal law, and is supported by reason and by authority. People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. Rep. 233; Landis v. State, 70 Ga. 654; Pollard v. State, 53 Miss. 410; 6 Crim. Law Mag. 656. Reversed and remanded.

(94 Ala. 53)

JOHNSON v. STATE.

(*Supreme Court of Alabama.* Jan. 7, 1892.)

WITNESS—COMPETENCY—HUSBAND AND WIFE.

On the prosecution of a husband for an assault committed on his wife, the wife is not only competent, but she may be compelled, to testify against the husband.

Appeal from city court of Montgomery; I. M. ARRINGTON, Judge.

Wesley Johnson was indicted and tried for an assault with intent to murder his wife. He was convicted of an assault and battery, and now appeals. Affirmed.

John Gindrat Winter, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

MCCLELLAN, J. The sole exception reserved on this record goes to the action of the trial court in compelling the defendant's wife to testify on his trial upon a charge of assault and battery committed upon her person. The right of the wife to testify in such case—her competency as a witness—is admitted. We do not think there can be any doubt of the power of the court to compel her to testify. She is made competent for her own protec-

tion, not as an individual simply, but as an individual member of society; and that society—the public—has interest in her testimony, to the end that crime may be punished, which is distinct from any purely personal right of hers, and which she cannot waive. Upon considerations of this character, the law has come to be well settled in recognized texts and by adjudications of courts of high standing that the wife is not only competent in such cases, but is compelled, to testify. Mr. Justice Stephens, in his Digest of the Law of Evidence, which is incorporated bodily in the American and English Encyclopædia of Law, as "containing the most clear and concise statements of the law of evidence extant," declares the rule to be "that in any criminal proceeding against the husband or wife, for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compelled to testify." 7 Amer. & Eng. Enc. Law, p. 102. And so it has been expressly declared in the following well considered cases: Turner v. State, 60 Miss. 351; Dumas v. State, 14 Tex. App. 465; Bramlette v. State, 21 Tex. App. 611.[1] Moreover, the wife's competency being conceded, and her testimony being relevant, it is not perceived that any legal wrong is done to the defendant by compelling her to testify. As was said in Turner v. State, supra: "If the proposition be [as is contended in this case] that the wife has only a privilege of testifying or not, as she may elect, it is clear that the appellant cannot assign for error the action of the court in compelling her to give testimony over her objection; for, if the action of the court be error, it is the privilege of the witness, and not the legal right or immunity of the defendant, which is impaired. 1 Greenl. Ev. § 451; 2 Phil. Ev. 941; Rosc. N. P. Ev. 146; Reg. v. Kinglake, 11 Cox, Crim. Cas. 499;" Bramlette v. State, (Tex. App.) 2 S. W. Rep. 765. In State v. Neill, 6 Ala. 685, may be found expressions which seem to give importance to the wife's willingness to testify in cases of this sort; and so in Cotton v. State, 62 Ala. 12, and Woods v. State, 76 Ala. 35, some basis for an argument opposed to our conclusion of the first point considered may be afforded; but in the first case the language used was a mere *dictum* of the court, employed casually and *argvendo* only; in the last two what was said had no reference to the competency of the wife to testify against her husband when an offense against her person is charged; and in all of them the declarations of the court were palpably made in view of or with reference to the principles which obtain in cases where the husband's rights are only collaterally involved, and, of course, where the element of violence towards the person of his wife is not the *gravamen* of the proceeding. There is nothing in any of these cases which militates against the power of the court to compel the wife to testify upon the trial of the husband on a charge of assault and battery committed upon her. The judgment of the city court is affirmed.

[1] 2 S. W. Rep. 765.

TOLIVER v. STATE.

(*Supreme Court of Alabama.* Jan. 7, 1892.)

CRIMINAL LAW—EVIDENCE—STRIKING OUT—INSTRUCTIONS.

1. On a prosecution for the larceny of cattle, where the defense is that defendant had purchased them from a third person, paying for them with a horse and wagon, evidence drawn out by the prosecuting attorney, in cross-examining one of defendant's witnesses, that defendant's wife had told witness that defendant had traded said horse and wagon for some cattle, though clearly illegal, should not be stricken out on motion of the prosecuting attorney, since a party calling out illegal evidence has no right to have it excluded on his motion.

2. On a trial for grand larceny, defendant's evidence that he fled the country, on hearing that he was to be prosecuted, because he was poor, and unable to give an appearance bond for so serious a charge, is properly excluded, since it is incompetent for a witness, giving evidence in his own behalf, to testify to his uncommunicated intentions.

3. In a criminal case, a charge that if the evidence is susceptible of two reasonable constructions, one of which is consistent with defendant's innocence, it is the duty of the jury to favor or adopt that construction rather than the other, tends to confuse and mislead them, is an invasion of their province, and should not be given.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

Solomon Toliver was indicted for grand larceny. He was convicted, and appeals. Reversed.

On the trial of the case it was shown by the state that the defendant had fled the country, and was afterwards arrested in Birmingham by a detective. The defendant, testifying in his own behalf, offered to explain his object in fleeing, as follows: That he was poor, and unable to give an appearance bond for so serious a charge, and after his conviction before the recorder for the same offense, and after working out his sentence on the streets, he heard he was to be prosecuted by the state for the same offense, and that he thereupon went to Birmingham. The court, on the objection of the solicitor, refused to allow the said testimony, or any part thereof, to be introduced, and to this ruling the defendant duly excepted. The defendant, among others, requested the following charge: "(1) It is the duty of the jury to reconcile the evidence, if they reasonably can, consistently with innocence; and if two hypotheses are presented, the one showing guilt, the other innocence, each being reasonably credible, it is their duty to acquit." The court refused to give this charge, and the defendant duly excepted to its refusal.

John G. Winter, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

STONE, C. J. The defendant was indicted and convicted of grand larceny, cattle being the subject of the theft. The indictment was joint against defendant and Alfred Thomas. The testimony was that, shortly after the cattle disappeared, four of them were brought by defendant to the city of Montgomery, and there offered for sale. He was arrested, tried before the city recorder, and, under his sentence of conviction for a violation of the city ordinance, suffered the punishment imposed.

On being discharged from the custody of the city authorities he fled, and two years later he was captured in the city of Birmingham, and brought to trial in the present case. Thomas was never arrested, he having fled the country when Toliver was first arrested. The defense attempted by the defendant was that he purchased the cattle from Thomas, paying for them with a horse and wagon. A witness introduced by defendant was asked "if defendant requested him, when told that the cattle were stolen cattle, to go and get his horse and wagon from Alfred Thomas." This question was not objected to by the state. The witness answered that "defendant's wife told him that the horse and wagon were at Alfred Thomas' house." It will be observed this answer was not responsive to the question. The prosecuting attorney "then asked the witness to state what defendant's wife said about the horse and wagon." He answered "that defendant's wife told him that defendant had traded said horse and wagon to Alfred Thomas for some cattle." After this answer was given, the prosecuting attorney "moved the court to exclude all the testimony of the witness; and the court, contrary to the objection of defendant, granted said motion to exclude; and the defendant then and there duly objected to said ruling of the court, and then and there duly excepted to the same." It will be observed that all the testimony of this witness was in its nature illegal.

Three propositions are settled by many rulings of this court: *First.* The court may exclude illegal testimony at any stage of the trial. McCreary v. Turk, 29 Ala. 244; Bush v. Jackson, 24 Ala. 273; 1 Brick. Dig. p. 887, § 1190; Warren v. Wagner, 75 Ala. 188. *Second.* A party calling out illegal testimony has no right to have it excluded on his motion. Edgar v. McArn, 22 Ala. 796; Furlow v. Merrell, 23 Ala. 705. *Third.* Parties may try their issues on illegal testimony if they choose to do so, provided no objection is raised by either. Moon v. Crowder, 72 Ala. 79. The principle raised in this case is somewhat novel. The testimony being patently illegal, if we ignore the manner of its introduction it fell clearly within the rule which allows its exclusion at any stage of the trial. On the other hand, that part of it which, it seems, could alone exert any influence on the jury's finding, was called for and brought out by the solicitor himself, and he clearly had no right to demand or ask its exclusion. We think the city court erred in entertaining and granting the motion to exclude. The solicitor, as we have seen, had no right to make the motion, and the effect of entertaining it was to give some sanction to a practice of experimentation, which it would be dangerous to allow in cases involving life or liberty. A witness giving evidence in his own behalf is not permitted to testify to his uncommunicated intentions. Fonville v. State, 91 Ala. 39, 8 South. Rep. 688. A charge which instructs the jury that if the evidence is susceptible of two reasonable constructions, one of which is consistent with defendant's innocence, it is their duty to favor or adopt that construction rather than the other, tends to confuse and mislead them, is an invasion of their province, and should not be given. Gibson v. State, 91 Ala. 64, 9 South. Rep. 171. Charge No. 1, asked by defendant, was properly refused. There is nothing in the other questions reserved. Reversed and remanded.

(94 Ala. 33)

Ex parte JONES.

(*Supreme Court of Alabama.* Jan. 8, 1892.)

MANDAMUS TO COURT—DISCRETIONARY ORDERS—HABEAS CORPUS.

1. *Mandamus* will not lie to compel a criminal court to allow a writ of *habeas corpus* for the purpose of giving bail, such action being within the judicial discretion of that court.

2. Under Const. art. 6, § 2, and Code, § 675, defining the jurisdiction of the supreme court, where a criminal court refused a writ of *habeas corpus* for the purpose of giving bail, the remedy is by renewing the application in the supreme court, rather than by *mandamus* to the criminal court.

Application of Lewis Jones for *mandamus* to the city court of Selma to grant a writ of *habeas corpus* for the purpose of giving bail. Denied.

J. W. Mabry, for petitioner. *Wm. L. Martin*, Atty. Gen., for the State.

MCCLELLAN, J. The petitioner, upon being arrested on a warrant charging him with murder, waived preliminary examination before the justice of the peace before whom the warrant was returnable, and was thereupon committed to jail without bail, to await the action of the grand jury of Dallas county. He then applied to the judge of the city court of Selma for a writ of *habeas corpus*, alleging that the offense for which he had been committed was on the facts a bailable one, and praying that he be brought before the judge on said writ; that a hearing on the facts be then had; and that he be allowed to give bail. Judge HARRALSON of the city court refused to award the writ of *habeas corpus*, and said Jones now applies to this court for a *mandamus* directing and requiring said judge to award the same, and proceed thereunder to examine into the matter as prayed in the original petition. The application made here must be denied. If the petitioner has any remedy it is not *mandamus*. That remedy can only be invoked when a specific legal right is clearly shown, and there is no other adequate remedy for its enforcement. 3 Brick. Dig. p. 625, §§ 2-4. Assuming that petitioner was entitled to the writ, and of consequence that its refusal was erroneous, his remedy lay in a renewal of his application therefor to this court, which could either grant the writ absolutely or declare his right to it, so that, upon a second application to the judge of the city court, or other officer authorized to act in the premises, his right would be effectuated. Code, § 675; Const. art. 6, § 2; Ex parte Chaney, 8 Ala. 424. *Mandamus*, moreover, does not lie to control judicial action. It never issues to direct a judicial officer how to act, or what conclusion to reach, upon a judicial question, but only to compel some action

when a matter is presented for decision before an officer charged in that regard, and he refuses to hear and determine it. Ramagnano v. Crook, 85 Ala. 226, 3 South. Rep. 845; Dunbar v. Frazer, 78 Ala. 538. Now, whether the writ of *habeas corpus* will be awarded in any case is a judicial question. It is not to be granted as matter of course, but such facts must be made to appear to the judge to whom the petition therefor is presented as, in his judgment, *prima facie* entitled the petitioner to the writ. Ex parte Campbell, 20 Ala. 89; Hurd, Hab. Corp. 219-222; Code, §§ 4761, 4762, 4766. And this power to determine *in limine* whether the writ should issue is essentially judicial power, the exercise of which may be revised on appellate application to this court, but never by a *mandamus* commanding the judge below to do that which he has determined he should not do. High, Extr. Rem. § 155. We do not think that the cases of Ex parte Mahone, 30 Ala. 49, and Ex parte Champion, 52 Ala. 311, to which our attention has been invited, conflict with the foregoing views, at least so far as the matters really decided are concerned. Had the judge awarded the writ, and then refused to proceed with the case, the cases cited would be in point, and *mandamus* would lie, not to control his action, but merely to compel him to take some action, to hear and determine the matter involved in the premises. But he did not do this. His only action was to refuse to award the writ. This being judicial action,—not a failure or refusal to act,—as we have seen, *mandamus* is not petitioner's remedy, and his application, therefore, is denied.

(95 Ala. 189)

JOHNSON *et al.* v. OEHMIG *et al.*

(*Supreme Court of Alabama.* Jan. 8, 1892.)

SALE—ACTION FOR PRICE—DEFECTIVE TITLE.

In an action for the price of goods sold, it is no defense that the title to the goods was in a third person at the time of the sale, while defendant still holds possession of the goods.

Appeal from circuit court, De Kalb county; JOHN B. TALLY, Judge.

Assumpsit by Oehmig & Wiehl against Henry Johnson and L. M. Gordon for goods sold and delivered. The defendants pleaded a special plea, which set up that the account sued on was made for an engine and a set of mill-rocks; that after said purchase, and after defendants had paid the $100 in cash, they ascertained that plaintiffs had no title to the engine sold them by plaintiffs; that the said engine was the principal inducement for said purchase; and that before the defendants ascertained the want of title in plaintiffs to said engine they had made valuable improvements on the same. The plaintiffs demurred to the special plea. The court sustained the demurrer, and there was verdict and judgment for the plaintiffs. Defendants appeal. Affirmed.

W. W. Haralson, for appellants. *L. A. Dobbs*, for appellees.

WALKER, J. In Ogburn v. Ogburn, 3 Port. (Ala.) 126, it was held that the vendee of personal property cannot, while holding possession thereof, defend against an action for the purchase money by proof of want of title in the vendor. In the course of the opinion in that case it was said: "We think no defense can be made to an action for the purchase money when the facts relied upon to make it would not, if the parties were changed, and the money had been paid, enable the vendee to recover it back for the breach of the warranty of title." The defendants would not be entitled to such recovery on the facts stated in their second plea. In an action by a vendee of personal property against his vendor for a breach of warranty of title, only damages for actual loss can be recovered. The plaintiff in such an action must not only establish that his vendor is without title to the property sold, and that another is the true owner, but also that he has restored the property to such owner, that it has been taken from him under compulsory proceedings, or that he has parted with money or property in consequence of a judgment obtained against him, or voluntarily in answer to a claim made for the property. O'Brien v. Jones, 91 N. Y. 193. In Harris v. Rowland, 23 Ala. 644, the property sold had been recovered on the adverse title. No such state of facts is shown by the second plea in this case. It is not averred that the defendants have in any way been disturbed in their possession of the property. If that possession remains undisturbed, their title will be perfected by lapse of time. If a paramount title is asserted, the plaintiffs may settle with the adverse claimant, or they will be answerable in damages on their warranty of title if the defendants shall be required to deliver up the property in response to a claim by one who may prove to be the true owner. So long as the vendee of personal property remains in undisturbed possession, he cannot recover damages in an action of an implied warranty of title, or set up want of title in his vendor as a defense to an action for the purchase money, unless there were fraudulent representations made by the vendor in regard to the title. Such a vendee, in peaceable possession, has nothing substantial to complain of in the fact that his vendor was not the true owner of the property. When nothing more is shown than that he may suffer loss in the future in consequence of the outstanding claim to the property, he must rely upon his warranty, and he cannot sue thereon until he has suffered damages because of its breach. Case v. Hall, 35 Amer. Dec. 605, and note; Sumner v. Gray, 38 Amer. Dec. 39; Burt v. Dewey, 100 Amer. Dec. 482, and note; 2 Benj. Sales, (C. Corbin's Ed.) §§ 948, 1347, and notes. There was no error in sustaining the demurrer to the second plea. Affirmed.

(99 Ala. 306)

HARMON *et al.* v. SILER.

(*Supreme Court of Alabama.* Jan. 18, 1892.)

SEPARATE ESTATE OF DECEASED WIFE—ACTION FOR NECESSARIES.

An action at law will not lie against the estate of a deceased wife to charge her separate estate for the payment of articles used for the support of the family during coverture.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Action by Harmon & Son against W. D. Siler, as executor of one L. N. Pickett. Judgment for defendant, and plaintiffs appeal.

John Gamble and *Tompkins & Troy*, for appellants. *Gardner & Wiley*, for appellees.

COLEMAN, J. The complaint as amended presents a case in which it is sought to subject the statutory estate of a deceased wife to the payment of a debt contracted during coverture for the purchase of articles of comfort and support of the household and family, and for which the husband would be liable at common law. The suit is against the executor of the deceased wife alone. The liability of the separate estate of the wife to such debts is purely statutory. The only judgment which the statute authorizes, so far as it affects the estate of the wife, must be founded on proceedings against the husband and wife jointly, or upon a judgment against the husband alone, followed by a motion against the wife. The estate of the wife cannot be condemned to sale for the satisfaction of such claim by independent original proceedings against her alone, if living, or her estate, if she be dead. O'Connor v. Chamberlain, 59 Ala. 435. In the case of Rodgers v. Brazeale, 34 Ala. 512, it was declared that an action at law does not lie against the administrator of a deceased wife to charge her separate estate with the payment of articles of comfort and support of the household, furnished during coverture. These principles of law were fully recognized in the case of Carter v. Wann, 45 Ala. 346. It is unnecessary to consider the rulings of the court in regard to the admissions of testimony, or the legal questions decided relative to the statute of non-claim, as under the averments of the complaint and the undisputed proof, or facts offered to be proven, plaintiff cannot possibly recover in this action. Affirmed.

(94 Ala. 223)

HOOPER v. PAYNE.

(*Supreme Court of Alabama.* Jan. 13, 1892.)

MORTGAGES ON CROPS—LIEN—EFFECT OF PENDING EJECTMENT SUIT—INFANCY—EVIDENCE.

1. A judgment in ejectment is not conclusive upon a person occupying part of the land, not made a party; and a mortgage by such person on the crops, pending the suit, creates a valid lien thereon, though the mortgagee has notice of the ejectment suit.

2. The fact that the mortgagor was an infant son of the defendants in the ejectment suit does not invalidate the mortgage in favor of the landowner, where the son had exclusive control of the crops grown by him, and executed the mortgage with his father's approbation; since infancy is a personal privilege, and cannot be taken advantage of by a stranger.

3. Evidence that the son, though living or boarding with his parents, furnished his own supplies, cultivated the crops with his own labor, and had exclusive control and ownership thereof, justified a presumption that he executed the mortgage with his father's approbation.

Appeal from circuit court, Tallapoosa county; LEROY F. BOX, Judge.

Statutory trial of the right of property by John F. Hooper, interposing a claim to certain cotton seized under writ of detinue issued in a suit by W. H. Payne against R. A. Smith. Judgment for defendant. Plaintiff appeals. Affirmed.

Thomas L. Bulger, for appellant. *W. D. Bulger*, for appellee.

STONE, C. J. In August, 1888, Hooper, the appellant, instituted a statutory action of ejectment against Araminta and G. W. Smith. The subject of the suit was a tract of land on which the said G. W. and Araminta Smith were then residing. Only the husband and wife were made parties defendant. Hooper recovered in that action September 10, 1890, and also recovered $250 damages for use and occupation of the premises while they were withheld from him, (Hooper.) No part of this $250 was for the use and occupation of the part of the land cultivated by R. A. Smith, to be explained presently. R. A. Smith is a son of G. W. and Araminta Smith, and was under 21 years of age. He in 1890, and for three years before that time, cultivated a part of the tract of land which Hooper recovered in the action of ejectment. He lived or boarded with his parents, and the agreed statement of facts shows that, while the part of the land he cultivated was in the joint possession of himself and his mother, he cultivated on his own account, procured his own supplies, and had the entire management, control, ownership, and disposition of the crops grown by him. He in January, 1890, mortgaged the crop to be grown that year to Payne, to procure supplies to enable him to make the crop, which gave rise to this suit. At that time Payne knew that Hooper's ejectment suit was pending against G. W. and Araminta Smith for the recovery of the land.

The infancy of R. A. Smith is not, *per se*, a controlling factor in this case. If a disability, it was personal to him, and could not be set up by a mere stranger. 3 Brick. Dig. p. 563, §§ 16, 17. Hooper sustained no relation to him which authorized him to assert and maintain the proposition that G. W. Smith, his father, was the owner of the crop grown by the son. True, under ordinary circumstances, and in the absence of R. A. Smith's mortgage to Payne, which secured the supplies with which the crop was made, it is possible the father could have claimed and disposed of the crop at any time while it remained under the control of the minor son. Stovall v. Johnson, 17 Ala. 14. He asserted no such right. The testimony, as we have seen, shows that R. A. Smith, with the consent of his father and mother, furnished his own supplies, and cultivated the crop with his own labor and for his own use. We think the circumstances justify the presumption that the mortgage to Payne was with the father's approbation. Coming to these conclusions, we hold that this case must be tried without any reference to the relationship between R. A. Smith and G. W. and Araminta Smith.

When the ejectment suit was instituted, and continuously until he was evicted under the writ of possession, R. A. Smith

was in possession and cultivating the particular land on which the cotton was grown, the subject of this suit. He was not sued in the action, and hence was not concluded by the judgment recovered. As to him it established nothing; accomplished nothing. So far as the rights of these parties are concerned, that suit cuts no figure. The case then stands as if Hooper had dispossessed him without suit and without process; a mere forcible eviction. Such being the case, the right to the crop, in a personal action brought for its recovery, cannot be determined by showing that the title to the land was in Hooper. To conclude R. A. Smith, he should have been made a defendant to the ejectment suit. Smith v. Gayle, 58 Ala. 601, 604, 605; Cooper v. Watson, 73 Ala. 252. The mortgage vested in Payne a sufficient title to maintain the suit. Act No. 44, Acts Ala. 1888-89, p. 45. Affirmed.

(94 Ala. 74)

THOMAS v. STATE.

(*Supreme Court of Alabama.* Jan. 8, 1892.)

JURORS — SELECTION FROM LIST SERVED ON DEFENDANT — POSTPONEMENT OF TRIAL.

1. Sess. Acts 1886-87, § 11, (Crim. Code 1886, p. 134, note,) provides that when the day of the trial of a capital case has been fixed to begin in a succeeding week the sheriff shall serve defendant with a copy of the list of jurors drawn for such week. *Held*, that the fact that the trial was not entered on until the week succeeding the one originally fixed, for which week a different *venire* was summoned, did not render it necessary that a new order should be made, setting another day for trial, or that a new *venire* should be summoned or served on defendant; and that the latter could not complain of an order directing the selection of the jury from the list originally served on him.

2. The fact that the sheriff placed on the list the names of several jurors who had not been summoned cannot be taken advantage of on motion in arrest of judgment, after conviction, since the action of the sheriff should have been called to the attention of the court before the trial was begun.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

William Thomas was indicted for murder in the first degree, was convicted, and sentenced to be hanged. He now appeals. Affirmed.

The day set for his trial was August 14, 1891; and the defendant was duly served with a list of 75 names, which list contained the names of 36 persons who were purported to have been summoned on the regular jury for the week commencing August 10, 1891. On that day—August 14, 1891—the court, at the request of the solicitor, set said case for trial on the following Monday, August 17, 1891, a day of a different week, and for which week commencing August 17, 1891, a different *venire* had been summoned than for the week commencing August 10, 1891. When the case was called for trial on Monday, August 17, 1891, the defendant moved to quash the *venire* on the ground "that the list served on him did not contain the names of those summoned on the regular jury for the week commencing August 17th." The court overruled this motion, and allowed the defendant to select a jury from the names contained in the list served on him, and to this action the defendant duly excepted.

Edwin F. Jones, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

STONE, C. J. The order made for summoning the *venire* in this case strictly conformed to the statute. The order setting the case for trial was made July 29, 1891. The day set for the trial was August 14, 1891. This was during a week subsequent to the one in which the order was made, and consequently "the jurors drawn and summoned for such week"—the week during which the trial was to take place—were, by the statute, made a part of the *venire* from which the jury was to be organized. Sess. Acts 1886-87, § 11, (Crim. Code 1886, p. 134, in note.[1]) The order conforming to the very letter of the statute, we do not think the city court erred in requiring the jury to be selected from that *venire*. The fact, or accident, by which the trial was not entered upon until a day during the succeeding week, could not properly render it necessary that a new order should be made, setting another day for the trial, or that a new *venire* should be summoned or served on the defendant. Had such course been pursued, possibly it would have been regular; but the defendant cannot complain that it was not done. There was no error in overruling defendant's motion to quash the *venire*.

The motion to quash the *venire*, based on the ground stated above, being overruled, the organization of the jury and the trial were entered upon, without further preliminary objection. After the trial was concluded, and the jury had returned a verdict of guilty, the defendant moved in arrest of judgment. The ground of the motion did not appear on the record, but arose as follows: Under the order to the sheriff to place on the *venire* the names "of the jurors drawn and summoned for the week" of the trial, that officer had placed the entire 36 names drawn as petit jurors for that week. These constituted a part of the list served on the defendant. It was stated in the motion that 5 of the 36, though drawn as jurors, had not been summoned. The *venire* for that week, and the sheriff's return upon it, proved this statement to be true. Had that motion been made before the trial was entered upon, it should, and doubtless would, have been sustained. But it came too late. Such motion, not raising the question of the guilt or innocence of the accused, should always be made before the

[1] This section provides: "When the term of the court continues two or more weeks, and by law the criminal docket is not taken up until the second or third week of the same, the court, in its discretion, may, on any day of the term, fix the trial of a capital case for any day of a subsequent week of the term, during which such case may be tried; and if the sheriff shall serve a copy of the special jury drawn to try said case, together with a copy of the jurors drawn and summoned for such week, together with a copy of the indictment, one entire day before the day set for trial, that shall be held a compliance with the law requiring a copy of the jury and indictment to be served on the defendant, as hereinbefore provided."

trial on the merits is entered upon. Parties must not be permitted to speculate on the chances of a favorable verdict, and, failing, then fall back on some preliminary, ministerial error, not previously called to the attention of the court. We cannot suppose, and do not charge, that such was the intention in this case, but the tendency of such practice is not favorable to a proper administration of the law. 3 Brick. Dig. p. 264, § 163 et seq. Motions in arrest of judgment must, as a rule, rest on something apparent on the record. That which is available in arrest of judgment is, in general, equally available on error. There is nothing in the record before us to authorize the arrest of the proper judgment on the verdict rendered. Banks v. State, 72 Ala. 522; Diggs v. State, 77 Ala. 68. There is no error in the record, and the judgment of the city court must be affirmed. The day appointed for the execution of the prisoner having passed, it is ordered and adjudged that the sentence of the law be executed on Friday, February 19, 1892, within the walls of the jail of Montgomery county, by hanging the said William Thomas by the neck until he is dead. In executing this sentence the sheriff will conform to statutory regulations. Affirmed.

(94 Ala. 50)

McQUEEN v. STATE.

(*Supreme Court of Alabama.* Jan. 27, 1892.)

JURY — SPECIAL VENIRE — MURDER — EVIDENCE — CONFESSIONS — ARGUMENTATIVE INSTRUCTIONS.

1. Where the court orders a special *venire* of 50 jurors to be drawn, and one of them proves to be on the regular panel, defendant is deprived of his rights to the full number of jurors ordered, and the *venire* must be quashed. Darby v. State, 9 South. Rep. 429, 92 Ala. 9, followed.

2. On a trial for murder it appeared that decedent was wounded by a gunshot in the back at the lower end of the spinal column, and the day before his death said to a witness: "I want you to do all you can for me. I believe— I don't think I will live." *Held* that this was a sufficient foundation for the admission of his dying declarations.

3. The fact that a defendant makes confessions in answer to questions by the officer having him in custody does not render them inadmissible, where it appears the confessions were made voluntarily, and without threat or inducement.

4. Defendant requested a charge that unless the jury were convinced beyond a reasonable doubt that the killing was done "'willfully,'—that is, governed by will, without yielding to reason; 'deliberate,'—that is, formed with deliberation, as distinguished from a sudden rash act; 'malicious,'—that is, with fixed hate, or done with wicked intentions, not the result of sudden passion; and 'premeditated,'—that is, contrived or designed previously,"—then they could not find him guilty. *Held*, that it was argumentative, and was properly refused.

5. The giving of argumentative charges on request of the state is not reversible error, unless it appears to have misled the jury.

Appeal from circuit court, Butler county; JOHN P. HUBBARD, Judge.

Indictment against Peter McQueen for murder. Verdict of murder in the second degree, and judgment thereon. Defendant appeals. Reversed.

On examination of J. F. Brown, sheriff of Butler county, as a witness for the state, he testified "that, after defendant was arrested and in his custody, he made a statement to him about the difficulty, and that said statement was voluntary; that he made no threats, nor offered any inducements." On cross-examination, Brown said that defendant said nothing to him, except in answer to the questions propounded by him. The defendant objected to the introduction of any statement made by him to the sheriff, on the ground that it was not shown to be voluntary, and, upon the court's overruling his objection, the defendant excepted. The testimony for the defendant tended to show that he shot the deceased in self-defense. At the request of the solicitor, the court gave the following written charges to the jury: (4) "The court further charges the jury that 'premeditation' means determined on beforehand, but the required operation of the mind—the reflection and premeditation—may take place in the shortest interval of time, even at the moment of committing the act, as well as a month beforehand, and, like any other fact, it may be proved by circumstantial evidence which excludes every reasonable doubt." (5) "The court further charges the jury that a doubt which requires an acquittal must be actual and substantial,—not mere speculation or possibility. It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." The defendant excepted to the giving of these charges, and also excepted to the court's refusal to give the following charge requested by him: "The court charges the jury that unless they are convinced beyond a reasonable doubt, from the evidence in the case, that the killing of the deceased by the defendant was 'willful,'—that is, governed by the will, without yielding to reason; 'deliberate,'—that is, formed with deliberation, in contradistinction to a sudden and rash act; 'malicious,'—that is, with fixed hate, or done with wicked intentions or motives, not the result of sudden passion; and 'premeditated,'—that is, contrived or designed previously,—then they cannot find the defendant guilty as charged in the indictment."

Gamble & Powell, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

CLOPTON, J. In Darby v. State, 92 Ala. 9, 9 South. Rep. 429, it was decided that when the presiding judge draws from the jury-box the names of 50 persons, and orders them to be summoned to appear on the day set for the trial of a capital case, and a copy of the list of the names so drawn, with the list of the regular jurors drawn and summoned for the week, to be served on the defendant, he is entitled to the full number; and, if one whose name is drawn and put on the special *venire* is also on the regular panel for the week, the defendant is deprived of his right to the full number ordered, and it is good ground for quashing the *venire*. The motion to quash the *venire* in the present case is made on the same ground as in Darby's Case, and the facts in the two

cases, the name of the juror being changed, are identical. On the authority of that case the motion to quash the *venire*, which was made in due time, should have been granted. It is unnecessary to consider the exceptions to the refusals of the court to send, while the jury was being impaneled, for the special jurors who were serving on the grand jury. A like proceeding will not probably occur on another trial.

The deceased was wounded in the back, a little to the left of the spinal column, and near the lower end of the spine. It was a gunshot wound, the deceased dying next day. The evidence shows that he said to the witness: "I want you to do all you can for me. I believe— I don't think I will live." The circumstances, and the statement of the deceased to the witness, *prima facie* show that he was under a conviction of approaching death, and had lost hope of recovery. A sufficient predicate was laid to admit the dying declarations, leaving to the jury to consider the circumstances under which they were made in determining the weight which should be given to them. Jordan v. State, 82 Ala. 1, 2 South. Rep. 460; Ward v. State, 78 Ala. 441.

The ruling as to the admissibility of the confessions of defendant in evidence is in accord with the decisions of this court. It is affirmatively shown that the confessions were not made under the influence of threats, promises, or other improper inducements, but were voluntary.

The mere fact that the defendant was under arrest, and made the confessions in answer to questions propounded to him by the officer having him in custody, does not render them inadmissible. Spicer v. State, 69 Ala. 159.

The charge requested by defendant is argumentative, and for this reason, if no other, was properly refused.

The same observation is applicable to the first two charges requested by the state; but the giving of an argumentative charge will not operate to reverse the judgment, unless it appears to have misled the jury. For the error in refusing to quash the *venire* the judgment is reversed.

Reversed and remanded.

(94 Ala. 622)

GATCHELL *et al.* v. FOSTER.

(*Supreme Court of Alabama.* Jan. 8, 1892.)

GARNISHMENT—LIABILITY ON NEGOTIABLE NOTE—TRANSFER—COLLATERAL ATTACK.

1. A garnishee disclosed that on November 2, 1889, he was indebted to the principal defendant by three notes, giving amounts, and when due, the first being due in six months; that he did not know whether the payee owned the notes at the date of the disclosure, or whether they would be transferred before maturity; but did not disclose their negotiability or where payable. *Held*, that judgment against garnishee February 18, 1890, was authorized by Code, § 2976, providing for judgments against garnishees, and suspending execution thereon until the maturity of the debt.

2. Where the maker of negotiable notes payable at a banking-house disclosed the indebtedness by the notes, without mentioning their negotiability, or where payable, he will not be allowed in a collateral proceeding to defeat a judgment against him as garnishee by showing that the notes were transferred before maturity.

3. Where a garnishee was in court, and allowed judgment to be entered against him without objection, or setting up an existing available defense, such as the negotiability of notes, he is estopped to set up such defense on a petition for *supersedeas*, though the notes were transferred before maturity, and he compelled to pay them to the transferee.

4. The omission in a judgment against a garnishee to recite the amount of judgment against the principal defendant is an irregularity not affecting the validity of the judgment on a collateral attack, where it appeared to have been a clerical omission, to be corrected on motion.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Petition of J. D. Foster to supersede and vacate an execution on a judgment against him, as garnishee, at the suit of A. D. Gatchell & Co. against W. T. Farrar. Gatchell & Co. demurred to the petition on the grounds that the petitioner seeks to obtain relief on matters which were in existence and pleadable before the rendering of the judgment against which relief is sought; that the petitioner seeks to go behind the judgment, and bring forward matters which existed prior to the rendition of said judgment; that it is not alleged in the said petition that the petitioner was injured by reason of the failure of the judgment rendered against him to set out the amount of the judgment against Farrar, the defendant in the original suit; that the facts set forth in said petition did not entitle petitioner to any relief in the present proceedings. The demurrer was overruled, and Gatchell & Co. appeal. Reversed.

Blackwell & Keith, for appellants. *Gordon McDonald* and *Matthews & Whiteside*, for appellee.

CLOPTON, J. The object of this proceeding, instituted by appellee, is the *supersedeas* and vacation of an execution issued on a judgment rendered against him February 18, 1890. The judgment was rendered against him on his answer to a writ of garnishment sued out by appellants in a pending suit brought by them against W. T. Farrar. The garnishment proceedings leading to, but exclusive of, the judgment, seem to be regular. It appears, however, from the petition for *supersedeas* and the exhibits thereto, that the indebtedness admitted in the answer of the garnishee was evidenced by promissory notes payable at the First National Bank of Anniston, and that the judgment was rendered before maturity of the notes, or either of them. Such being the real character of the indebtedness, appellee contends that the judgment was not warranted by the answer, on which alone it was rendered; and that in such case, on the principle declared in Corbitt v. Pynes, 45 Ala. 258, it may be set aside at a subsequent term. It may be conceded that the weight of authority maintains the proposition that the maker of a negotiable note cannot be charged as garnishee of the payee while it is still current as negotiable paper, subject to be transferred to a *bona fide* purchaser without notice before maturity. But the mere fact of negotiability does not exempt the note

from garnishment at the suit of a creditor of the payee, so long as he remains the proprietor. Mills v. Stewart, 12 Ala. 90. It may be that in such case, when the answer of the garnishee does not disclose that the note is still the property of the payee, judgment should not be rendered before maturity of the note, and only then when it affirmatively appears, from the answer or otherwise, that the payee is the proprietor at the time of maturity. This question we do not decide, for, conceding that an answer disclosing an indebtedness by negotiable paper does not warrant a judgment against the garnishee before maturity, in order to avail himself of this defense against the rendition of judgment, it is essential that the negotiable character of the note be disclosed in the answer. In the present case the answer admits that the garnishee and one Letcheuwalter were indebted to Farrar, the original defendant, on or about November 2, 1889, by three promissory notes, described as follows: "One note for five hundred dollars, due at six months after date; one for one thousand dollars, due at twelve months after date; and one for five hundred dollars, due at eighteen months after date." The answer further states that the garnishee does not know whether the payee held and owned the notes at the time of the answer, or whether either or all of them have been transferred by him to innocent purchasers, or whether they will be transferred before maturity. There is no further or other description of the indebtedness, no statement or indication that the notes were payable at a bank or banking-house, or at any particular place, so as to constitute negotiable paper,—notes of such character that, if transferred before maturity, for value, without notice, the transferee could enforce their payment, though they may have been held by the payee at the time of the service of the garnishment, and though the maker may have suffered judgment to be rendered against him as garnishee, and may have paid the same. The notes set forth in the answer are subject to any defenses which the maker may have against them, or which may accrue before notice of their transfer. The court was not bound to inquire into the character of the notes, but could act upon the description as given in the answer. The answer disclosing only non-negotiable notes, on which the maker may be charged as garnishee, and failing to disclose that he had received notice of their transfer, or that any person other than the payee asserted any claim to them, the court was authorized to render judgment against the garnishee, and suspend execution until the maturity of the debt, as provided by section 2976 of the Code. The judgment was warranted by the answer. In all instances in which the matter of discharge insisted upon in the petition does not appear on the record, a proceeding by petition and *supersedeas*, it has been said, may be properly regarded as a substitute for a bill in equity, and that any matter of discharge which constitutes an equitable satisfaction of the judgment which the writ of execution is used to enforce may be inquired into on such proceeding, and the execution perpetually superseded. Bank v. Coleman, 20 Ala. 140. But, as a general rule, on *supersedeas*, matters which go behind the judgment or errors or irregularities in the course of the proceedings cannot be inquired into. The ground of relief must rest upon the facts occurring subsequently to the judgment. When the answer warrants the judgment, antecedent facts will not be considered, unless there is want of jurisdiction in the court, apparent on the face of the record, or fraud is alleged and shown. Gravett v. Malone, 54 Ala. 19. The negotiability of the notes was an antecedent fact, which the garnishee could and should have set up in his answer as a defense to the rendition of the judgment. As appears from the judgment entry, it was rendered on motion of plaintiffs, the garnishee appearing by counsel. Being present when it was rendered, and having suffered it to be rendered without objection, or without setting up an existing available defense, he will not be permitted to set up such defense on petition and *supersedeas*. The judgment is conclusive on him. The notes having been in fact transferred before maturity, and the maker having been compelled to pay them to the transferees, the payment of the judgment is certainly a hardship; but a hardship resultant from the filing of an insufficient answer from which the court cannot relieve him without violating the elementary principles on which the conclusiveness of judgments rests when collaterally assailed.

The next ground of relief is that the judgment omits to recite the fact and amount of the judgment against the original defendant. It will be admitted that a garnishment issued as a remedy to obtain satisfaction of a judgment, though in some respects a new suit, being consequential and auxiliary to the judgment, a dependency thereon, it is essential to the regularity of a judgment against the garnishee that it should recite the fact and amount of the recovery against the original defendant. The recitation, however, of the fact and amount is the duty of the clerk, and its omission may be corrected on motion. Whorley v. Railroad Co., 72 Ala. 20; Randolph v. Little, 62 Ala. 396. The omission to recite the fact and amount of the judgment against the original defendant is an irregularity not affecting its validity when collaterally assailed. By the judgment, execution was suspended until the maturity of the first note, and was not in fact issued until after the maturity of the second. The record does not show the amount of the judgment against the original defendant, but from the amount of the judgment rendered against the garnishee the presumption is that the sum of the note first maturing exceeded the sum of the judgment against Farrar. On this state of the record we cannot hold the judgment void on collateral attack. Judgment reversed, and judgment rendered sustaining the demurrers to the petition.

(94 Ala. 481)

NORTON *et al.* v. NORTON *et al.*

(*Supreme Court of Alabama.* Jan. 12, 1892.)

HOMESTEAD—RIGHTS OF WIDOW—CONVEYANCE—APPEAL—SETTLEMENT OF ESTATE—QUESTIONS NOT RAISED BELOW.

1. Where no objection is made, in the court below, to the removal of a settlement from the probate to the chancery court on the application of an administrator, and the questions to be determined are those of which the chancery court has exclusive jurisdiction, no objection can be taken on appeal.

2. Code, §§ 1892–1900, 2543, confer upon a widow the right of quarantine until her dower is assigned, the right of homestead, exempt from the payment of debts, and dower in all the lands of which her husband was seised in fee during the coverture. *Held* that, as the rights of quarantine and homestead are personal rights, which cannot be alienated, but which may be forfeited by removal, a conveyance of the widow's entire dower interest, and her removal from the homestead, entitles the grantee only to the rents and profits to which the widow would have been entitled had she removed from the homestead without making the conveyance.

Appeal from chancery court, Barbour county; JOHN A. FOSTER, Chancellor.

This comprises two suits,—the first, a bill by E. T. Norton, administrator of John T. Norton, asking that his administration be removed to the chancery court; the second, a bill by Henry T. Norton, setting forth his purchase of the widow's dower interest, and asking for a decree that he be entitled to dower, and to the rents of all the land of the decedent.

J. W. Williams, for appellants. *H. D. Clayton* and *G. W. Peach*, for appellees.

CLOPTON, J. E. T. Norton was appointed, in September, 1887, administrator of the estate of John T. Norton, by the probate court of Barbour county. In November thereafter, Josephine Norton, the widow of the decedent, sold and conveyed to Henry T. Norton, one of the heirs, all her right, title, interest, and claim in and to the real property of her deceased husband, including the homestead, and moved off the land, Henry T. Norton entering into possession under his purchase. No assignment of dower has ever been made. E. T. Norton, having been removed from the administration, filed in the probate court an account for final settlement, which was contested by the heirs. Thereupon he filed the bill for the purpose of removing the settlement of his administration into the chancery court. Henry T. Norton, whose cross-bill had been dismissed without prejudice, filed an original bill, setting forth his purchase of the dower interest, and the widow's conveyance thereof, and basing thereon a prayer for a decree to the effect that he is entitled to dower, and also to all the rents of all the lands of the decedent. By agreement of counsel both suits were heard together, and one decree rendered. It is well settled that to authorize the removal of the settlement from the probate to the chancery court on the application of the administrator, there must arise some question or matter which the probate court, by reason of its limited powers, is incompetent to determine. When, however, a special equity exists, there can be no sufficient reason why the final settlement of a removed administrator may not, on his application, be transferred to and made in the chancery court. Though his office and functions as administrator are terminated by removal, he is required to make final settlement of his administration, which should be made in a court having jurisdiction and power to determine and adjust all the equities arising thereon. The ascertainment of the amount of rents to which the heirs and the widow or her assignee are respectively entitled is preliminary and essential to a full and complete settlement of the administration. It is well settled that the chancery court has exclusive jurisdiction to award to the widow rents or mesne profits between the death of her husband and the assignment of dower. Wood v. Morgan, 56 Ala. 397. No objection having been made during the pendency of the suit to the bill on the ground that the administrator has no right to remove the settlement into the chancery court, and as the bills and all the pleadings show that questions arise which should be determined before the final settlement is completed, of which the chancery court has exclusive jurisdiction, and as the parties agreed that the two suits should be submitted and heard together, and a decree rendered settling all the equities of all the parties in both suits, we shall not regard such objection, made for the first time in this court.

No objection is urged to the execution of the order for the sale of the lands, made by the probate court, or to the payment to H. T. Norton of a fair equivalent for the dower interest out of the proceeds of the sale in lieu of an assignment of dower by metes and bounds. The main point of contention is whether H. T. Norton is entitled, by virtue of his purchase of the dower interest, to one-sixth of the proceeds of the sale, and to the rents of all the lands, including the homestead. Appellants concede that he is entitled to one-sixth of the proceeds of the sale and one-third of the rents of the lands, exclusive of the homestead. The statutes confer on the widow the right to retain possession of the dwelling where her husband most usually resided next before his death, with the offices and buildings appurtenant thereto, and the plantation connected therewith, free from the payment of rent, until her dower is assigned. Also to have set apart the homestead, not exceeding in value $2,000, and in area 160 acres, as exempt from administration and the payment of debts; and dower of all lands of which the husband was seised in fee during coverture. Code, §§ 1892–1900, 2543. These rights are essentially distinct, and different incidents attach. The widow's quarantine is a personal right or privilege,—the right to the use and occupation of the property, by herself or tenants, until dower is assigned. This right is not an estate in the land, which can be sold under execution at law, or alienated. It terminates whenever the widow deprives herself of the right to dower by release to the heir, or in any other manner. Boynton v. Sawyer, 35 Ala. 497. Not be-

ing alienable, the transferee of her dower interest can base no claim to all the rents of all the lands on her right of quarantine. Neither can such claim be founded on the widow's conveyance of the homestead. The statute exempts the homestead in favor of the widow and minor children, if any, in any event, during the life of the widow, or the minority of the children, whichever may last terminate; and, if there be no minor child, the rents and profits of such homestead inure to the benefit of the widow during her life. The statute having the beneficent purpose of furnishing the widow a home, confers the right of occupancy as a dwelling place during her life. Under the law as it was at the time of the alienation of the dower interest, she may abandon it, and acquire a new homestead; she could not convey or incumber it. In Barber v. Williams, 74 Ala. 331, it is said: "The abandonment works a destruction of her privileges, and, as she has no power of alienation, if she does alien it, like the alienation of her right of dower before assignment, the descent to the heir is not intercepted, and he may maintain ejectment against her alienee, or those entering under him. By her removal from the homestead after alienating it, the widow forfeited the rents and profits which inure to her benefit under the statute, and her alienee acquired no claim thereto by virtue of her conveyance to him. The rights of the parties are not affected by the act of February 28, 1889, "for the protection of widows and minor children." The second section applies to homesteads previously set apart, but not abandoned at the time of the passage of the act. Acts 1888–89, p. 113. It may be that, when a homestead has been set apart to the widow,—being a larger use and enjoyment during her life,—the right of dower and its allotment are in abeyance, but the right is not thereby extinguished. As we have said, she is, under the statute, dowable of all the lands of which her husband was seised in fee during the marriage. On her abandonment of the homestead, if it has been set apart, her right to dower in the premises so set apart becomes operative, the same as if no homestead had been selected and set apart. In this case, however, no homestead was set apart; the order of the probate court being void for want of jurisdiction. James v. Clark, 89 Ala. 606, 7 South. Rep. 161. The alienation of the homestead being void, Henry T. Norton, the complainant in the second bill, is only entitled to the rents or mesne profits to which the widow would have been entitled had she abandoned the homestead without conveying her dower interest. In such case she would have been entitled to one-sixth of the proceeds of all the lands including the homestead, and to one-third of the rents of all the lands of which she is dowable from the death of her husband to the assignment of dower. The decree is in accord with these views. The assignment of error that the chancellor in the decree does not require Henry T. Norton to account for the rents during his possession of the premises is not well founded. The decree, as we understand it, requires him to account for them. The decree is affirmed on the original appeal. Henry T. Norton takes nothing by the cross-assignment of error. Affirmed.

(94 Ala. 508)

JERNIGAN *et al.* v. FLOWERS.

(*Supreme Court of Alabama.* Jan. 7, 1892.)

CREDIBILITY OF WITNESS—INTEREST—EJECTMENT—ADVERSE POSSESSION—EVIDENCE—BOND FOR TITLE.

1. Where a person conveys to his wife land, in which he holds only an equitable interest, and is then called by the wife as a witness in ejectment, it is competent for the defendant to show the interest of the witness, and his relationship to the party in whose favor he is called.

2. Where the evidence in ejectment is conflicting as to who was in possession of the premises at a certain time, and a witness for plaintiff testifies that plaintiff and her husband took possession in 1882 or 1883, and stayed two or three years, it is competent for defendant to introduce the record of an ejectment suit instituted by him in 1885, and the recovery in that suit, and delivery of possession, so that the jury may determine from the conflict whether or not plaintiff and her husband were in possession at that time, and, if they were, the character of the possession.

3. Where a person buys land at a tax-sale, and before receiving the deed executes a bond conditioned for the conveyance of title to another, the bond is, in effect, an agreement to convey all the equitable interest of the grantor, and is effectual to prevent any one, claiming under him with notice, from afterwards acquiring any interest through the said sale.

4. Where a person who is in possession of land, under a bond conditioned for the execution of a deed upon payment of the purchase money, complies with the agreement as regards payment, his possession becomes adverse to that of the vendor, and a conveyance by the latter is void as against him.

Appeal from circuit court, Coffee county; JESSE M. CARMICHAEL, Judge.

Ejectment by Emma Flowers against D. W. Jernigan and others. There was judgment for plaintiff, and defendants appeal. Reversed.

W. D. Roberts, for appellants. *P. M. Hickman*, for appellee.

COLEMAN, J. Appellee brought suit in ejectment to recover certain lands. The rule is that to recover in this action plaintiff must rely upon the strength of her title. In August, 1878, George P. Roberts sold to R. O. Flowers the land in controversy, and executed to him a bond to make a quitclaim title upon the payment of the stipulated purchase money. In August, 1881, George P. Roberts, the same vendor, sold and conveyed by quitclaim deed the same land to the defendants in this ejectment suit. The evidence tends to show that R. O. Flowers, the first purchaser, took possession of the land, and complied with the terms of his purchase by the payment of the purchase money at the time or before it was due, but that George P. Roberts died without making him or his vendee a quitclaim deed, as stipulated in the bond for title. On the 8th of December, 1881, R. O. Flowers by deed conveyed the land to Emma J. Faussett, who is the same person as Emma Flowers, plaintiff. The evidence tends to show that she went into possession under her purchase, and remained

in possession until ousted by the sheriff, in April, 1888.

It will be seen, from this statement of the facts, that when R. O. Flowers sold and conveyed to plaintiff he did not have the legal title, but only an equity; and it will be further seen that plaintiff's possession, coupled with that of the vendor, lacked a few months of completing 10 years, the time necessary under the statute to perfect a legal title by adverse possession. The defendant offered to prove that R. O. Flowers and plaintiff were husband and wife at the time he executed the deed to her, and were living together as husband and wife in the year 1885, and at the time of the trial of the present suit. The court refused to permit this proof to be made. This ruling of the court was clearly erroneous. It is elementary that the interest of a witness in the result of a suit may be shown, and his relationship to the party in whose favor he is called to testify. It was erroneous for the further reason that, if they were man and wife, his deed of conveyance at the time of its execution did not operate to vest in her more than an equitable title. Whether the act of February 28, 1887, (Code, § 2341,) had the effect to vest in her the legal title, also, as against the defendants, would depend upon the further fact that no rights had been acquired by the defendants before the adoption of that act. Maxwell v. Grace, 85 Ala. 579, 5 South. Rep. 319; Manning v. Pippen, 86 Ala. 857, 5 South. Rep. 572. G. R. Flowers, the father of R. O. Flowers, testified that plaintiff and R. O. Flowers "went on said place in the year 1882 or 1883, and they stayed on it two or three years." In view of this testimony, it was competent for the defendants to introduce the record of the ejectment suit instituted by the defendants in the year 1885 against R. O. Flowers, and the recovery in that suit, and delivery of possession of the land by the sheriff in consequence of the recovery. It was for the jury to determine, from the conflicting testimony, whether R. O. Flowers was in possession of the land, and the character of his possession, if the proof showed he was in possession, at the time of the institution of the ejectment suit against him.

The facts are not presented in the bill of exceptions as fully and satisfactorily as desired, but we will lay down the material principles of law which appear to bear upon the case. George P. Roberts, from whom both parties claim, purchased the land in controversy at a tax-sale. In August, 1878, the time he executed his bond for title to R. O. Flowers, he had the tax collector's certificate of purchase, but had not received the tax-deed. By quitclaim deed, in August, 1881, he sold and conveyed the same land to the defendant Jernigan; and it was by virtue of the legal title conveyed by this tax-deed Jernigan brought the suit in ejectment in 1885 against R. O. Flowers, and received possession of the land. In August, 1881, when the quitclaim deed was made to Jernigan, the tax-deed had not been executed to any one, and the bond of Roberts to Flowers to make him a quitclaim deed upon the payment of the purchase money had been executed in August, 1878, some three years before the sale to Jernigan. The bond of Roberts to R. O. Flowers, in effect, was an agreement to convey all the equitable interest he then owned in the land, and was effectual to prevent the grantor from subsequently acquiring, any right or interest in the land through or by virtue of the equitable interest acquired by his purchase at the tax-sale, and which he had sold and agreed to convey to R. O. Flowers. It was equally effective against any who might claim under him by descent, or a subsequent purchaser purchasing with notice of his sale to R. O. Flowers. This principle is sustained by the following authorities: Smith's Heirs v. Bank, 21 Ala. 134; Nolen v. Gwyn, 16 Ala. 725; Derrick v. Brown, 66 Ala. 166, 167. There is no controversy as to the fact that R. O. Flowers went into possession in August, 1878, and that he or his grantor, the plaintiff in this suit, remained in possession continuously until dispossessed by the sheriff, in April, 1888.

The evidence also tends to show that R. O. Flowers complied with his agreement as regards the payment of the purchase money, and was entitled to receive a quitclaim deed from Roberts, the common vendor of both claimants. Upon the payment of the purchase money in full, the possession of R. O. Flowers became adverse to that of his vendor; and if fully paid, as the testimony tends to show, before the quitclaim deed to Jernigan was executed, the holding of R. O. Flowers was adverse at the time of its execution. Whatever rights R. O. Flowers had acquired passed to Emma Flowers by his deed of conveyance to her. The assignment of the tax collector's certificate by Roberts to Jernigan conveyed no greater interest than that held by the assignor. R. O. Flowers, or his grantee, being in possession, under his purchase, at the time Jernigan bought the land from Roberts, Jernigan cannot be said to have purchased without notice. Whether the superior equity and possession of R. O. Flowers acquired by his purchase from Roberts is available to plaintiff in a court of law, or whether her remedy is in a court of equity, depends upon the facts which may be introduced on another trial. Bare peaceable possession by an actual occupant under claim of ownership is ordinarily sufficient to authorize a recovery against a mere trespasser who has no claim or color of title. Russell v. Erwin, 38 Ala. 48; Guilmartin v. Wood, 76 Ala. 211; Childress v. Calloway, Id. 134; Wilson v. Glenn, 68 Ala. 386; Anderson v. Melear, 56 Ala. 622; Lucy v. Railroad Co., (Ala.) 8 South. Rep. 806. Whether the proof will show that the suit in ejectment by defendants against R. O. Flowers, and recovery and possession of the land, were, as to Emma Flowers, the plaintiff, *res inter alios acta*, and the dispossession of her by the sheriff a bare trespass, cannot be anticipated. We cannot say from the evidence that Robert Flowers and plaintiff were man and wife; neither does the evidence disclose the character of the possession of Robert Flowers, if, in fact, he was in pos-

session, in contemplation of law, when the ejectment suit against him was instituted, or during the time "they stayed together two or three years" on the place, as testified to by one of the witnesses. It is settled law in this state that a conveyance of lands in the possession of a third person, adversely held by him under a *bona fide* claim of ownership, is void as against the adverse holder. Bernstein v. Humes, 60 Ala. 582. The jury must determine from the facts in evidence, under proper instructions, whether there was such adverse holding, at the time of the execution of the conveyance by Roberts to Jernigan, as to render the conveyance void. If the jury find the facts to be that the land was adversely held when Jernigan purchased and acquired the quitclaim deed from Roberts, and further find, under the rule of law we have declared, that the dispossession of Emma Flowers was a bare trespass, he will not be permitted to defeat a recovery by plaintiff by setting up the title acquired by his purchase from Roberts, or by showing an outstanding legal title in Roberts. The property, under such proof, being adversely held when the deed to him was executed, the deed was a nullity as to Mrs. Flowers. The necessary link is wanting by which he can connect himself with that title. On the other hand, if the jury find there was no such adverse holding when Jernigan acquired the legal title through his purchase from the common vendor, Roberts, as to render his deed null and void, then in a court of law his title must prevail, whatever may be the superior equities or rights of plaintiff in another court. Reversed and remanded.

(94 Ala. 369)

SIDEL v. ELYTON LAND CO.

(*Supreme Court of Alabama.* Jan. 14, 1892.)

HUSBAND AND WIFE—PROPERTY PURCHASED WITH WIFE'S MONEY.

Plaintiff's husband conducted the negotiations for the purchase of land. The first payment was made by him with his individual check. The receipt from the vendor stated that the land was sold to plaintiff, and that the money was paid by her. Plaintiff alone signed notes for the deferred payments. The contract of the vendor obligated it to make the title to plaintiff, and recited that the lot was sold to her, and the money paid by her. Plaintiff had nothing to do with the negotiations, nor was she ever in possession of the lot. On the occasion of her marriage, the husband gave her money as a wedding present, which she afterwards redelivered to him for safe-keeping, and which he never returned or accounted for. *Held*, that this was not sufficient to establish that the money used by the husband to make the first payment was plaintiff's separate estate, and she was therefore not entitled to disaffirm the contract, and recover it back.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

This was a suit by Jeannie Sidel against the Elyton Land Company for money had and received. There was judgment for defendant, and plaintiff appeals. Affirmed.

W. B. Feagin, for appellant. *Alex. T. London*, for appellee.

CLOPTON, J. This suit, which is an action for money had and received, brought by the appellant against the appellee, was tried in the city court without a jury, on an agreed statement of facts, and judgment rendered for defendant. The admitted facts may be stated as follows: The husband of plaintiff negotiated with defendant for the purchase of a lot of land near the city of Birmingham, which negotiations terminated in the purchase of the lot for $4,347,—one-fourth cash, and the balance in three equal annual payments. The contract of sale and purchase was consummated August 13, 1887, in the manner following: For the purpose of making the cash payment, the husband of plaintiff drew, in his own name, a check payable to defendant on the Alabama National Bank for the sum of $1,086.75, which was paid by the bank. For the amount of the check defendant executed a receipt, dated August 13, 1887, of which the following is a copy: "Received of Mrs. Jeannie Sidel ten hundred and eighty-six and 75-100 dollars, being on account of purchase of lot one, and west half lot number two, in block 754, in Birmingham, Ala., which was sold to her Aug. 4th, 1887, for $4,347, the balance to be paid, with interest, as follows: Three equal annual payments." Plaintiff signed three several notes for the deferred payments, each reciting that it was given on account of the purchase money of the lot mentioned in the receipt. Plaintiff's husband did not join in the execution of the notes. Defendant made a bond obligating itself to make titles to the plaintiff on payment of the notes. The bond also recites that the cash payment was paid by plaintiff, and the lot bargained and sold to her. Though the bond and notes are dated August 4, 1887, the bond and receipt were delivered to plaintiff's husband, and the notes and check to defendant, at the same time. Plaintiff had nothing to do with negotiating for the purchase of the lot, except to sign the notes after the terms of the contract were agreed on. Plaintiff and her husband went to France, where he died, in December, 1889; and after her return to Birmingham she, through her agent, notified defendant, June 18, 1890, that she renounced and disaffirmed the purchase, and offered to transfer and convey to defendant the bond for title, and all interest she might have in the lot. The bond and receipt were never delivered to plaintiff, but were found among the papers of her husband after his death: neither was she ever in possession, nor assumed any ownership or control, of the lot On the occasion of their marriage, her husband gave to plaintiff $2,500 as a wedding present, which, some days afterwards, she delivered to him to keep for her, and which he has never returned or accounted for, unless his statement to her after the purchase of the lot is admissible in evidence.

The claim of appellant to recover the money is based on the alleged fact that the money used by her husband to make the cash payment was her statutory separate estate; and on the proposition that a married woman has no statutory power to make an executory contract for the purchase of land, except with the assent or concurrence of the husband expressed in writing; and if, independent of the

statute, she had capacity to purchase the lot with the assent, or without the dissent, of her husband, she also had capacity to disaffirm the contract after the termination of her coverture, and that her disaffirmance reinvested her with the right to the money. This proposition cannot and does not arise unless plaintiff first shows that the money with which the cash payment was made was her separate estate. The present action is maintainable only on the theory that the money sued for *ex æquo et bono* belongs to plaintiff, and that defendant, in equity and good conscience, ought not to retain it. The burden is on the plaintiff to show that she is entitled to the money; it is not sufficient to show that defendant has no right to keep it. Hungerford v. Moore, 65 Ala. 232. The admitted facts show that the entire transaction was negotiated by the husband, without the knowledge of plaintiff, so far as appears, until she signed the notes. There being no explanatory evidence, the nature and character of the transaction must be determined from the papers, in connection with the admitted fact that the negotiations were conducted exclusively by the husband. Looking to these, the transaction was, on its face, a purchase of the lot by the husband in the name of plaintiff, and, giving a check for the cash payment in his own name, is *prima facie* a payment by the husband from his own funds. When a portion of the purchase money is paid by the husband, and title taken in the name of the wife, the presumption arises that it was intended as a provision for the wife. Harden v. Darwin, 66 Ala. 55. This presumption may be rebutted, but the recitals of the receipt and bond, and the notes, in the absence of other evidence, do not, under the circumstances, rebut, but rather support, the presumption. The testimony of plaintiff that her husband told her, after the payment of the money, that the money he had used to make the cash payment was hers, was properly excluded; it was an *ex parte* declaration when defendant was not present,—mere hearsay. The only other fact on which plaintiff relies to show that the money was her own is the wedding present of $2,500, some time before the lot was purchased. There is no evidence tending to show that this money was ever in Alabama, or what disposition her husband made of it, or how and where he kept it, or that it was deposited as plaintiff's money in the bank, or that her husband had no money of his own on deposit. Actual notice that it was plaintiff's money, against which the check was drawn, is not pretended; and, if it be said that the recitals of the receipt and bond were sufficient to put defendant on inquiry, there is an entire absence of evidence that the utmost diligence would have led to the discovery that it was plaintiff's money. All these facts, if they be facts, lay peculiarly within her knowledge, and yet she fails to give any information in regard to them. Some proof that the money with which the cash payment was made was plaintiff's is an essential element of her right of recovery. It cannot be inferred from the mere facts that her husband gave her, some months previously, $2,500, which she afterwards delivered to him, and for which he has never accounted. The evidence is not of that full and satisfactory character which the law requires in such cases. Affirmed.

(94 Ala. 372)

CONSOLIDATED ELECTRIC LIGHT CO. v. PEOPLE'S ELECTRIC LIGHT & GAS CO.

(*Supreme Court of Alabama.* Jan. 14, 1892.)

INJUNCTION—INTERFERENCE WITH ELECTRIC LIGHT WIRES.

In an injunction suit by one electric light company against another, the bill alleged that defendant was about to erect its wires along the streets and alleys on which complainant's wires were located, and to place them in such close proximity to complainant's wires as to do irreparable injury to complainant, and greatly endanger the lives of its servants. *Held*, that the answer, which merely denied that danger would ensue "with a reasonably prudent management of complainant's system of wires," was insufficient to authorize a dissolution of the temporary injunction.

Appeal from chancery court, Jefferson county; THOMAS COBLES, Chancellor.

Bill by the Consolidated Electric Light Company against the People's Electric Light & Gas Company to enjoin it from erecting wires along the route of complainant's wires. Decree dissolving the temporary injunction. Complainant appeals. Reversed, and injunction reinstated.

R. H. Pearson and *Jas. H. Little*, for appellant. *Bulger & Heflin*, for appellee.

STONE, C. J. This case brings before us a subject which, in some of its bearings, is comparatively new in jurisprudence. It is the utilization of electricity, alike as a mechanical force and as an illuminator. This use being relatively new, and probably not perfected in its adaptations, it behooves us to take our steps cautiously,—very cautiously,—lest our rulings may sanction or encourage conduct which would lead to great destruction of property, if not of life itself; and, while we confess ourselves ignorant of the scientific principles on which this new discovery and use are based, it is common knowledge, in which we must be supposed to share, that very great skill and circumspection must be employed in directing and controlling its application. The world has learned that the electric current, when heavily charged, is so instantaneously destructive of life that it has, in some places, displaced the guillotine and the halter in the execution of criminals. All men know that when it is sufficiently intensified to subserve the purpose of illumination, or the propulsion of machinery, to come in touch with its charged apparatus is inevitable destruction. The authorization and supervision of the apparatus necessary to each of the enterprises brought to view in the record before us are certainly matters which pertain to the municipal government of the city of Birmingham. The privilege or franchise of each company to construct its plant and works within the city must have been first obtained, for no prudent

company or corporation would enter upon so expensive an enterprise without such authority; and the authority of the city government in the premises would not terminate with the grant of the franchise. It doubtless could and would assert its power to prevent any and all abuse of the privilege. Vested rights, properly so called, are respected in judicial administration; but no one, under ordinary circumstances, can assert and maintain a vested right to the exclusive enjoyment of a public street. Monopolies are not favorites of the law, and if a street have sufficient width and capacity to admit of more than one public enterprise, without unduly obstructing it as a public highway, an exclusive right should not be granted to one company; and if granted, except under peculiar circumstances, it may and should be revoked. In the case before us it is averred, and not denied, that the Consolidated Electric Light Company—complainant below and appellant here—first established its plant, and first occupied certain streets with its poles and wires. The attempt of the defendant company to establish its service along the same streets gave rise to this suit. It is certainly true that the company which, with authority, first occupies a reasonably sufficient space for its works along a street border thereby acquires the right not to be molested in its possession. It cannot, however, claim more space than is reasonably sufficient for the safe and successful operation of its works. Nebraska Tel. Co. v. York Gas & Electric Light Co., (Neb.) 43 N. W. Rep. 126; Grand Rapids, E. L. & P. Co. v. Grand Rapids, E., E. L. & F. G. Co., 33 Fed. Rep. 659. It is averred in the bill that the defendant company "is now erecting poles along the streets and alleys named in paragraph fourth, [those in which complainant was maintaining poles and wires,] which extend into the space occupied by orator's wires and conductors, and between said wires and conductors; and that it is now preparing to place, and will immediately place, its wires and conductors, unless restrained therefrom by your honor, which are to be used in a business similar to your orator's, and to be charged with electrical currents the same as orator's, on the top of said poles, in and among orator's wires, and within orator's right of way, as hereinbefore described, in such manner as will continually interfere with orator's business, and cause orator irreparable injury, and burn out orator's electrical apparatus, and so deteriorate orator's light and power service, and so prevent orator from supplying its customers and lighting the streets of said city, as to become a public nuisance, and will destroy orator's business; and that it will, if permitted by your honor, greatly endanger the lives of orator's servants, and cause such constant and irreparable injury to your orator that it ought not to be permitted." The answer of the defendant does not deny the acts and intentions done and entertained by it, as charged in the foregoing extract, but denies the danger that would ensue, "with a reasonably prudent management of complainant's system of wires." Its exact language is: "Respondents deny that the character of electrical currents is such that another wire, or system of wires, placed in closer proximity, would give more frequent contact with orator's wire, and irreparably injure them by deteriorating orator's light and power service, or that it would destroy complainant's business, but aver that, with a reasonably prudent management of complainant's system of wires in said city, another system of wires might be operated along all of the said alleys, streets, and avenues in said city, with the greatest security to both complainant and respondent. * * * Further answering said section, respondents say that by the erection of respondents' system, and the observance of care on the part of complainant in the tightening of their wires, and the management of their business, with a view of serving their business, rather than obstructing respondent's business, the danger to their employes [would] be greatly reduced, rather than increased, by respondent's system they are now proposing to erect, and there would be no difficulty for the servants of complainant to observe the wires, and to avoid contact therewith."

We think applied electricity has been long enough employed, and its uses and dangers sufficiently ascertained, to authorize the statement of certain propositions as falling within the purview of common knowledge. Among them, may we not state the following? (1) Contact with electrical conductors, sufficiently charged to subserve the purposes of city illumination, destroys animal life. (2) To properly regulate the apparatus for distributing electric light requires that the employes or servants shall ascend the poles and go among the wires. (3) Two sets of wires, occupying the same space, and charged from different dynamos, located apart, and controlled by separate and independent engineers, could not fail to be dangerous in many ways. We cite the following authorities, which shed light on the questions we have been discussing: Thomp. Electr. §§ 43, 92, 93; Teachout v. Railroad Co., (Iowa,) 38 N. W. Rep. 145; Gas-Light Co. v. Hart, (La.) 4 South. Rep. 215; Nebraska Tel. Co. v. York Gas & Electric Light Co., (Neb.) 43 N. W. Rep. 126.

We do not think the specific allegations in complainant's bill, setting forth interference, actual and threatened, with its previously established rights, have been sufficiently answered and negatived by the defendant. Giving to the answer a fair interpretation, and not taking its affirmative allegations into account, we think very great danger and loss would likely ensue to complainant's employes and its property if defendant be allowed to proceed with its work as projected. We therefore hold that the chancellor erred in dissolving the injunction on the denials in the answer.

We do not feel authorized to presume the city did or would grant to one company the right to occupy all the available space of its streets, unless such monopoly is shown to have been a necessary condition of obtaining the service. We will not discuss this question in detail at this time. Monopolies, as we have

said, are not favored, and are never sanctioned, unless a necessity for their tolerance is shown, or unless that necessity springs out of the very circumstances of the case or the transaction. Many affirmative averments are set up in the answer which, if true, call loudly for redress. It is charged that complainant is claiming and occupying much more space than is necessary for the amount of service it renders. This is accomplished, it is charged, in various ways. By sometimes occupying both sides of streets; by crossing streets from side to side; by maintaining dead wires, etc. All this is done, it is charged, to maintain its monopoly and to keep down competition. If these charges are true, they show great public wrongs, which call loudly for municipal interference and correction. They would not authorize a rival company to attempt their redress by measures which would probably lead to a destruction of property and of life itself. The conservation of public security is of infinitely more importance than the success of either of the contending enterprises. As we have said, we think the denials in the answer are not sufficient to authorize the dissolution of the injunction. The decretal order of the chancellor is reversed, and the injunction reinstated. Reversed and remanded.

(44 La. Ann. 800)

STATE v. WARD. (No. 11,056.)

(*Supreme Court of Louisiana.* May 9, 1892. 44 La. Ann.)

Appeal from district court, parish of East Baton Rouge; GEORGE W. BUCKNER, Judge.

Prosecution against William Ward. From a judgment on conviction, he appeals. Affirmed.

Walter H. Rogers, Atty. Gen., for the State.

FENNER, J. The record presents no bill of exceptions or assignment of errors, and a careful scanning of the proceedings discloses no error. The defendant, unrepresented by counsel, has addressed a letter to the clerk of the court full of protestations of innocence and of complaints of the proceedings. We have read it, but it discloses no matters within the cognizance of this tribunal under the record as presented. Judgment affirmed.

(94 Ala. 352)

THORNTON v. HIGHLAND AVE. & B. R. CO.

(*Supreme Court of Alabama.* Jan. 26, 1892.)

RECEIVERS—POWER TO INCUR DEBTS—RIGHTS OF CREDITORS—APPEAL.

1. A receiver who by the decree appointing him is authorized to "run an hotel," and "for that purpose to make such purchases as may be necessary," has power to purchase on credit.

2. A bill was filed to recover rent due on certain property; and a receiver was appointed, who managed the property until, with the consent of all the parties to the action, a decree of the court restored the property to the possession of complainant. Thereafter, but during the pendency of the action, and before the discharge of the receiver, a petition was filed in the suit, alleging a debt contracted by the receiver in the management of the property, and praying that complainant might be required to pay the amount due petitioner, or, on failure to pay within a time to be appointed, that the property be sold for the debt. *Held*, that the court erred in dismissing the petition, as at that time it was the proper and only forum to give petitioner the relief he was entitled to receive.

3. In such case an appeal will lie from the decree dismissing the petition, as the petitioner is a principal to a side issue growing out of the main case.

4. In such case the appeal may be taken from the decree at the time it is rendered, without awaiting the action of the court on the matters involved in the main case.

Appeal from chancery court, Jefferson county; THOMAS COBBS, Chancellor.

The Highland Avenue & Belt Railroad Company filed a bill in chancery to enforce the collection of a debt due for rent of an hotel; and a receiver was appointed, who managed the hotel until, with consent of all the parties to the action, a decree of the court restored the possession of the hotel to complainant. Thereafter, but during the pendency of the action, and before the discharge of the receiver, T. F. Thornton filed a petition in the case, alleging a debt contracted by the receiver in the management of the hotel, and praying that complainant might be required to pay the amount due petitioner, or that the hotel be sold to pay the debt on failure of complainant to do so. The demurrer of complainant to the petition was sustained, and the petition was dismissed by decree of the court. Petitioner appeals. Reversed.

Cabaniss & Weakley, for appellant. *Alex T. London*, for appellee.

COLEMAN, J. On the 26th day of July, 1890, the Highland Avenue & Belt Railroad Company filed its bill in the chancery court against M. Clifford to enforce the collection of a debt due for the rent of the Lake View Hotel. With other relief, the bill prayed for "a temporary injunction to restrain the said Clifford from removing any part of said personal property," and "for a receiver to take charge of the hotel property therein," etc. The court granted the temporary injunction and appointed the receiver, as prayed for in the bill, and directed M. Clifford to surrender to the said receiver the Lake View Hotel, with the personal property. The decree proceeds as follows: "And it is further ordered, adjudged, and decreed that the said receiver, until the further order of this court, is authorized to conduct and run the hotel; and for that purpose the receiver is authorized to make such purchases as may be necessary." The receiver took possession of the property under his appointment, and undertook "to conduct and run the hotel" as authorized in the decree. Having no money or cash on hand, and no provision made by the court for raising money, the receiver purchased the necessary supplies for the hotel on a credit. The debt of petitioner, Thornton, was contracted by the receiver for groceries supplied to the hotel. The petition shows that after the debt due him was contracted, by an order of the court made December, 1890, "by consent of the said parties to the cause, the posses-

sion of said hotel and other property was restored to the complainant," and "that, since the restoration of the property to the complainant, said Merrill, [who was the receiver] has remained in possession and operated the hotel as the agent of the complainant." The Highland Avenue & Belt Railroad Company interposed a demurrer to the petition. The court sustained the demurrer, and, petitioner declining to amend, his petition was dismissed out of court. From this decree dismissing the petition the present appeal is prosecuted.

The cause was submitted to this court by appellant upon the decree dismissing the petition, and, if an appeal does not lie, in the alternative, for the writ of *mandamus*, as a counter-motion to the motion of appellee to dismiss the appeal. This practice has been recognized for a long time in this court. Tabor v. Lorance, 53 Ala. 543. It is not denied that the decree of the court dismissing the petition ordinarily is such a final decree, as to the petition, as will support an appeal; but it is contended that petitioner, Thornton, is not a party to the litigation between the original parties, has no right to make himself a party, and consequently cannot appeal. The principles of law declared in the cases of Ex parte Printup, 87 Ala. 148, 6 South. Rep. 418, and Renfro v. Goetter, 78 Ala. 313, cited in brief and argument and opinion of the chancellor, are not applicable to the question at bar. The petitioner in the present case does not seek to be let in to prosecute or defend as plaintiff or defendant in the original case. He is not interested whether plaintiff or defendant succeeds, in the matter litigated, and the determination of their respective rights in no way can affect his standing in court or his right to relief. Receivers are appointed to hold and preserve the property until it is finally determined by the court who is entitled to it, or its proceeds if sold. Until then it is in the custody of the law, and the receiver holds it as an officer of the law. Expenses more or less necessarily result from its conservation. To prevent irreparable damage and loss, sometimes it is necessary to make provision, in cases of a going business, that the business be continued. Such seems to have been the view taken by the court in the present case. Whether correct or not in this instance, we will not consider. The parties interested acquiesced in the order, and do not complain. Contracts made with a receiver in his official character, within the scope of his duties and the limits of his authority, are not binding on him personally. If such was the case, no one would accept the responsible office of a receiver. The party contracting with the receiver looks to the *res*, the fund or property *in gremio legis*, backed by a pledge of the court that it shall be liable for all costs and expenses legitimately incurred in pursuance of its orders and decrees. Kerr v. Little, 39 N. J. Eq. 83. Any one who attempts to interfere or sue a receiver without leave, in a matter pertaining to his official duties, will be regarded as in contempt of court, and may be punished accordingly. If there is an income from the property, the current expenses should be first paid out of this; but, this failing, there is no doubt but that the *corpus* may be applied to such necessary expenses. Beckwith v. Carroll, 56 Ala. 12; Meyer v. Johnston, 53 Ala. 237; Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 437, 6 Sup. Ct. Rep. 809. Any one contracting with a receiver is charged with notice of the duties required of him, and the extent of his authority. It becomes necessary, therefore, to ascertain whether petitioner's debt was contracted within the scope of the duties and authority of the receiver. The court made no order by which the receiver was entitled to raise money to "conduct and run the hotel." By the decree appointing him, he was authorized to run the hotel, "and for this purpose the receiver is authorized to make such purchases as may be necessary." The petition avers that the receiver, as such, had no money with which to make cash purchases, and the purchase of the groceries was necessary in order to conduct and run the hotel. When the order was made the court knew its own officer had no money, and it made no provision for raising any. How was the receiver to perform his duty unless he purchased on a credit? We are of opinion that the order gave the power and the discretion to the receiver to make purchases, if necessary, upon a credit. If the averments of the petition that the purchase of the groceries were necessary under the order of the court to "conduct and run the hotel," as directed, are true, and the sale of the goods was made to the receiver in his official character, it is a proper charge upon the income first, and, if there was no income, then upon the *corpus* of the property. Under such conditions the court should never surrender its custody of the property or discharge the receiver until all claims incurred by the receiver in the proper discharge of its duties have been adjusted and provided for. When the petition was filed and heard, and dismissed by the decree of the court, the original cause was still pending, and the receiver had not been discharged. The order of the court, made in pursuance of an agreement between the original parties, as averred in the petition, by which the property was placed in the hands of the complainant, did not deprive the court of authority to resume possession and control of it for the purpose of enforcing all claims to or liens upon it, the result of its own orders or decrees. That court at that time was the proper and only forum to give petitioner such relief as he may have been entitled to receive. We are of opinion the court erred in dismissing the petition. Whether the charges for the groceries were reasonable, and whether necessary, as averred, was a matter for proof, to be taken under the direction of the court. It was within the province of the court, and proper practice, to have referred these questions to the register for examination and report; and all parties in interest should have had due notice of the time and place of executing such reference.

An attorney has a lien upon the funds in court, held for distribution or payment to the proper party, secured by his professional services, which may be enforced by petition in the court. If the court refuses to enforce the lien in a case where it exists, the action of the court will be reviewed on appeal by this court. Weaver v. Cooper, 73 Ala. 320. The judgment of the court upon a petition to set aside a sale of land, sold under execution or decree of court, may be reviewed on appeal. Allen v. Allen, 80 Ala. 154. When a writ of possession is directed by the chancellor to issue against the person in possession, an appeal by a party improperly dispossessed against the purchaser is the proper remedy. Creighton v. Bank, 3 Ala. 156. An appeal lies in favor of a receiver from the decree of the court confirming the report of the register allowing to him compensation. Magee v. Cowperthwaite, 10 Ala. 967. The correctness of this ruling was fully recognized in the later case of State v. Railroad Co., 54 Ala. 140. It has been held often that an appeal will lie after final decree from any decree rendered for or against a receiver on the settlement of his accounts, although he is not a party to the original suit. Hovey v. McDonald, 109 U. S. 155, 3 Sup. Ct. Rep. 136; Hinckley v. Gilman, 94 U. S. 468; Farmers' L. & T. Co. v. Central R. R. of Iowa, 7 Fed. Rep. 539. It cannot be doubted that the petition was filed in the proper court, and that the court had jurisdiction to hear and determine the questions involved. If the court had improperly granted relief, those injuriously affected were not without redress by appeal. In such case the proper remedy would be by appeal. We cannot see why an appeal would lie against petitioner and not in his favor, if the court erroneously ruled to his prejudice. It is one of those side issues growing out of the main case to which the petitioner is a principal party, and in which it has been repeatedly held in other courts that an appeal will lie. The cases cited from 109 U. S., 3 Sup. Ct. Rep., and 94 U. S., supra, and Kerr v. Little, 39 N. J. Eq., are directly in point. In the case of Dorsey v. Sibert, (Ala.) 9 South. Rep. 288, the receiver appealed in a matter in which he had no interest, and from a decree from which he had no right to appeal. The court there says, in regard to the merits of the question: "We can consider it only when it shall arise on appeal by some party to the suit who complains that it is injurious to him." Conceding the facts of the petition to be true, the court erred in dismissing the petition. We are of opinion that an appeal may be taken in such cases, from the decree, at the time it is rendered, and that the parties are not required to await the final action of the court upon the matters originally involved in the litigation. In some cases, as where the litigation extends over a great many years, and continued from term to term, perhaps, by consent of parties, or for causes in regard to which a petitioner would not be heard, to hold that an appeal could not be prosecuted until the final determination of the main case would amount to a denial of justice without delay. The parties to the original cause were before the court when the petition was filed. It was not necessary to formally make them parties to the petition. It was the duty of the court, under the rules of practice, to make no order or decree affecting their interest in the property, without seeing that they had notice. They had the right to demur or plead to the petition, and exercised this right. The register was bound to give notice to the parties interested in the matter of the petition of the time and place of executing any reference referred to him. The decree dismissing the original bill concludes all questions as to the parties to the original bill. The effect of the reversal is simply to open the cause to hear and adjudicate the rights of the petitioner as to the matter therein contained. The motion to dismiss the appeal is denied. Reversed and remanded.

(95 Ala. 166)

MAXWELL v. MOORE.

(*Supreme Court of Alabama.* Jan. 26, 1892.)

CHATTEL MORTGAGES—DISCHARGE OF LIEN—TENDER AFTER DEFAULT.

A tender of full payment of a chattel mortgage debt after a default, but before the mortgagee has taken or demanded possession in order to foreclose, if kept good, and if the money be brought into court, discharges the lien of the mortgage, and extinguishes the mortgagee's title.

Appeal from circuit court, Tuscaloosa county; S. H. SPRATT, Judge.

Detinue by B. S. P. Moore against J. R. Maxwell to recover possession of a mule. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Wood & Mayfield, for appellant. *Fitts & Somerville*, for appellee.

CLOPTON, J. The principal question involved in the special pleas, replications, and demurrers to the replications is whether a tender of the amount due on a mortgage of personal property after condition broken operates, when kept good, to discharge the lien of the mortgage, and revest the title in the mortgagor, so that he may maintain an action of detinue against the mortgagee, who has taken possession after tender made, sold the property under the mortgage, and purchased at the sale. The contention of appellants is that, as mortgages are governed in this state by the principles of the common law, a tender cannot effectually extinguish the lien unless made at the time of payment fixed by the contract of the parties,—an offer of strict performance of the condition. In those states where mortgages are rendered as a mere lien or security for a debt, and the title as remaining in the mortgagor until divested by foreclosure, the rule generally adopted is that a tender at any time during the continuance of the right of redemption is the equivalent of payment as to things incidental and accessorial to the debt, and extinguishes the lien of the mortgage, though the tender is not kept good. Kortright v. Cady, 21 N. Y. 373, though not the first, may be regarded as the leading, case holding this view. A qualified and more conservative rule is adopted in those states where a

mortgage is considered as immediately transferring the legal title to the mortgagee, subject to be defeated by the payment of the debt at the time and in the manner specified in the mortgage. In a few the courts hold that an accepted tender after default will not, at law, reinvest the mortgagor with the title, and that his only remedy is in equity to redeem; but in the others the common-law rule, that after condition broken the title vests absolutely in the mortgagee, has not been applied so strictly, where the mortgage is of personal property, as to hold that a tender after default, when kept good, cannot under any circumstances operate the destruction of the lien. There are *dicta* in some of our early cases, and probably the weight of authority is, that a tender after default, in order to effect the extinguishment of the title of the mortgagee, must be made before he has rightfully and peaceably taken possession for the purposes of foreclosure. This question, however, has never been decided in this state, though directly presented in Frank v. Pickens, 69 Ala. 369; the disposition of that case not calling for its decision. It is not presented in this case; the replications averring that the tender was made before the mortgagees acquired possession. We shall, therefore, leave it, as it has heretofore been, undecided.

It may be conceded that by the strict rule of the common law a tender after failure to perform the condition of the mortgage will not, at law, destroy the title, which has become absolute in the mortgagee by the forfeiture. In equity, however, a mortgage being regarded as incident to and security for the debt, the rigor and harshness of the common-law rule has been greatly relieved by holding that the mortgagor has the right to redeem, if not barred by unreasonable delay, by payment or tendering full payment at any time before foreclosure. But courts of equity will not enforce the equity of redemption so as to deprive the mortgagee of his security by discharging the lien of the mortgage. Its enforcement is dependent upon payment of the debt by the mortgagor, or by a sale of the property. In many of the states, courts of law, while not taking cognizance of the equity of redemption for the purpose of enforcing the right to redeem, but acting upon and applying the equitable principles, have extended to a tender after default the effect of a tender made at the time and in the manner specified in the mortgage, modified so as to prevent the mortgagee's deprivation of his security without satisfaction of a debt. In Frank v. Pickens, supra, it was expressly held that a tender of payment of the mortgage debt cannot operate to extinguish the title of the mortgagee unless the money tendered is kept ready to be paid to the mortgagee whenever he may manifest a willingness to receive it; and if the benefit of the tender is claimed in court the money must be placed in the custody of the court, so that, if the tender be adjudged good, it may be awarded to the mortgagee,—otherwise the mortgagor is regarded as having abandoned the tender. Recognizing the mortgagor's right of redemption, and observing the principles on which courts of equity enforce it, the current of the later decisions is that an unconditional tender, after default, of the full amount due on the mortgage, if kept good, and the money brought into court, discharges the lien of the mortgage. We cite a few of the cases: Crain v. McGoon, 86 Ill. 431; Knox v. Williams, 24 Neb. 636, 39 N. W. Rep. 786; Matthews v. Lindsay, 20 Fla. 962; Musgat v. Pumpelly, 46 Wis. 660, 1 N. W. Rep. 410; Jones, Chat. Mortg. § 635.

The effect of a plea of tender accompanied by bringing the money into court came incidentally before this court in the case of Foster v. Napier, 74 Ala. 393. In that case, the suit was founded on a bond executed by Foster in the institution of a statutory action for the recovery of mules and a wagon. The record of the proceedings, pleadings, and judgment in the action of detinue brought by Foster against Napier was read in evidence. In the action of detinue Foster claimed the property under two mortgages executed by Napier. A special plea was filed by Napier, averring payment of the mortgages, except $175, which the plea alleged had been tendered to the mortgagee before action brought; and the money was brought into court. It is said: "The issues being thus formed, if the defendant proved the truth of his second plea, he was entitled to a verdict, but the money tendered would become the property of the plaintiff. In such case the issue is confined to the question of the debt, or its payment, for which the mortgage was given as security. * * *" The defense set up in that suit, and the verdict and judgment thereon, taking into the account the pleadings and charge of the court on the trial, settled conclusively that Napier did not, at the commencement of that suit, owe Foster exceeding $175 on the debts secured by the mortgages, and that before suit was brought he had tendered that sum, and had it in court for Foster. The principle of the decision is that a tender before suit brought by the mortgagee to recover possession, when the money is brought into court and the truth of the plea of tender is established, is tantamount to and has the same effect as actual payment in extinguishment of the lien and title of the mortgagee. In fact, it was treated as a payment.

Section 1870 of the Code declares: "The payment of a mortgage debt, whether the mortgage is of real or personal property, divests the title passing by the mortgage." Under section 2685 a plea of tender of money must be accompanied by a delivery of the money to the clerk of the court. If the money is deposited in court, and the truth of the plea established, the effect is to stop the running of interest from the time of tender. The money becomes the property of plaintiff, by relation, as of the time when the tender was made. That such is the intention and effect of the statute is manifest from the further provision, that if the tender be of personal property the plea must aver readiness to deliver it to the plaintiff, and judgment for the defendant upon the plea vests the title to

the thing tendered in the plaintiff, subject to any claim the defendant may have for his trouble in keeping it. A tender so made, and kept good, and the money brought into court, so as to be the equivalent of payment, if the tender be adjudged sufficient, comes within the spirit, equity, and policy of section 1870. On the foregoing principles, and in line with the current of the decisions in those states where mortgages are governed by the principles of the common law, we adopt as a safe and wholesome rule—conserving the ends of justice, protecting the mortgagor against oppression or undue advantage, and preventing injustice to the mortgagee—that a tender of full payment of the mortgage debt after default, and before the mortgagee has taken or demanded possession for the purposes of foreclosure, if kept good and the money brought into court, operates to discharge the lien of the mortgage and extinguish the title of the mortgagee.

True, only the first replication avers that the money is brought into court, but the omission of this averment in the others is not assigned as a ground of demurrer. While we have left undecided whether a tender after the mortgagee has taken or demanded possession will be effectual to discharge the lien of the mortgage, we hold that possession acquired after the tender is made does not affect its operation. The replications not being obnoxious to any of the objections assigned as grounds of demurrer, the demurrers were properly overruled. Affirmed.

(69 Miss. 219)

SOLOMON v. CITY COMPRESS CO.

(*Supreme Court of Mississippi.* Jan. 11, 1892.)

USE AND OCCUPATION—INSTRUCTIONS—AMENDMENT OF PLEADINGS.

1. In an action for use and occupation of land, the answer admitted use and occupation, and set up an outstanding term in W., to which plaintiff replied that W. had, previous to the period of occupation, sued for, surrendered, and abandoned his lease. *Held*, that it was error to instruct the jury that plaintiff could recover under a state of facts which failed to show that W. had surrendered and abandoned his lease, such surrender and abandonment being the single issue joined.

2. Where the original complaint states a single cause of action against two defendants, the court may allow an amended complaint which dismisses as to one defendant, and such amended pleading does not constitute a new cause of action, under Rev. Code, § 1581, allowing the court to authorize the amendment of pleadings so as to bring the merits of the controversy fairly to trial.

Appeal from circuit court, Lauderdale county; S. H. TERRAL, Judge.

Action by the City Compress Company against J. S. Solomon. Judgment for plaintiff. Defendant appeals. Reversed.

Fewell & Brahan and *Hamm, Witherspoon & Witherspoon*, for appellant. *A. J. McLaurin* and *Miller & Baskin*, for appellee.

COOPER, J. The appellee commenced this suit against appellant and one Fred Wolfe to recover certain rents reserved in a lease from L. A. Ragsdale to Wolfe of date August 5, 1881, for a term of 10 years. The declaration consists of a single count, by which it was averred that Ragsdale leased certain lands to Wolfe by writing for the term of 10 years; that the plaintiff had become the assignee of the reversion, and of the rent due under the lease; and that Solomon was assignee under Wolfe of the undivided one-half interest in the term, whereby the defendants were liable to the plaintiff for the rent then due, for which judgment was demanded. Pleas were interposed by Solomon, the substance of which it is unnecessary to state, for, after interposing demurrers to them, the plaintiff abandoned its original declaration, and filed an amended one. To the amended declaration the defendant, Solomon, demurred, and the demurrer was sustained, and leave given plaintiff to file an amended declaration. Under this leave the plaintiff filed a declaration containing three counts against Solomon alone. Each count sought to recover from this defendant rent accrued from August 15, 1888, to November 30, 1889, for the property known as the "City Compress Company," the same being the rent sought to be recovered by the original and first amended declaration from Wolfe and Solomon. By the first count the plaintiff, as assignee of the reversion and rent, sought to charge the defendant as assignee of the term. The second count was for use and occupation of the premises by Solomon. The third count, after stating in effect the contents of the first, gave a somewhat detailed statement of the following circumstances relied upon as establishing an estoppel against the defendant to deny that he was the assignee of the term secured to Wolfe by the lease from Ragsdale. In this count this history of the transactions between the plaintiff or some of its members and the defendant Solomon is given: Some years after the execution of a lease from Ragsdale to Wolfe, of the City Compress, Ragsdale died, devising said compress property, and a large quantity of other real estate, to his son, L. A. Ragsdale, Jr. Solomon, with six other persons, had entered into contract with L. A. Ragsdale, Jr., for the purchase of the compress and other lands, agreeing to pay therefor the sum of $256,000, of which sum they had paid $9,000, and had bound themselves for the payment of the remainder. Solomon and his associates became alarmed by the magnitude of their engagement, and feared it would result disastrously, because of their inability to meet the deferred payments as they matured, and were desirous of procuring other persons of financial ability to join them in the purchase. To accomplish this purpose, Solomon approached Robinson and Lyerly, and proposed that they, with Broach, or Barbee and Watkins, should join in the purchase of the whole property from Ragsdale; and, as an inducement to them to do so, he stated that the other purchasers would sell to these gentlemen, or to a corporation to be formed by them, the compress property, at and for the sum of $50,000, and transfer to them the rents from August 15, 1888, and that he (Solomon) was the assignee of the term of

Wolfe, and as such would pay the rents from said date, without any set-off or recoupment against the same. In accordance with this understanding, and relying upon the representations and promises of Solomon, these gentlemen joined in the agreement for the purchase of the property from Ragsdale, and bound themselves with those who had originally purchased said property for the payment of the purchase price. That afterwards they formed the plaintiff corporation, to which the compress property and the rights to the rents from August 15, 1888, were conveyed, and that Solomon had failed and refused to pay the rents from August 15, 1888, as he had agreed to do. There was a demurrer to the declaration, which was overruled, and three pleas and demurrers thereto, some of which were overruled and some sustained, and replications and demurrers thereto, some of which were also overruled and some sustained. The final result of the pleading was that the general issue to all the counts, with notice thereunder of the special matter attempted to be set up in several of the pleas, remained. To the second count there was a plea that the plaintiff was not owner of the demised premises, because of an outstanding term in Wolfe, and to this plea a replication that Wolfe had surrendered and abandoned his term, to which replication there was a traverse. To the third count there was a special plea denying that the defendant was the assignee of the term of Wolfe, or had so represented to the plaintiff, or to Robinson, Lyerly, or others, or had made any promise to pay to them or the plaintiff the rents for the compress property. Before referring to the instructions on which the cause was submitted to the jury, we will dispose of the errors assigned to the action of the court in permitting the plaintiff to amend its declaration, and to its rulings in making up the issues upon which the trial proceeded.

The first error assigned is that the court permitted the plaintiff to so amend the declaration as to set forth a new and different cause of action than that counted on in its original declaration; that in the original the rent sought was demanded of Wolfe and Solomon, while in the amended declaration Solomon alone is sought to be charged. In Miller v. Bank, 34 Miss. 412, (which is relied on by appellant in support of this assignment of error,) there was a declaration against two defendants, on a cause of action joint as to them. The suit was dismissed as to one of the defendants, but the declaration was not amended. After the evidence had been introduced and demurred to by the defendant, the plaintiff was permitted to add other counts as against the defendant severally, and the court then proceeded to hear and determine the demurrer which had been introduced under the original count. This was held to be error, but the judgment was reversed, and cause remanded, with leave to both parties to amend their pleadings; the court stating that the proper course to have been pursued would have been for the court to have discharged the demurrer, and directed the defendant to plead to the new counts. We find nothing in this decision denying to the plaintiff, who is proceeding to recover on a distinct and single cause of action, to so amend his pleadings, by dismissing, as to one defendant or otherwise, as to bring "the merits of the controversy between the parties fairly to trial."[1] The real controversy between the parties has been greatly obscured and confused by the course of pleading pursued. It would be unprofitable to examine in detail the wilderness of pleas and demurrers and replications appearing in the record. It is sufficient to say that, as to the first count and the pleadings thereunder, they are eliminated by the instructions of the court to the jury, which were, in effect, that the plaintiff was not entitled to recover by reason of anything contained therein. The same observation may be made in reference to the third count, except that the jury were permitted to find for the plaintiff thereunder, if from the evidence it believed the defendant made the representations and promises therein relied upon as constituting an estoppel against the defendant to deny that he was the assignee of the term of the lessee, Wolfe. Upon these two counts, the first and third, we think the defendant by the pleadings secured all the issues it was entitled to. We fail to perceive what application the statute of frauds, set up in the sixth, seventh, and eighth pleas, has to the controversy.

Recurring to the second count, and the issue made thereunder, we find the substance to be as follows: By the count the plaintiff says it was the owner of the premises which were occupied by the defendant by its consent from August 15, 1888, to November 30, 1889; wherefore the plaintiff is entitled to recover for the use and occupation. The defendant pleaded, confessing the use and occupation, but setting up an outstanding term in Wolfe for the time rent was demanded; and to this the plaintiff replied that at and before the 15th of August, 1888, Wolfe had surrendered and abandoned his term. The single issue, concisely and clearly joined under this count, was whether there had been a surrender and abandonment by Wolfe as pleaded. On the trial of the cause the plaintiff, by the instructions of the court, was permitted to free its controversy from the trammels of the issue it had accepted on this count. By the first instruction for the plaintiff the jury was told that the plaintiff was entitled to recover for use and occupation if the evidence proved "that Solomon, with a view to inducing Lyerly, Robinson, and Watkins to join the land syndicate and buy the compress, represented to them, in substance, that he had bought out the interest of Wolfe in the compress,

[1] Rev. Code, § 1581: "The court shall have full power and authority to allow all amendments to be made in any pleading or proceeding, at any time before verdict, so as to bring the merits of the controversy between the parties fairly to trial, and may allow all errors and mistakes in the name of any party, or in the form of the action to be corrected. * * *"

and that he had no offsets that he would claim against them for rents after the 15th day of August, 1888; and that, if they purchased the compress, the rents would be coming to them after the 15th day of August, 1888, and promised to pay the rent from that date; and if the jury further believe from the evidence that upon these representations Lyerly, Robinson, and Watkins purchased the compress, and had the right to say who should be admitted into a compress company afterwards to be organized, and did afterwards organize, with such parties as they chose to admit, the compress company which is plaintiff in this suit,—then Solomon is liable for the use and occupation of the property, provided they believe from the evidence that Solomon occupied and used the compress, and enjoyed the same, for the time sued for." The instruction is a clear and total departure from the issue tendered by the plaintiff and accepted by the defendant. By that issue the plaintiff conceded the non-liability of the defendant under the second count of the declaration, unless Wolfe had surrendered and abandoned his lease. If that should be proved, the defendant, by his pleading, admitted liability under that count. But the court, at the plaintiff's instance, told the jury that a totally different and distinct state of facts would entitle the plaintiff to recover. This was erroneous. Parties must recover upon the issues upon which the trial proceeds or not at all. The orderly administration of justice would be subverted, if those which have been established as essential to judicial proceedings are ignored or their limitations disregarded. The parties to legal proceedings must know the facts they intend to establish, and their legal effect when proved. Facts and law may be confessed by the pleadings, and by confessions so made litigants must be bound to the extent, at least, of the controversy in which they are made. Without passing upon any other of the very numerous errors assigned, the judgment, for the error above noted, must be reversed, and the cause remanded for a new trial.

WOODS, J., takes no part in the decision of this case.

(69 Miss. 31)

CANTON COTTON WAREHOUSE CO. v. POTTS.

(*Supreme Court of Mississippi.* Oct. 26, 1891.)

ABATEMENT OF NUISANCE—OBSTRUCTING HIGHWAY—EQUITY.

1. Where the only means of access for the occupants of plaintiff's lodging-house was through a public street on which such lodging was located, or across plaintiff's lot, and defendant unlawfully closed the street by erecting buildings thereon, plaintiff has sustained such peculiar injury as entitles her to maintain a private suit.

2. The remedy of complainant being incomplete at law, equity has jurisdiction of the suit.

Appeal from chancery court, Madison county; H. C. CONN, Chancellor.

Action by Rosanna Potts against the Canton Cotton Warehouse Company to abate a nuisance. Judgment for plaintiff. Defendant appeals. Affirmed.

Robert Powell and *W. H. Powell*, for appellant. *E. E. Baldwin*, for appellee.

COOPER, J. The appellee is the owner of a lot in the town of Canton situated in a square bounded on the east by the Illinois Central Railway, on the south by Peace street, and on the north by Franklin street. Her lot extends through the square from Peace to Franklin streets. Her residence fronts on Peace street; and in it she conducted the business of keeping boarders, who were servants of the adjacent railway, and resorted to her house because of its nearness to their place of business. On that part of the lot fronting on Franklin street, she has a cottage, the furnished rooms of which she rented to her boarders and others. The defendant owned the lot east of the lot of the plaintiff in the same square, and also a lot north of Franklin street, and north of the lot lying in the same square with the lot of complainant. The defendant, for the prosecution of its business, has erected certain buildings on its property, and also upon that portion of Franklin street by which its lots are separated, closing up the eastern end of Franklin street, which is the point towards the railroad and the business portion of the town. Complainant's lot, fronting on Franklin street, is thus placed in a *cul-de-sac*, closed at the end, through which those who patronized her furnished rooms were accustomed to approach them. The purpose of her bill is to compel the defendant to remove the obstructions from Franklin street, and for damages sustained by her by reason of their existence. The relief prayed is challenged by demurrer on the following grounds: *First*, that the obstructions complained of are, if a nuisance at all, a public nuisance, and that complainant has sustained no special injury authorising her to maintain any action; *second*, that she cannot maintain a bill for injunction until she shall have recovered in an action at law; *third*, that she has an ample and complete remedy at law for all injury she has sustained. The court below overruled the demurrer, and from that decree the defendant appeals.

Though the obstruction of the street by the defendant may be a public nuisance, and liable to abatement as such, the complainant has sustained such injury, peculiar to herself, as to warrant a private suit. Benjamin v. Storr, L. R. 9 C. P. 400; Soltau v. De Held, 9 Eng. Law & Eq. 104; Corning v. Lowerre, 6 Johns. Ch. 439; Frink v. Lawrence, 20 Conn. 117; Conrad v. Smith, 32 Mich. 429; Pratt v. Lewis, 39 Mich. 7.

The right of the complainant is clear, and its infraction manifest. The injury is of such nature that the remedy by action at law is incomplete, and under such circumstances the jurisdiction of equity is undoubted, without regard to whether there has or has not been a recovery at law. Learned v. Hunt, 63 Miss. 373. The decree is affirmed.

(69 Miss. 204)

SANFORD v. STARLING & SMITH CO.

(*Supreme Court of Mississippi.* Nov. 2, 1891.)

INTOXICATING LIQUORS — ILLEGAL SALES — ACTION FOR PRICE.

Rev. Code 1880, § 1108, making non-collectible any debt for liquors sold in less quantities than one gallon, and declaring void all notes and securities given therefor, does not apply to a purchase on credit of liquors from an unlicensed dealer, as the statute is expressly limited to licensed dealers. Cotten v. McKenzie, 57 Miss. 418, distinguished.

Appeal from circuit court, Washington county; R. W. WILLIAMSON, Judge.

Action by R. B. Sanford, as trustee, against Starling & Smith Company, for money had and received. Judgment for defendant. Plaintiff appeals. Reversed.

Jayne & Watson and *Dabney & McCabe*, for appellant. *Orrick & Baker*, for appellee.

WOODS, J. This action was brought by appellant for the recovery of $1,340, the proceeds of 40 bales of cotton alleged to have been sold by appellee to and for the use of appellant. Under the general issue the appellee gave notice that evidence would be offered to prove that a part of the consideration of the debts secured by the deed of trust executed by L. D. & E. H. Raiford to Sanford, trustee, to secure W. H. Andrews & Bro., is illegal, because some part of said debt was for whisky. Under this insufficient notice, evidence was permitted to be presented to the jury, on the trial below, showing that two or three items in the account of W. H. Andrews & Bro. against L. D. & E. H. Raiford, in settlement of which the note and deed of trust offered in evidence were given, were for spirituous liquors sold in quantities less than one gallon; and this evidence would appear to have exercised controlling influence in the determination of the cause. The court, on appellee's motion, excluded the note and deed of trust from the consideration of the jury on the ground that a part of the consideration of the note was for spirituous liquors sold in less quantities than one gallon, and hence that the note, with the trust-deed given to secure its payment, was void, and that therefore appellant had no title to the 40 bales of cotton for whose proceeds this suit was instituted. This action of the court was naturally followed by a peremptory instruction to the jury to find for the defendant.

The action of the trial court is sought to be upheld by counsel for appellee, as we infer, by virtue of section 1108, Code 1880, and the interpretation of that section contained in Cotten v. McKenzie, 57 Miss. 418. But this contention is fatally erroneous, in omitting to notice that the stringent provisions of that section are, by the very terms of the statute, applicable only to persons who are licensed to retail vinous and spirituous liquors in less quantities than one gallon. The section, in pursuance of the general public policy of our legislation, to control and hamper the retail liquor traffic, undertook to limit the extent of that particular business by requiring it to be conducted on a strictly cash basis, and made non-collectible, in whole or in part, any debt contracted for liquors sold at retail on a credit, at the same time declaring all notes or securities given therefor to be void. This section, (1108,) by its plain terms, applies only to licensed retail liquor dealers; and its penalty is imposed upon this class of persons alone. The succeeding section (1109) prescribes the penalty to be imposed upon merchants and others who sell or give away liquors at their places of business without having been licensed as retail liquor dealers. To enlarge section 1108 by such judicial construction as to make it include, not only licensed retail liquor dealers, but all other classes of persons engaged in all other species of trade, would not only be repugnant to all rules of statutory construction, but would clearly violate the expressed legislative intent in the enactment of the statute, which was, as already stated, to further burden and restrict the retail liquor traffic.

The thoroughly considered case of Cotten v. McKenzie, 57 Miss. 418, affords no support for the views of appellee. In that case a recovery was sought on a note, the consideration of which was an account for supplies for family use, and various items of vinous and spirituous liquors, in less quantities than one gallon, which had been sold by a licensed retail liquor dealer to his customer on a credit; and the court, in an exhaustive opinion, held that the note, having been given for supplies and for liquors in less quantities than one gallon, which had been sold on a credit by a licensed retail liquor dealer, must be treated in that proceeding as a whole, and was therefore void as a whole. The ground upon which that opinion rests is that a part of the consideration of the note in that case was illegal,—not insufficient,—and the contract was wholly void. The illegality consisted as clearly appears in the opinion, in the sale of liquors in less quantities than one gallon, on a credit, by a licensed retail liquor dealer. The proof in the case before us is undisputed that W. H. Andrews & Bro. were not licensed retail liquor dealers, but merchants carrying on a general supply business, who laid themselves open to punishment under section 1109. We cannot agree that the merchant who has sold to his customer family and plantation supplies to the amount of $1,340, and who has, in that amount, either inadvertently placed two or three small items of spirituous liquors purchased elsewhere at the buyer's request, or who has willfully sold, at the customer's request, two or three small items of liquors, in less quantities than one gallon, and charged the same in the customer's general account, shall lose his entire demand under a mistaken application of a rule never designed for him, but which is confined, by its own terms, to persons licensed to carry on an unfavored retail traffic in liquors. Reversed and remanded.

(69 Miss. 190)

DAVIS v. LOUISVILLE, N. O. & T. RY. CO.

(*Supreme Court of Mississippi.* Nov. 2, 1891.)

CARRIERS — INJURIES TO PASSENGERS — CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad company to recover for personal injuries, plaintiff's evidence showed that when the train was approaching the station at which plaintiff desired to get off the conductor told plaintiff that he must hurry off, as the train did not have time to stop; that the train was running three or four miles an hour; and that plaintiff received certain injuries in attempting to pass from the car in which he was sitting to the baggage-car to get his baggage, preparatory to getting off, as ordered by the conductor. *Held* that, as the facts did not disclose negligence *per se* in plaintiff, it was a question for the jury whether plaintiff was guilty of contributory negligence.

2. Whether, in such case, there was apparent danger in attempting to obey the conductor, was also a question for the jury.

3. In such case a statement of plaintiff that he knew it was dangerous to obey the conductor is not conclusive of the question, as it was for the jury to say whether in fact it was apparent that there was danger.

Appeal from circuit court, Washington county; R. W. WILLIAMSON, Judge.

Action by Henry Davis against the Louisville, New Orleans & Texas Railway Company for personal injuries. A verdict for the defendant was directed. Plaintiff appeals. Reversed.

Wilford H. Smith, for appellant. *Mayes & Harris*, for appellee.

WOODS, J. If the plaintiff's evidence, taken alone, would not have upheld a verdict in his favor, then the peremptory instruction for the defendant was correct; otherwise, it was not. The evidence of the plaintiff was to this effect: That having been admonished by the conductor of the train on which plaintiff was being transported as a passenger, after the engineer had given the customary signal of the approach of the train to the station to which plaintiff was to be carried, and at which he desired to disembark, that he (the plaintiff) must hurry off, as the train did not have time to stop at the station then near at hand; that the train was running three or four miles an hour; that plaintiff, as directed by the conductor, attempted to pass from the car in which he was sitting to the baggage-car, to get his mason's tools, preparatory to getting off, as ordered by that servant of the company; and that in so doing, without fault on his part, he received the injuries complained of.

We are of opinion that this state of facts did not disclose negligence, *per se*, in the plaintiff. On the evidence of the plaintiff alone the case was one peculiarly for the consideration of the jury, and whether, on all the evidence, the plaintiff was shown to have been guilty of contributory negligence, should have been passed upon by the jury. One may avoid the charge of contributory negligence by showing that he received the injury complained of while performing an act required to be done by the defendant; such act not being apparently dangerous. Of course, if the act required to be done was plainly dangerous, no recovery could be had. For example, if the train in question had been running at the rate of 20 miles an hour when the plaintiff undertook to get ready to leave it, under the direction of the conductor, and he had received the hurt in attempting to jump from the train, the court might and should have declined to submit the question of contributory negligence to the jury. In this case there would be no question of fact to submit, for the recklessness of behavior of the plaintiff in endeavoring to jump from a train, under such circumstances, is manifest. But suppose, as in the case at bar, the train was only moving three or four miles an hour, and the attempt was not, even then, to jump from the train, but, under the direction of the conductor, to pass from one car to another, preparatory to leaving the train; the plaintiff being about 20 years of age, a man, and accustomed to railway travel. Can it be affirmed that there was apparent danger, under this evidence, in attempting to obey the officer having charge of the train and the passenger? Or, rather, shall not this question, and the question of the plaintiff's negligence, be submitted to the jury, to be determined in the light of the surrounding circumstances?

It is said, however, by appellee's counsel, that there was no question as to the apparent danger to plaintiff in attempting to comply with the conductor's order, because the plaintiff, in his own evidence, swears he knew it was dangerous to attempt to obey the conductor. We do not so understand the matter. The plaintiff's statement of his belief that the act was apparently dangerous is not conclusive of that question. The real point to be considered is, not what the plaintiff thought of the danger of the situation, but was it in fact apparent that there was peril? And this question was one of fact, to be determined by the jury, on all the evidence in the case. Reversed and remanded.

(69 Miss. 73)

HOLLINGSWORTH *et al.* v. HILL *et al.*

(*Supreme Court of Mississippi.* Nov. 9, 1891.)

LANDLORD'S LIEN.

A lessee of a plantation sublet a part thereof, and his tenant, after making a crop of cotton, and before it was gathered, abandoned the premises, and the lessee sold the cotton to defendants. The lessor of the plantation held a claim against the lessee for rent, and for supplies furnished, and assigned such claim to plaintiff, who thereupon claimed a lien on the cotton sold. *Held*, that under Code 1880, § 1301, which gives a lessor a lien on all crops grown on the leased premises for rent, and advances made for supplies to lessee, plaintiff was entitled to recover.

Appeal from circuit court, Yazoo county; J. B. CHRISMAN, Judge.

Replevin by D. M. Hollingsworth against Allan Hill and others for the recovery of seven bales of cotton. Attachment by Powell against the same defendants of the same property, and the actions consolidated and tried as one. Verdict for defendants by direction, and judgment thereon. Plaintiffs appeal. Reversed and remanded.

Dr. Hill rented a plantation for 1890 from Hudson, and executed a deed of trust conveying some mules, and the crops to

be grown on the land, to secure the rent, and supplies to be furnished, and a considerable debt past due, and it was stipulated in this deed that Hudson might apply any payments made as he saw proper. The deed of trust was duly recorded. Hill delivered 83 bales of cotton of the crop of 1890, and Hudson so applied it as to extinguish the old debt and the rent, and leave his account for supplies advanced, to the sum of $1,706, unpaid. This claim was assigned by Hudson to Powell, who caused the trustee in the deed of trust to bring replevin for seven bales of cotton, and himself sued out an attachment against Hill on the account for supplies, and the seven bales were seized under both writs, and claim was made to this cotton by Allan Hill and his mother, whose claim arose in this way: Dr. Hill sublet 20 acres to Squire Jefferson, who, after making a crop of corn and cotton on the land, in the fall, after its maturity, but before gathering, abandoned the leased premises, owing Dr. Hill for rent of land, rent of a mule, and for advances furnished him; and Dr. Hill accepted the situation, gathered and appropriated the corn, and disposed of the cotton in the field by selling it to Allan Hill and mother for payment by them of Squire Jefferson's indebtedness, with some reduction. Under this contract the cotton was gathered by Allan Hill and mother, who paid Dr. Hill as agreed. The two cases were consolidated by agreement, and tried as one. The evidence showed that the claim for advances by Hudson to Dr. Hill was due and unpaid.

Calhoon & Green and *T. H. Campbell*, for appellants. *E. E. Baldwin*, for appellees.

CAMPBELL, C. J. The court erred in instructing for the appellees. They claim under J. A. Hill, and have no greater right than he has, and it is clear that, as against him, the appellant was entitled to recover the cotton. Hill had expressly stipulated that Hudson might apply payments as he saw proper, and he had so applied them as to leave the account for advances unpaid. It was a lien on the cotton superior to any claim derived from dealing with Hill. Code, 1880, § 1301.[1] When the tenant, Squire Jefferson, abandoned the premises he had leased, and Dr. Hill took possession, as he had the legal right to do, he proceeded, as well he might, to deal with the crop as owner; and, after appropriating the corn raised by Jefferson, procured the cotton to be picked under an arrangement with Allan Hill and his mother, who, as Allan Hill testifies, bought the crop from Dr. Hill. As they dealt with Dr. Hill as owner, as in law he was, because of the surrender by the abandonment of Jefferson, (12 Amer. & Eng. Enc. Law, p. 758, and cases cited,) they took the cotton acquired by dealing with him charged with whatever bound it as his, and must look to him for compensation for their labor and expenses. Dr. Hill regarded the crop raised by Jefferson as his own after its abandonment by Jefferson, and it was his in legal contemplation, and it was so regarded by those who dealt with him about it; and the legal consequences of his ownership must follow, whatever the hardship. Reversed, and remanded for a new trial.

[1] Section 1301 gives the lessor of land a lien on all the agricultural products raised thereon for rent and advances made by him and supplies furnished by him to the tenant.

(69 Miss. 103)

ALABAMA & V. RY. CO. v. BRENNAN, Sheriff, *et al.*

(*Supreme Court of Mississippi.* Nov. 30, 1891.)

MUNICIPAL CORPORATIONS—TAXATION—INJUNCTION.

1. Under the city charter of Vicksburg, § 30, providing that, where property is reported by the assessor as undervalued, the owner is entitled to notice before the board of aldermen can change the valuation, such owner cannot be deprived of his notice by an ordinance passed under section 33 of the charter, providing that the assessment is to conform to such time and method as may be prescribed by ordinance. The former section is not affected by the latter, and the two, being harmonious, must both stand.

2. In such case, where the board changes the valuation returned, without notice to the owner, an injunction will lie against the collection of all the excess of taxes over the sum due on the valuation rendered by the assessor.

Appeal from chancery court, Warren county; CLAUDE PINTARD, Chancellor.

Action by the Alabama & Vicksburg Railway Company against J. M. A. Brennan, sheriff, and others. Judgment for defendants. Reversed.

Birchett & Shelton and *Nugent & McWillie*, for appellant. *Gibson, Henry & Bien*, for appellees.

CAMPBELL, C. J. The dealing by the board of mayor and aldermen with the valuation of property of the appellant, as rendered to the assessor, was not according to the charter of the city of Vicksburg, but in disregard of the plain requirement of section 30, which provides for precedent notice to the owner of the property reported by the assessor as undervalued, "with his statement of what he believes to be the reasonable taxable value of said property," before action on it by the board. It is true that the tremendous and dangerous power is conferred on the board of mayor and aldermen finally (and without any opportunity for redress against confiscation, practically, it might be, under some conditions) to determine the taxable value of all property; and, in view of this, there is the greater need for observance with scrupulous exactness of the few safeguards for the property owner. The provision mentioned as contained in section 30 is about all he has, and he may justly invoke that. His valuation rendered to the assessor may be changed by the board, after a hearing or opportunity for it, upon notice to him, where the assessor has reported an undervaluation, and stated what he believes to be a proper one. Section 30 of the charter is not affected by section 33, as supposed. By the latter it is declared that the "assessment [is] to conform to such time and method as may be prescribed therefor by ordinance," but this general declaration

cannot be held to abrogate the specific provision of the former section as to dealing with undervaluation of property. The board may by ordinance prescribe the time and method of assessment, in conformity to the particular provisions of the charter. The two sections are harmonious, and must both stand. It is a great mistake to suppose that the board has the right to meet in secret session, (or open one either,) and without precedent notice to the property owner, and upon no other basis than its own will, to change the valuation of property by the owner. No such practice can find any sanction in the charter under consideration. The injunction should have been perpetuated as to all the excess of taxes over the sum due upon the valuation rendered to the assessor. Decree reversed, and decree for such injunction to be entered.

(69 Miss. 22)

NESBITT v. CITY OF GREENVILLE.

(*Supreme Court of Mississippi.* Nov. 30, 1891.)

DANGEROUS STRUCTURES ON STREET—LIABILITY OF CITY.

1. Where a city permitted the maintenance of a water-tank in a defective condition in a public street, and plaintiff's decedent, being lawfully engaged at work in such street, stepped under the defective structure for a few minutes,—there being no apparent danger,—and was killed by the falling of the tank, the question of the city's negligence, and as to whether the deceased was guilty of contributory negligence, are for the jury.

2. In such case the city is chargeable with notice of, and is liable for injury resulting from, such defects in the structure as ordinary care and reasonable diligence would discover.

Appeal from circuit court, Washington county; R. W. WILLIAMSON, Judge.

Action by M. M. Nesbitt against the city of Greenville. Judgment for defendant. Plaintiff appeals. Reversed.

Jayne & Watson, for appellant. *Yerger & Percy*, for appellee.

WOODS, J. There is much evidence in the record tending to show that the highway at the point where the plaintiff's deceased husband received his injuries was a public street in Greenville, and we have no reason to suppose that the peremptory instruction of the court below had any relation to this phase of the case. Let us examine briefly the evidence which was offered for the purpose of showing negligence in the municipality in permitting an obstruction for a long while in a public street,—an obstruction, as it now appears, which was dangerous to persons passing along or using such street. The obstruction was erected by one Pace about two years before the injury complained of occurred. Whether erected by the permission of the municipality does not appear from the record, but this is not important, since the city's liability for its continuance is clear. There is no dispute as to the knowledge of the city of the existence of the structure in the street. The structure was a tank, holding 70 or 80 barrels of water, placed on a frame-work which was itself placed on posts from 4 to 6 feet high above the surface of the street. The water which was stored in this tank was used for street-sprinkling purposes, and for consumption by citizens. It was immediately in the street, and very near the base of a levee which had been erected across the west end of the street by the board of levee commissioners. To this tank, directly, persons using the river water were accustomed to come for their supplies, and to it the street sprinklers came directly, also. Within about 70 feet of the tank there were two coal-yards, and all the business of these yards was conducted near it. Now and then small steam-boats landed at the foot of this street, and fishing vessels sometimes tied up at its foot, also; and persons from such boats and vessels passed up the street in question, and by this tank, from the river. Persons on foot occasionally used this particular portion of the street to reach the levee. This tank, thus built, and thus situated, and thus used, suddenly fell one day in August, 1890; and in its fall the husband of appellant, who at the moment was under it, received injuries which resulted in his death. The immediate cause of the fall of the tank was found to be the breaking in two of one of the timbers constituting the frame-work upon which the tank sat. This broken piece of timber was found to have been unsound,—"water-sobbed," as the witness who testified to this fact characterized it. The same witness had not a great while before discovered the water-sobbed and unsafe condition of this piece of timber.

We agree with counsel for appellee that ordinary care over its streets is the measure of diligence imposed upon municipal corporations, and that they are not insurers against injury to persons using the public streets. We do not dissent from the elementary principle, that before the municipality can be held liable for injuries resulting from nuisances or defects in its streets, it must have knowledge of the nuisance or the defect, and its danger. Notice there must be to charge the municipality, but this notice may be actual or constructive or implied. When the obstruction is created by the city itself, or where it permits an obstruction erected by another in its streets, it must take notice of such defects in the obstruction as ordinary care will discover. The structure in a street, to every part of which the entire public has the right of free access, must be erected in such manner and from such materials as to be reasonably safe; and it must be kept in this safe condition. Proper repairs, from time to time, are as much the duty of the city as a safe structure originally. Inseparably connected with this statement is another, viz., that a municipality is liable for injury resulting from its defective structures where, by reasonable diligence, it might have acquired knowledge of such defect. The common knowledge of mankind is chargeable to a municipality, also. The knowledge of the action of the elements on structures of wood, and of the liability of timber to decay under certain conditions, is to be attributed to municipalities, just as to natural persons. The duty of the municipality to exercise ordinary care to detect such

natural decay, and to guard against injuries therefrom, follows necessarily. Recurring now to the facts put in evidence to show the appellee's negligence and consequent liability, we are of the opinion that the city's freedom from culpability was not so manifestly clear as to leave no room for differences of opinion among reasonable men, and therefore that the question of appellee's negligence should have been submitted to the jury.

Was the deceased free from contributory negligence? Was he guilty of such misuser of the street at the time he was injured as to absolve the municipality from liability in any event? The deceased was engaged in preparing, in this open street, the timbers necessary to the erection of a dump just beyond the levee into the river, under a contract with the city. He had been engaged in that work, with the laborers employed by him, for two weeks or more. We take it to be true that the city had the same right to occupy such part of the street in the prosecution of this public work as might be convenient and necessary, in the same manner and to the same extent that an abutting lot-owner may be permitted to employ a part of the street in the erection of a building upon his lot. Presumably, too, the deceased was using the street with the knowledge and under the permission of the municipality. While thus lawfully engaged in the street, the deceased, as an incident to his work, had occasion to sharpen a saw; and in order to do this piece of work, incident to the main enterprise, he placed himself for a few minutes under this tank, in a part of the public street,—there being no apparent danger from the structure,—and, while so situated, was fatally injured by the fall of the tank. Suppose he had stood outside the edge of the tank while engaged in his incidental work of saw-sharpening. Suppose he had been simply standing near it, supervising the work of his hands, and the injury had occurred. Would he have been so clearly guilty of contributory negligence, or such misuser of the street, as to leave no room for difference of opinion as to his culpability? On all the facts in the case before us, can it be affirmed that only one conclusion can be drawn by reasonable men? Would all reasonable men certainly draw the same inference of contributory negligence from all the evidence in this case? Was there nothing material, of fact or inference, as to which reasonable men might not honestly differ? We intimate no opinion as to the negligence of deceased, but we are of the opinion that the question should have been submitted to the jury.

Reversed and remanded.

(69 Miss. 56)

WITKOWSKI v. MAXWELL *et al.*

(*Supreme Court of Mississippi.* Nov. 30, 1891.)

MARRIED WOMAN—LIABILITIES—BILL OF EXCHANGE PAYABLE TO HUSBAND—PROTEST—PROOF OF DEMAND.

1. A bill of exchange drawn by a married woman, who is a separate trader, to the order of her husband, for the purpose of being indorsed to one of her creditors, is binding on her, and is not affected by the fact that it is, in form, a contract between the drawer and her husband.

2. In an action against the drawer of a bill of exchange, the certificate of a notary was in evidence, stating that he presented the bill, and that payment was refused. The deposition of the notary was taken three times. In the first he stated that on the day of maturity he took the bill to the place of business of the acceptor, which he thought was on L. street, and demanded payment, and, being answered that the acceptor was out of the city, he protested the bill, and gave notice to the parties. In his second deposition he stated that at the time of the protest the place of business of the acceptor was the Star Boot & Shoe Store, 1526 L. street, and that presentment was made to the son of the acceptor. Defendant read the depositions of a number of witnesses, who testified that at the time of protest the acceptor was in business on C. street, and that the son was not with the father, but was doing business for himself on Sixteenth street. The third deposition of the notary stated that his second deposition was hastily prepared by the officer from notes furnished by him, and that he only intended to state that his impression was that the place of business of the acceptor was on L. street, and that he thought presentment had been made to the son. He stated that it was impossible to speak with absolute certainty, but that undoubtedly he had presented the paper at the proper place and to the proper person. The acceptor testified that he was out of the city at the time of the protest. *Held*, that the evidence would support a finding of presentment and demand at the proper place of business.

Appeal from circuit court, Washington county.

Action on a bill of exchange by Maxwell & Peale against A. V. Witkowski. Judgment for plaintiffs. Defendant appeals. Affirmed.

Campbell & Starling, for appellant. *Yerger & Percy* and *Frank Johnston*, for appellees.

COOPER, J. On July 16, 1886, the appellant, a married woman, the wife of Simon Witkowski, and a separate trader, was indebted to the appellees, and the indebtedness was evidenced by her promissory note, which was indorsed by her said husband and by L. Witkowski. On that day, and in substitution of her said note, she drew a bill of exchange upon L. Witkowski, who resided in Denver, Colo., directing him to pay to the order of Simon Witkowski, her husband, the sum of $1,563.90, on the 1st day of December, 1886. Simon Witkowski indorsed said bill, and delivered it to appellees, and it was duly accepted by L. Witkowski. At maturity it was presented for payment, and, being dishonored, was protested, and notice given to the drawer and indorser, against whom the present suit is brought. The sufficiency of the presentment, protest, and notice is contested by the appellant upon grounds to be hereinafter stated. The declaration is in the usual form, nothing appearing therein to show the consideration of the bill, the coverture of the appellant, or her residence. She pleaded her coverture and residence in the state of Louisiana at the time of drawing the bill, and that Simon Witkowski was then her husband, and that by the laws of that state husband and wife could not contract together. The plaintiffs replied, setting up the prior indebtedness of the defendant as above stated, and that the bill sued on was executed in lieu and substitution of the note. To this replication the defend-

ant demurred, and the same was by the court overruled. This action of the court is brought in review by the first assignment of error.

The demurrer was properly overruled. It is not denied by appellant that she was indebted to appellees in the debt which formed the consideration of the bill sued on. Her sole contention is that the form of the transaction is that of a promise on her part to pay the sum of money named in the bill to her husband on default of the acceptor, and that this contract she was disqualified by the laws of her domicile from making. The case of Doll v. Theurer, 6 Rob. (La.) 276, relied on by appellant, decides only that, where the wife makes a contract with her husband not authorized by law, the husband has no right of action, and cannot convey one to another person. In Martin v. Drake, 1 Rob. (La.) 218, and Petitpain v. Palmer, Id. 220, it is clearly intimated that where the real transaction is between the wife and a third person, and the real contract is between them, recovery may be had upon the note of the wife made to the husband as a mere conduit, and by him indorsed to the other party to the contract. In the first of these cases Mrs. Drake had executed her note payable to and indorsed by her husband. The defense was that the note was given for a slave sold to the defendants, which at the time of the sale was inflicted with an incurable disease known to the "seller." The court said: "The record does not show, nor is it pretended, that Mrs. Drake was separated in property from her husband; that the purchase was for her individual account and benefit; or that the husband indorsed the note only as her surety, to pay a debt of her own. Under the pleadings, we are bound to presume that the purchase was made, and the note given, on account of the community; if so, the wife cannot bind herself jointly with her husband for a debt contracted during the marriage, either as a drawer or indorser of a note. Petitpain v. Palmer, was upon a similar instrument, and the court held that the wife was not liable. To the contention of counsel in argument that the contract was one of suretyship entered into by the husband for the wife, under the form of an accommodation note with his indorsement thereon, the court replied: "If this be available, it ought to have been alleged and proved." "The wife's identity is so completely merged in the husband's that she can no more contract with him than with a stranger. Therefore the drawing or indorsement of a bill or note by a husband to his wife is void, and she cannot sue upon it either in his life-time, or against his executor after his death. But the husband may indorse it to her in order that she may be the mere conduit, and indorse it over to another party, the whole transaction being regarded as the husband's." 1 Daniel, Neg. Inst. § 241; Slawson v. Loring, 5 Allen, 340. And, though *prima facie* such note is a nullity, she may be charged on it by evidence *aliunde* that it was given in her separate business. 1 Daniel, Neg. Inst. § 248; Bank v. Miller, 63 N. Y. 639; Hardin v. Pelan, 41 Miss. 112.

The second assignment of error is upon the action of the court upon admitting in evidence so much of the notarial certificate of protest as stated that the notary had given notice of protest to the maker and indorser of the protested bill. Without determining whether the admission of this evidence was or was not erroneous, it is sufficient to say that no reversible error is shown. The deposition of the notary was taken, and the fact that notice was given is so abundantly proved that the mere admission of other incompetent evidence to establish the same fact would not cause a reversal. In truth, no serious controversy seems to have been made on the trial that some notice was given; the real contention, so far as notice was involved, was as to the sufficiency of that given. No effort was made by the plaintiffs to prove that notice, other than that stated in the notarial certificate, was given, which consisted of a copy of the dishonored bill of exchange, and a declaration by the notary that he had presented the original "at the store of L. Witkowski, and demanded payment thereof, which was refused; reason, out of the city." Whereupon, etc. It is contended that the notice should have contained all the facts constituting presentment and demand, and that that given was fatally defective in not showing to whom presentment was made. It was held in Routh v. Robertson, 11 Smedes & M. 382, that, where the notice of dishonor was such that its legal effect of what was stated to have been done would release the indorser, the notice was insufficient. In that case the notice stated presentment and protest on the 26th of March of a bill of exchange not due until the 29th. The legal effect of this would have been to discharge the indorser, and since the notice stated, in effect, that he had been discharged, it was held that it could not be proved that the presentment and protest were in fact on the 29th. In Chewning v. Gatewood, 5 How. (Miss.) 552, and Rowan v. Odenheimer, 5 Smedes & M. 44, it was held that notice sufficient to indicate clearly that the paper had been presented and dishonored, and that the holder looked to the indorser for its payment, was sufficient. In Chewning v. Gatewood the court said: "It has uniformly been held that no particular form of notice is necessary; and though it be irregular, or even vary in some particulars from the true state of the facts, yet if it be sufficient to put the party upon inquiry it is good." 2 Amer. & Eng. Enc. Law, p. 410, note 1.

On the trial of the cause the notarial certificate of protest was introduced, and the deposition of the notary was also taken and read in evidence. In fact, the notary was three times examined. On his first examination he stated that on the day of the maturity of the bill he took it to the place of business of the acceptor, which he thought was on Lawrence street, and demanded payment, and, being answered that the acceptor was out of the city, he protested the bill, and gave notice to the parties. On his second examination he stated that at the time of the protest the place of business of the acceptor was the Star Boot & Shoe Store,

1526 Lawrence street, and that presentment was made to Mr. Jules Witkowski, the son of the acceptor. The depositions of several parties were taken by the defendant going to show that at the time of the protest another person was conducting business at 1526 Lawrence street, and that the acceptor was then in business on Champa street; also that Jules Witkowski was at that time not engaged by his father, but was doing business for himself on Sixteenth street. The deposition of the notary was then taken a third time, and he explained that his second deposition was hastily prepared by the officer, by whom it was taken, from notes furnished by him, and that he supposed his answers as written down only stated, as he intended to state, that his impression was that the place of business of Witkowski was on Lawrence street, and that he thought presentment had been made to Jules Witkowski. On this, his final testimony, he stated that very many pieces of paper were protested by him, and that it was impossible for him at so long a time to speak with absolute certainty as to when and to whom presentment had been made, but that undoubtedly he had at the time presented the paper at the proper place and to the proper person. It affirmatively appears from the evidence of the acceptor himself that at the time of the protest he was in fact out of the city, and to this extent his evidence corroborates the testimony of the notary. The court instructed the jury for the defendant that it devolved on the plaintiffs to prove presentment, and demand of payment at the proper place of business of the acceptor, and demand upon him or his representative, and by its verdict the jury has found that such was made. We cannot say that the verdict is not supported by the evidence. The notarial act was evidence of the fact that presentment had been made in the manner stated, *i. e.*, at the place of business of the acceptor, and though the officer, as a matter of precaution, should have noted at the time to whom presentment was made, his failure so to do does not invalidate his act if, as matter of fact, it was presented to the representative of the acceptor. In Rowan v. Odenheimer the indorser lived in the same city with the maker, and personal notice of dishonor was necessary. The notary was examined as a witness, and stated that he had left the notice at the store of the indorser, but could not remember with whom. There was a verdict and judgment for the plaintiff, which the court refused to disturb, and which on appeal was affirmed. The decision in Duckert v. Van Lilienthal, 11 Wis. 56, cited in the notes to Dupre v. Richard, 43 Amer. Dec. 214, and relied on by counsel for appellant as authority for the proposition that "the protest should show to whom the bill was presented, and, if it does not, it will not bind the indorser," was disapproved in Wallace v. Crilley, 46 Wis. 577, 1 N. W. Rep. 301, and declared to be *dictum* to the extent that it announced the rule now contended for. As we have said, the notarial certificate was evidence of presentment at the usual place of business of the acceptor, and, he being not found, it was sufficient to demand payment of any one having apparent authority to act for him. We cannot say that the verdict of the jury, by which it is settled this was done, is not supported by competent evidence from which the inference flows. The judgment is affirmed.

SCOTT *et al.* v. FRANCIS VANDEGRIFT SHOE CO. *et al.*

(*Supreme Court of Mississippi.* Dec. 14, 1891.)

JURY—TRIAL IN EQUITY COURT—CONSTITUTIONAL LAW—FRAUDULENT ASSIGNMENT.

1. Code, § 1848, relating to chancery courts, provides that "the said courts shall have jurisdiction of bills exhibited by creditors, who have not obtained judgment at law, or, having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors, and may subject the property to the satisfaction of the demand of such creditors, as if complainant had a judgment and execution thereon returned, 'No property found.'" *Held*, that a decree setting aside an assignment on the complaint of creditors who had not obtained judgments at law would not be disturbed on the ground that it violated Const. art. 1, § 12, which declares that "the right of trial by jury shall remain inviolate," since Const. 1890, § 147, expressly provides that "no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction."

2. An assignor preferred his mother on account of an alleged indebtedness for borrowed money. The mother refused to testify about the money, and how the debt arose. The testimony of the assignor about the indebtedness was very general. There was a preference to an aunt for "borrowed money," which proved to have been for a debt due from the father of the assignor, for which the latter gave his own note in some settlement of the father's estate, which settlement was obscure, and not clearly explained. The preferences to relations were nearly enough to exhaust the estate. Just before the assignment the assignor gave a mortgage on certain real estate to secure a fee to his attorney, who agreed to draw up a deed and defend the assignor in any suit brought against him in regard to the assignment. *Held*, that the assignment was properly set aside.

Appeal from chancery court, Noxubee county; T. B. GRAHAM, Chancellor.

Action by the Francis Vandegrift Shoe Company and others against T. F. Scott and others to set aside an assignment on the ground of fraud. Decree for complainants. Defendants appeal. Affirmed.

A. C. Bogle and *W. H. Bogle*, for appellants. *Rives & Rives*, for appellees.

COOPER, J. On the 4th day of April, 1890, T. F. Scott, a merchant at Cooksville in this state, made a deed of assignment, with preferences, for the benefit of his creditors. On the 7th day of April, Linkauff & Strauss, A. G. Levy & Co., Richardson Bros. & Co., Block & Newberger, Flash, Preston & Co., Malone, Chapman & Co., Vanvleet & Co., creditors of said Scott, sued out writs of attachment against him, which were levied upon the goods in the

hands of Long, assignee; said writs of attachment being returnable, and were returned, to the circuit court of Noxubee county. On the 13th of September, 1890, the Francis Vandegrift Shoe Company, Davis, Marshall & Co., Burney, Cavanaugh & Long, Marx, Rothenbergh & Co., T. G. Bush & Co., D. A. Shalein & Co., and Mrs. Lillian C. Madison, administratrix of James E. Madison, creditors of said Scott, exhibited their bill in this cause in the chancery court of Noxubee county, in their own behalf and in behalf of all other creditors who should join therein, attacking as fraudulent and void the assignment made by Scott to Long, and seeking to subject the property thereby conveyed to the payment of their debts against Scott. After the bill in chancery had been filed, the creditors above named, who had attached at law, asked to be made parties complainant thereto, and that their actions at law should be stayed until the final determination of the equity cause, in which, as they averred, the rights of all parties could be finally disposed of without the expense incident to the actions at law. The court, over the objection of the defendants, permitted these creditors to join in the bill. The goods assigned by Scott were, under the direction of the court, sold by a receiver appointed in this cause, and from the sale a fund of $1,500 has been realized. The value of the other property assigned, lands and choses in action, added to the fund now in hand, will be less than the debts due by Scott; and it is not pretended that under any circumstances there can be a residuum to be paid to him. Scott, the assignor, and Long, the assignee, in the deed, are made defendants to the bill, as are also A. C. Bogle, whose connection with the controversy will be hereafter stated, and one J. P. Long, who had bought the goods assigned from the assignee before the bill was filed, but who, having confessedly paid no part of the purchase price, is not affected by the decree finally made.

The first errors assigned are to the jurisdiction of the court. It is said that the court had no jurisdiction of the controversy as presented by the bill of the original complainants, because none of them had secured a judgment at law against the debtor Scott; and, secondly, that it had no jurisdiction on the petition of those creditors who had attached at law for their demands, for the additional reason that, the circuit court having taken jurisdiction at the instance of these creditors, the defendant was entitled to have the controversy with these creditors there settled. The jurisdiction of the court of chancery to entertain bills of this character at the instance of creditors who have not recovered judgments at law rests upon the provisions of sections 1843, 1844, and 1845 of the Code, which are as follows: "Sec. 1843. The said courts shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors; and may subject the property to the satisfaction of the demand of such creditors, as if complainant had a judgment and execution returned thereon, 'No property found.' Sec. 1844. Upon such bill a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such writs may be issued in other cases, and subject to such proceedings and provisions thereafter as are applicable in other cases of such writs. Sec. 1845. The creditor in such cases shall have a lien upon the property described therein from the filing of his bill, except as against *bona fide* purchasers before the service of process upon the defendant in such bill." It is insisted by counsel for appellants that these sections of the Code are violative of section 12 of article 1 of the constitution of this state, which declares that "the right of trial by jury shall remain inviolate." It is a sufficient reply to this objection to say that the decree was made after the adoption of the constitution of this state, which became operative on November 1, 1890, and that by section 147 thereof it is declared that "no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction." The contention of appellants is that jurisdiction to determine whether or not Scott was debtor to the complainants was vested in the circuit and not the chancery court, and, because it was, that the court should not proceed to the determination of any other question presented in the cause. This is precisely the case covered by section 147 of the constitution, which is a complete provision, requiring no legislation to put it in operation, but which acts and is operative by reason of its own declaration.

The next question presented by the assignment of errors is whether the chancellor rightly decided the assignment to be fraudulent in its character. In considering this question it becomes necessary to state the connection of the appellant Bogle with the assignment. On the 3d day of April, Scott applied to Bogle to prepare the deed of assignment, which was afterwards executed, and a fee of $400 was agreed upon between the parties. To secure the payment of this fee, Scott and his mother executed their notes for the sum fixed, and executed a mortgage upon certain lands owned by them as tenants in common. The understanding of both Scott and the attorney, Mr. Bogle, was that Bogle should, for the fee fixed, prepare the deed of assignment, and should also represent Scott in maintaining the assignment and defending any suits that might be brought against him. On the next day the assignment was prepared and executed, and by it the interest of Scott in the lands mortgaged to Bogle was conveyed to the assignee as part of his estate. The preferences declared by Scott in the assignment were, first, about $7,000 to his mother, Mrs. Nancy Scott, evidenced by certain promissory notes,

the debt being, as stated in the assignment, for borrowed money. The next preference was in favor of an aunt of the assignor, for $700, also stated to be for money borrowed from her. The next preference was for a debt, of an amount not stated, due from the assignor to his nephew, T. Scott. Other preferences for several small sums were then given to certain other creditors, and the estate remaining was to be distributed equally among creditors, generally. Mrs. Nancy Scott, the mother of the assignor, was examined as a witness, and produced the notes given her by her son for the several sums for which she was preferred; but being interrogated as to the circumstances under which the debts arose, the source from which the money was received by her, and generally for the purpose of discrediting the existence of the claims, she persistently and positively declined to reply. Mr. Scott was also examined as a witness in reference to the various transactions from which his alleged indebtedness to his mother sprang; and, while he stated that he owed the sums for which she was preferred, he was unable to do more than make the most general and indefinite explanations of the circumstances under which the obligations were incurred. The argument of appellants is that the court below did not believe the debt to Mrs. Scott, or any of the other preferred claims, to have been simulated, but, construing the mortgage to Bogle and the deed of assignment as one instrument, avoided the assignment as fraudulent in law, because it reserved a benefit to the grantor in the assigned property, by providing for the payment out of the assigned property of the fee to Bogle, which fee was to be paid him for services, in part, to be thereafter rendered for the assignor. It is said that the recitals in the deed, and the notes evidencing the debt to Mrs. Scott, are at least *prima facie* evidence that the debt was due; that Mr. Scott and his mother were the only persons examined as witnesses to disprove its validity, and that both testified that it was really due; that if they failed to respond to the interrogatories put to them, and failed to remember, or, if they remembered, to disclose their private affairs, out of which the indebtedness arose, such failure of memory or willful refusal to reply could not do more than impeach the credibility of the witnesses; that complainants took the deposition of Mrs. Scott as their witness, and if she refused to tell all she knew, the effect cannot be to do more than to discredit her testimony; that to overturn a *prima facie* case some positive and direct evidence is required, and so they say, if the chancellor did in fact find that the assignment was void, because the debts to Mrs. Scott were simulated, such finding rests upon no evidence sufficient for its support.

Turning to the consideration of the other phase of the cause,—the employment of counsel for future defense of the assignor in reference to assaults made upon his disposition of the property,—it is argued by counsel that the execution of the mortgage was a separate and distinct transaction, lawful in itself, or, if not to the full extent of the fee secured thereby, that it ought not to be held to vitiate the assignment, but that the debt secured should be abated so that only so much should be charged upon the property as the mortgagor might lawfully have bound it to pay, viz., a reasonable fee for preparing the deed. We are unable to say that the court below separated and distinguished the details of the transaction as it is now presented by counsel, or that it should have done so. In all its parts, and in its entirety, it was the subject of investigation. To say the least of the preferred debts to Mrs. Scott, their amount and consideration, and the circumstances under which they are incurred, are presented in a very suspicious light. When to this is added that the debt to the aunt of the assignor, which the deed recites to have been incurred for borrowed money, is shown to have been a debt due by the father of the assignor, for which the latter gave his own note in some settlement of the father's estate, which settlement is obscure and not clearly explained, and the fact that the other preferred debt is also due to his nephew, and when to this is added the further fact that the preferred debts to near relatives are probably sufficient to exhaust the whole estate assigned, and then consider that, in the act of making the assignment for the professed benefit of all creditors, there is fixed as a primary charge upon the land, which is a part of the assigned property, a fee to secure the services of counsel in defending the assignor against the assaults of dissatisfied creditors, it becomes apparent that the line between an assignment for the benefit of creditors and one for the benefit of the debtor is practically obliterated, if the one under consideration is sustained. We are therefore of opinion that the decree of the court is correct, and it is accordingly affirmed.

(28 Fla. 558)

SELDEN *et al.* v. CITY OF JACKSONVILLE.

(*Supreme Court of Florida.* Dec. 22, 1891.)

EMINENT DOMAIN—COMPENSATION—RIGHT OF ACCESS TO PREMISES.

1. The guaranty of a constitution that private property shall not be "taken" or "appropriated" without compensation does not extend to mere consequential damages resulting to property abutting on a street from a change of grade of the street, or other improvement thereof not constituting a diversion of the street from street purposes, by municipal authorities acting within the scope of their charter powers, but only to a trespass upon or physical invasion of the abutting property.

2. The provisions of the constitution of 1885, that private property shall not be "taken" without just compensation, (section 12, Declaration of Rights;) that the legislature may provide for the drainage of the land of one person over or through that of another upon just compensation therefor to the owner of the land over which such drainage is had; and that no private property nor right of way shall be "appropriated" to the use of any corporation or individual until full compensation shall first be made to the owner, or first secured to him by deposit of money, such compensation to be irrespective of any benefit from any improvement proposed by such corporation or individual, (sections 28, 29, art. 16,)—do not of themselves render a municipality liable

for mere consequential damages resulting to property abutting on a street from the lawful change of grade or other authorized improvement of the street by the municipality.

3. Upon the voluntary dedication of land to the purposes of a street, it becomes, to the extent that it is necessary to be used for a street, the property of the people of the state; and the dedication carries with it the continuing power to change its grade, or otherwise improve it, in so far as such improvements are for street purposes. This power may be delegated by the legislature to a municipality as one of its governmental agencies, and to the exercise of these powers the fee of the owners of abutting lots in the street to its center is at all times subject.

4. There are incident to the ownership of property abutting on a street certain property rights which the public generally do not possess, viz., the right of egress and ingress from and to the lot by the way of the street, and of light and air which the street affords. These incidental rights are, under a constitutional prohibition simply against the "taking" or "appropriation" of private property, subordinate to the right of the state, or of any duly-authorized governmental agency acting for it, to alter a grade or otherwise improve a street for street purposes. The original and all subsequent purchasers of abutting lots take with the implied understanding that the public shall have the right to improve or alter the street, so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the improvement or destruction of such incidental rights as a mere consequence from the lawful use or improvement of the street as a highway.

5. The erection by a municipal government within the limits of a street, and for street purposes, and under street conditions justifying it, of a viaduct for the purpose of changing the grade of the street, and in the exercise of its power to change such grades, is not a "taking" or "appropriation" of private property, within the constitutional guaranty against such taking or appropriation, even though the abutting owners' rights of ingress, egress, light, and air are destroyed thereby; nor is this result of law changed by the mere fact that other corporate bodies than the municipality have contributed to the expense of the erection of the viaduct. Whether, however, it would not be a diversion of the street from the street purposes, and a "taking" and "appropriation" for which compensation must be made, if the necessity for the viaduct was created by railroad tracks crossing the street, not presented.

(*Syllabus by the Court.*)

Appeal from circuit court, Duval county; JAMES M. BAKER, Judge.

Suit by George Selden and others for an injunction to restrain the city of Jacksonville from erecting a viaduct for the purpose of changing the grade of a certain street. From an order denying the application plaintiffs appeal. Affirmed.

A. W. Cockrell & Son, for appellants. *W. B. Young* and *J. M. Barrs*, for appellee.

RANEY, C. J. The last clause in the twelfth section of the declaration of rights of our constitution is: "Nor shall private property be taken without just compensation." This is not, however, the only provision of that instrument relating to the exercise of the right of eminent domain. There are two sections in the "Miscellaneous Provisions," or sixteenth article, which read as follows:

"Sec. 28. The legislature may provide for the drainage of the land of one person over or through that of another, upon just compensation therefor to the owner of the land over which such drainage is had.

"Sec. 29. No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be provided by law."

It cannot be denied that the almost uniform course of decision has been that a municipal government was not liable for any consequential damages resulting to dwelling lots from an authorized or lawful change of grade of the street by the municipal authorities, where the constitutional provision obtaining has been like that of our declaration of rights: "Nor shall private property be taken without just compensation." Such seems to have been this court's understanding of the law 20 years ago, as is shown by Dorman v. City of Jacksonville, 13 Fla. 538.

The meaning given by the courts and commentators to the words "taken" or "appropriated," as used in such a provision, is that there must be a trespass upon or a physical invasion of the abutting property, to bring municipal authorities within the constitutional prohibition, so long as such authorities keep within the scope of their powers in using or improving the street. If they do no illegal act, as by creating a nuisance, or do not appropriate the street to other than street purposes, or do not invade, or do physical injury to, the abutting property, there is, in the absence of negligence, or of the want of due skill and care in making improvements, (which negligence or want of care or skill may, of itself, be a ground of corporate responsibility for damages,) no liability to the owners of such property for any damage resulting from a change of grade or other improvement in the street made by the municipal powers for the convenience or benefit of the public in using the highway as such. The voluntary dedication of the street as a highway creates certain rights in the public; the land so dedicated becomes, to the extent that it is necessary to be used for a street, the property of the people of the state; and the dedication of it to such purpose carries in this country, as well as in England, the continuing power to change its grade or otherwise improve it, in so far as such improvements are for street purposes. This power may be delegated by the legislature to a municipality as one of its governmental agencies, and to the exercise of these powers the fee of the abutting owner in the street to its center is at all times subject, in the manner or to the extent indicated above, under a constitutional provision like that in our bill of rights.

In some cases holding these views there has been an omission, at least, to notice any distinction between the rights of an abutting owner, as such, and the public generally, in or as to the streets; but there can be no doubt that there is a

substantial and clearly-defined difference. There is incident to abutting property, or its ownership, even where the abutter's fee or title does not extend to the middle of the street, but only to its boundary, certain property rights which the public generally do not possess. They are the right of egress and ingress from and to the lot by the way of the street, and the right of light and air which the street affords. Viewing property to be not the mere corporal subject of ownership, but as being all the rights legally incidental to the ownership of such subject, which rights are generally said to be those of user, exclusion, and disposition, or the right to use, possess, and dispose of, (Lewis, Em. Dom. §§ 54, 55; Dill. Mun. Corp. § 587*b*; Cooley, Const. Lim. 675, 676,) we are satisfied that the rights just mentioned are within the meaning of the word "property," as it is used in this constitutional provision. These incidental rights of property are, under a constitutional guaranty, simply against the "taking" or "appropriation" of property, subordinate to the right of the state, or any duly-authorized governmental agency acting for it, to alter the grade or otherwise improve the streets for street purposes. An original purchaser of an abutting lot, and all subsequent purchasers, take with the implied understanding, or as tacitly agreeing, that the public shall have the right to thus improve or alter the street so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the impairment or destruction of such incidental rights, as a mere consequence from the use or improvement of the streets as highways. Ohio and Kentucky alone, of all the courts of this country, have denied such subordination of these incidental rights to the highway rights of the public. The doctrine of the courts of the other states and of the United States is that, so long as there is no application of the street to purposes other than those of a highway, or no diversion of it from street purposes, any changes of grade made lawfully, and in the exercise of good faith, or not maliciously, or for the purpose of doing injury to the abutter, is not within the constitutional inhibition against taking property without compensation, nor the basis for an action for damages. Lewis, Em. Dom. § 96, and authorities cited in note; Dorman v. City of Jacksonville, supra.

The Ohio doctrine, as summarized by Lewis in his work on Eminent Domain, (pages 121, 122, § 98,) gives a right of recovery, not only under the circumstances indicated above, but also where one builds to an established grade, and it is changed to his damage; or where one builds before a grade is established, but succeeds in anticipating the grade which is afterwards established, and the grade after being so established is changed; or where one builds before a grade is established, and afterwards an unreasonable grade is established. The right of recovery is based, in the later cases there, upon the guaranty that private property shall not be taken for public use without just compensation, (Lewis, Em. Dom. p. 122,) and the property taken is spoken of in these cases as the right of access. In the earlier cases, however, the ground of the decision was that of natural right and justice. Judge Dillon, in a note to his work on Municipal Corporations, (page 1226, § 990,) says, of the doctrine obtaining in this state, that the common-law measure of the liability of municipal corporations has been designedly and deliberately carried beyond the limits established by the current of decision elsewhere.

In Kentucky, in the case of Louisville v. Mill Co., 3 Bush, 416, the grade of the street was to be raised 12 feet above the mill company's lot at the only point of ingress and egress, the improvement entirely closing the passway; and in Bridge Co. v. Foote, 9 Bush, 264, there was sufficient space left between the appellee's lot and the bridge for two wagons to pass abreast; and in the former the abutting owner was held entitled to relief, on the ground that there was a taking of his private property, an interference with his private right of air, light, and passway, while in the latter relief was denied, as there was no interference with the private rights of the appellee; the lessening in value of his lots from the lawful construction of the bridge, and the avenues leading to it, being regarded as mere consequential damages, not constituting a cause of action. See, also, Kemper v. Louisville, 14 Bush, 87; Lewis, Em. Dom. § 99; 2 Dill. Mun. Corp., note to page 1226, § 990. Both Judge Dillon and Mr. Lewis treat the Kentucky doctrine as virtually making the extent of the injury, and not the fact of injury, the basis of municipal liability.

The provision of the Kentucky constitution is: "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." Art. 13, § 14.

In Ohio there are two sections on the subject in the constitution of 1851. They are the nineteenth section of the bill of rights, and the fifth section of the thirteenth, or "Corporations," article, and they read as follows:

"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases where private property shall be taken for public use a compensation therefor shall be first made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction, for benefits to any property of the owner." Section 19, art. 1, "Bill of Rights."

"No right of way shall be appropriated to the use of any corporation until full compensation shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall

be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law." Section 5, art. 13, "Corporations."

The courts of Ohio do not attempt to sustain their peculiar doctrine upon the theory that there is anything exceptional in the constitution of that state. They hold, as indicated above, that there is a "taking" of property. As much as the decisions of Ohio have been discussed by other courts and by commentators, there can be found neither in those discussions, nor in the decisions themselves, any suggestion that the Ohio doctrine is referable to anything peculiar in the constitution of that state. The same is true of the Kentucky decisions.

It is not to be denied that much hardship has resulted to individuals in their property rights from time to time from the established doctrine, nor have the courts failed to appreciate these hardships. In O'Connor v. Pittsburgh, 18 Pa. St. 187, a case in which the city authorities reduced the previously established grade, with reference to which the church of the plaintiff had been constructed, and cut down the street 17 feet in front of the church, Chief Justice GIBSON, delivering the opinion of the court, said: "We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none." Still this doctrine has been so firmly established as law, based upon the principle of the rights of the state in highways, and the immunity of itself, and of governmental agencies acting for it, and for the benefit of the people, that, notwithstanding the departure of the Ohio courts, they have found themselves unable to ignore or change it, though suggestions have at times fallen from them as to the advisability of the law-making power doing so. These suggestions, and doubtless a growing sense of the harsh consequences of the doctrine, have led to not only legislative action, but also to changes in the organic law of many states, as shown by the constitutions of Pennsylvania of 1873, and that of Alabama of 1875, by which it is provided that municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed; * * * and that of Arkansas of 1874, providing that private property shall not be "taken, appropriated, or damaged;" and those of Illinois of 1870, West Virginia of 1872, Missouri of 1875, Colorado and Texas of 1876, Georgia of 1877, and California of 1879, that it shall not be "taken or damaged." The purpose and the effect of this introduction of the words "injured," "destroyed," or "damaged" was to give compensation for damages often resulting to private property where there was not a "taking" of the property. There being no taking of private property, and consequently no infraction of the constitutional guaranty against taking without making just compensation, there were yet, as just intimated, many cases in which damages resulted to property owners, although the works or improvements were constitutionally authorized by the law making power of a state, and carefully and skillfully executed by governmental agencies. Such damage, not being occasioned by any illegal or wrong act, has found expression in the phrase, *damnum absque injuria*. It has also become the custom to speak of such damages as "consequential damages," meaning that they are simply the consequence of a legal act, and therefore are not a basis of recovery in the courts, nor of a lawful claim for compensation. It seems not to have been the purpose of these amendments to give a right of recovery for all damaging consequences, resulting from the improvement, to the owner of the property affected, but only for such as affect physically some right of property incident to the abutting property.

This is illustrated by the cases of Edmundson v. Railroad Co., 111 Pa. St. 316, 2 Atl. Rep. 404; Railroad Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. Rep. 871; Chester Co. v. Brower, 117 Pa. St. 647, 12 Atl. Rep. 577; Railroad Co. v. Marchant, 119 Pa. St. 541, 13 Atl. Rep. 690; Railroad Co. v. Walsh, 124 Pa. St. 544, 17 Atl. Rep. 186,—cited by appellant's counsel, and which are decisions under the new provision of the constitution of Pennsylvania, referred to above. This provision, so far as it need be given now, is as follows: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." The first case was an action for damages done to plaintiff's buildings and land by negligent blasting and the reckless and careless construction of the road by the contractors. The company had been given the right to enter and construct, and did not enter or construct under the right of eminent domain. It was held, upon the facts of the case, that the company was not liable for the negligence of its contractor, who was exercising an independent employment, and to whom the maxim, *respondeat superior*, applied; and that a railroad company to which one grants the right to enter upon his land, and construct a road, is not liable for damages resulting as a consequence of the company's entering and constructing; and that the above provision of the constitution did not apply to damages resulting from carelessness or negligence in constructing a railroad. "The words 'injured or destroyed,' as found in this section, as every one knows," says the opinion, "were not designed to change, alter, or limit the nature and effect of corporate contracts, but to impose on those having the right of eminent domain a liability for consequential damages from which they had been previously exempt. * * * To create a liability for injuries of this kind, and to make corporations responsible for such damages, was the object, and only object, of the section under discussion." In the second of the above

cases (Railroad Co. v. Lippincott) a railroad company erected on its own land a viaduct, and operated a railroad thereon; and it was held that there could be no recovery for damages resulting to plaintiff's property, lying on the opposite side of the street, from noise, smoke, and dust, the necessary consequence of a due operation of the railroad, no portion of his property having been taken or used in the construction of the viaduct; and that, except on proof of negligence, the lawful use by a railroad company of a lawful erection, entirely upon its own property, was not the subject of damages under the above section of the constitution. It was said by the court that none of the plaintiff's property had been taken, nor any of his rights infringed, so that neither by the constitution, nor by the case quoted, was there warrant for his contention; that over and beyond the damage which arises from the taking of property, whether in the shape of land or a right, the constitution imposed on corporations a direct responsibility for every injury for which a natural person would be liable at common law; and that this was held in the preceding case, but that beyond this they could not go. The third of the above cases (Chester Co. v. Brower) is one in which the county erected a bridge, with stone abutments and piers, on a street over a creek in a borough. The approach or abutment of the bridge was of solid masonry, and extended in front of Brower's lot and house. It is stated that the street could no longer be used except for travel on foot, the travel now passing over the approach and upon the bridge. The conclusion reached was that the county was liable in an action on the case for the consequential damages to the property; and this, though the legislature had not provided a remedy to enforce the right by the provision of the constitution. "There was," observes the opinion, "no taking of the property of the plaintiff by the county for the purpose of constructing the bridge. * * * The claim was for consequential damages caused by the erection of the abutments of the bridge some fourteen feet above the grade of the street in front of the plaintiff's house. It follows that, under the law as it stood at and prior to the adoption of the constitution, he would have been without remedy. Struthers v. Railroad Co., 87 Pa. St. 282, and cases there cited. The constitution of 1874 made a radical change in the law as regards consequential damages." In the fourth case, (Railroad Co. v. Marchant,) in which the facts were quite similar to those in the second case, the decision was that the mischief which the constitutional convention had before it in adopting the above section was the want of a remedy under previous constitutions to obtain compensation when property was injured or destroyed in the construction or enlargement of corporate works, though no portion of it was actually taken by the corporation; and that the remedy provided thereby to secure just compensation by corporations for property "injured or destroyed" has relation to injuries which, though properly termed "consequential," are yet to be understood as confined to such injuries to one's property as are actual, positive, and visible, and are the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured, as provided in the constitution in advance; that a railroad corporation which has constructed its railroad on its own property in a city, without taking any portion of another's property, is not liable for those indirect injuries which are the result merely of the operation of its road in a lawful manner, and without negligence, unskillfulness, or malice; that the provision was not intended to impose on corporations a liability in the operation of their works which has never been imposed on individuals. The remaining case (Railroad Co. v. Walsh) decides that where a railroad is laid down upon a public street, and, though at grade, is so constructed with reference to the property of an abutting owner that by its operation in a lawful manner access to the property, if not cut off, is rendered dangerous, the company is liable for consequential damages under the constitution. The distinction between this case and those of Lippincott and Marchant is that in the latter there was no injury by reason of the construction of the road, whereas here it was the direct result of the construction; the track being laid close to the curb-stone on the side of the street next to plaintiff's property, with the effect indicated. See, also, Railroad Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. Rep. 187. The case cited from Alabama (City Council v. Maddox, 89 Ala. 181, 7 South. Rep. 433) holds, under a constitutional provision similar to that of Pennsylvania, omitting the words "or secured," that the liability of a municipal corporation extends to all cases of injury caused by grading or cutting down streets or sidewalks, without regard to the original dedication or condemnation, or to damages paid on former occasions; the measure of damages in every case being the difference in the market value of the property before and after grading.

There is in these Pennsylvania and Alabama decisions nothing, considering the provisions of our constitution, that aids appellants.

We are unable to find in either or all of the three sections of our constitution a justification for the theory of appellant's counsel that the use of the term "right of way," in the last of the three sections, was intended as an adoption of the rule allowing indirect or consequential damages. We do not doubt that the abutting owner's right of access, or of ingress and egress, from and to the street, and of light and air from the open space above or over the surface of the street, are easements and private property incidental to the ownership of the abutting lot, nor that these easements cannot be "taken" or "appropriated" without just compensation being made for them as such property. This is fully demonstrated by the

New York Elevated Railroad cases: Story v. Railroad Co., 90 N. Y. 122, (decided in 1882;) Lahr v. Railroad Co., 104 N. Y. 268, 10 N. E. Rep. 528; and Abendroth v. Railroad Co., 122 N. Y. 1, 25 N. E. Rep. 496, —hereafter to be noticed; and by other authorities, as indicated both above and hereafter.

Whatever meaning we give to the expression "right of way," we still find nothing in the constitution that places it within the protection or inhibition of that instrument, unless such right of way is "taken" or "appropriated." These words "taken" and "appropriated," it seems to us, were used in their well-defined sense, and in no other. There is nothing in the proceedings of the constitutional convention which justifies an inference that these words were used in any other sense, or that the framers of that instrument intended to give compensation for damages or injury other than such as should result from a taking or appropriation, as distinguished from consequential damages.

An examination of these proceedings proves that the clause of the bill of rights was adopted on the 3d day of July, and without anything to distinguish its consideration. Journal Const. Conv. 1885, pp. 229, 230.

The first time anything like the twenty-ninth section of article 16, "Miscellaneous Provisions," appears to have been brought to the attention of the convention, was the 11th day of the same month, and in the seventh section of an article reported by the minority of the committee on private corporations. The majority had recommended two sections to constitute an article to be entitled "Private Corporations," and substantially the same as those finally adopted July 21st, and now constituting sections 30 and 31 of article 16; they being intended to prevent unjust discrimination and unjust charges by common carriers and others performing services of a public nature, and prohibiting common carriers from granting free passes or discounting fares of members of the legislature and salaried officers of the state. The seventh section of the article reported by the minority of the committee as an article to be entitled "Private Corporations" uses the words "no property," instead of "no private property nor right of way," and does not use the word "individual." This minority report was indefinitely postponed on the 18th of July, notice of motion for a reconsideration of the note being given.

On the 21st of July, the sixteenth article being under consideration, the following were offered as additional sections, and were referred to the committee on miscellaneous provisions:

"The right of drainage, and the means to secure it, shall be promoted and protected, and the right of way through inferior lands for the drainage of superior by the direct, as well as by the natural, course shall be provided for and enforced: provided, that the cost and damage of such easement may be assessed in proportion to benefit upon the lands of the parties applying for the same: and provided, further, that the owners of lands bearing the servitude shall be entitled to just compensation from the parties so applying."

"The right to collect rates or compensation for the use of water supplies to any county, city, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The committee, on the 24th of July, reported these sections back to the convention, recommending the former to the favorable consideration of the convention, but the latter "without recommendation," and on the next day they were referred to the judiciary committee. On the 29th of the month this committee reported, as a substitute for the same, what is now the twenty-eighth section of article 16, as it is given above, it having been adopted by the convention on the last day of July.

On the 24th of July, the sixteenth article being under consideration, there was offered a section to be entitled "Private property, how taken for public use," the first paragraph of it being: "No private property of persons or corporations shall be taken or damaged for public use, in the construction of railroads, canals, or if taken for other purposes, under chartered rights, without just compensation to be paid for the same." This proposed section was also referred to the committee on miscellaneous provisions, and on the 28th day of that month it reported as a substitute for the same what is now the twenty-ninth section of the sixteenth article, as given at the outset of this opinion, it having been adopted on the last day of July.

These proceedings, if they indicate anything, tend to the conviction that the purpose of the convention was, as shown by its final action, to exclude from the constitution any provision for compensation for damage other than where there was a taking or appropriation of property. If such was not the intention, the word "damaged," or its equivalent, would have been put in the twenty-ninth section; such word being in the proposed provision for which it was a substitute.

It is not to be assumed that the judges and lawyers who sat in the convention did not understand what the meaning of the words "taken" or "appropriated" was then what it is now, or did not know that the abutting owner's right of access and other easements indicated were private property. The expression "private property," in so far as we can see, certainly includes any right of way which is the subject of private property, and, unless the words "right of way" mean a public right of way, we can find in them nothing that adds to the effect which the expression "private property," or the entire section, would have without them. We, however, do not mean to intimate that the expression "right of way" includes or applies to a mere public right of way; and we may remark that it does not occur to us that the purpose of the section in which these words are to be found was so much to specify what should never be taken without just compensation as it was to declare the cases in

which there shall be no taking without either previous payment, or a security by deposit of money, of the compensation for such taking, ascertained in the manner indicated. It is entirely clear that the state, acting for itself, is not, even if a municipal corporation is, within the terms or spirit of this section, in so far as it prescribes anything not implied by the more general provision of the twelfth section of the declaration of rights. We state these views not as committing ourselves finally to the meaning of the words "right of way," in connection with any future case distinguishable from this, nor as precluding the recognition of any now undiscovered legal effect they may have been intended to establish. Giesy v. Railroad Co., 4 Ohio St. 308, 328, et seq.

The New York Elevated Railroad cases, mentioned above, and decided under a constitutional provision similar to that in our declaration of rights, are relied upon as sustaining the appellants' cause. In the second of these cases, that of Lahr, 104 N. Y. 268, 10 N. E. Rep. 528, the conclusions of the Story Case are stated to be, in effect, as follows: (1) That an elevated railroad in the streets of a city operated by steam, and constructed as there described, (about 15 feet above the surface of the street, supported on columns placed along and partly inside of the outer edge of the sidewalk, and about 11 feet from Story's building, a warehouse, and extending across the whole traveled track of the street, the structure and passing trains to some extent, as found by the trial court, obscuring the light and impairing the usefulness of the premises, and the line of columns abridging the sidewalk and interfering with the street as a thoroughfare,) was a perversion of the use of the street from the purposes for which it was originally designed, and a use which neither the city authorities nor the legislature could legalize or sanction without providing compensation for the injury inflicted upon abutting owners. (2) That abutters upon a public street, claiming title to their premises by grant from the municipality, it covenanting that a street to be laid out in front of the premises should forever continue for the free and common passage and as the public streets and ways for all persons passing or returning through or by the same, in like manner as the existing streets in the city are or ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street, for the benefit of property situated thereon. (3) That the ownership of such easement is an interest in the real estate, constituting "property," within the meaning of that term as used in the constitution, and for which compensation must be made before it can be lawfully taken. (4) That the erection of an elevated railroad, the use of which was intended to be permanent, in a public street, and upon which cars are propelled by steam-engines generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters by the damage occasioned by such taking.

It was further held in Lahr's Case that no legal difference exists, with reference to the interest acquired by abutting owners in a public street, where the title is like that held by Story, and where it is one acquired through mesne conveyances from the original owner, whose property has been taken by proceedings *in invitum*, instituted by the municipality under a public statute for acquiring land for street purposes; such statute providing that the land thus taken shall be held "in trust, nevertheless, that the same be appropriated and kept open for or as a part of a public street * * * forever, in like manner as the other public streets * * * in said city are and of right ought to be." In Abendroth's Case, 122 N. Y. 1, 25 N. E. Rep. 496, the decision was that though the title of the owner of the abutting lot extends only to the side of the street, and the owner thereof has no interest in the street except as the owner of such abutting lot, he has incorporeal private rights in the street which are incident to his lot, and are private property, within the meaning of the constitutional provision forbidding their being taken for public use without just compensation; and that it is no justification to their impairment that the act complained of is done pursuant to legislative authority.

It is apparent from the above statement of these decisions, and no one giving a careful and fair consideration to the opinions can fail to be so impressed, that the appropriation of the streets to the use of such railroads is held to be a diversion of the streets from highway purposes to the new and inconsistent purpose of an elevated railroad, and that this diversion is what, in the judgment of the court, constitutes the legal invasion and unlawful taking or appropriation of the easements incident to the abutting lot; and it is equally apparent upon the face of the opinions that the doctrine they sustain does not and was not intended to conflict with the views announced in the previous portions of this opinion, as to the power of a municipality over streets, so long as it does not divert the street from the original purposes for which it was established, or seek to apply it to other than street uses. The importance of the principle and interests involved, justify proofs of this assertion by extracts from the opinions. Answering the argument of the railroad company made upon the basis of Transportion Co. v. Chicago, 99 U. S. 635, where the claim against the city was for damages for an obstruction to the plaintiff's docks by the deposit of materials, the construction of a coffer-dam, and other work necessary to the building of a tunnel for the extension of a street, it is said in Story's Case: "The work was a necessary city improvement, and the interruption and obstruction was temporary, ceasing with the completion

of the work. It was held that the plaintiff could not recover; and this, upon the principle applied and practiced upon in all our cities, that the municipality, whether owners of the fee of the street or vested with an easement only, may repair or improve it, 'to adopt it to easy and safe passage.' It permits the leveling of a street by filling up or digging away, and, if intersected by a stream, the erection of a bridge or tunnel. If, in doing either of these things, materials are necessarily collected, or an excavation made, to the present and temporary detriment of a lot-owner, he cannot complain. His ownership is subject to the exercise of this public right, and he must submit to the inconvenience in order that the street may be preserved. So, in placing a pavement or excavating for a sewer, the stone for the one, or the dirt from the other, may for a time inconvenience the lot-owner. To this in like manner he must submit, as to a burden provided for in his grant, or as one of the terms implied by his location upon a public avenue." Again, it is observed: "It is no doubt true that the grade of a street or highway may be altered by raising it or lowering it, without liability on the part of the municipality to the abutter; but this is on the ground that the public had already paid a full compensation for all damage to be done by them to the adjacent owners by any reasonable or convenient mode of grading the way. But the principle applicable to such a case does not aid the defendant. There is no change in the street surface intended, but the elevation of a structure useless for general street purposes, and as foreign thereto as the house in Vesey street, (Corning v. Lowerre, 6 Johns. Ch. 439,) or the freight depot, (Barney v. Keokuk, 94 U. S. 324.)" And speaking of the surface railway cases, (People v. Kerr, 27 N. Y. 188, and Kellinger v. Railway Co., 50 N. Y. 206,) it is said: "The use of the streets permitted was not inconsistent with the purposes of the trust." It is also remarked in the opinion delivered by Judge TRACY (90 N. Y. 170) that, while the legislature may regulate the uses of the street as a street, it has no power to authorize a structure thereon which is subversive of and repugnant to the uses of a street as an open public street; and that whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of a street, as a street, must be largely a question of fact, depending upon the nature and character of the structure authorized. In Lahr's Case it is observed that an abutting owner necessarily enjoys certain advantages from the open street, which belong to him by reason of the location of his property, and are not enjoyed by the general public, such as the easements referred to above; and that they are not only valuable to him for sanitary purposes, but indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising a fund necessary to defray the cost of constructing the street; and that he is compelled to pay for these advantages and rights at their full value; and if, in the next instant, they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property. And it is also further said that the right which the municipality acquires is limited by the public necessity, and, in the case before the court, could not extend beyond its use for street purposes; and all other uses which might be enjoyed therein, consistent with its use as a street, must, from necessity, have remained in and resided with the person from whom it was taken, even after the transfer of the fee to the municipality. Afterwards it is declared that "the logical effect of the decision in the Story Case is to so construe the constitution as to operate as a restriction upon the legislative power over the public streets opened under the act of 1813, and confine its exercise to such legislation as shall authorize their use for street purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets, which attempt to authorize their use for additional street uses, are obviously within the power of the legislature to enact; but questions arising under such legislation are inapplicable to the questions here involved. Such are the cases in respect to the changes of grade; the use of a street for a surface horse railroad; the laying of sewers, gas, and water-pipes beneath the soil; the erection of street-lamps and hitching-posts, and of poles for electric lights used for street lighting. All of these relate to street uses, sanctioned as such by their obvious purpose and long-continued usage, and authorized by the appropriation of land for a public street." 104 N. Y. 291–293, 10 N. E. Rep. 528.

These extracts clearly sustain the assertion in behalf of which they are invoked.

The practical deduction to be made from the preceding discussion is that, if what is sought to be enjoined is only an application of the street to additional street purposes, there is, in the absence of any physical invasion of the abutting lots, no taking or appropriation of any property or right of way of complainants, within the meaning of the prohibition of the constitution. Without intimating what effect allegations charging malice, negligence, or unskillfulness would have in an equitable suit of this character, it is clear that there are no such allegations in the record.

The theory of the bill is that the viaduct is being erected by the four railroad companies, and the county of Duval and city of Jacksonville, under and in accordance with the agreement there set out, and that the purpose of the agreement was to erect the viaduct over and above the numerous railroad tracks crossing said street, and to put the street railway on the viaduct, and make the surface of the viaduct, instead of the original surface of the street, the grade for the passage of the public as they should come and go. It would be idle to contend that the complainants are not damaged, at least con-

sequentially, independent of any benefits which may accrue from the improvement. In so far as we can understand the facts, they are to be completely shut in and cut off from any communication with the other portions of Jacksonville and the rest of the world, except by the St. Johns river, unless they shall, at their own expense, construct some way to reach the surface of the viaduct from their lots or improvements on the same, and there will be also an abridgment of light and air. The appellant's case, however, presented by the record before us, is not that the necessity of constructing the viaduct was produced by the laying of railroad tracks across Commercial street, and that, as a result of such railroad construction, that portion of said street was converted by the municipal agency into other than street purposes, and the object of the viaduct was to accomplish this end. We express no opinion on such a case, as it is not presented. If it be that the construction of this viaduct under and pursuant to the agreement is a diversion of the street from its highway purposes, there can be no doubt or question that there has been a taking of complainants' easements without compensation, and in violation of the provision of the bill of rights, and of the twenty-ninth section of the sixteenth article of our organic law; but under the state of the pleadings, and the manner of the submission of the cause before us, we cannot consider this question, but are confined to a judgment of the case as one in which the municipal government of Jacksonville is erecting the viaduct, not as a joint party with the others to the agreement, and acting under it, to meet a result necessitated by the existence of the railway track, but in the exercise of its chartered powers to change the grade of the street, though under an agreement with the several parties named as co-defendants, by which they are to contribute to the expense of the construction of the viaduct, by which the grade will be so changed. It is not contended that if the conditions exist which will justify the city, in the exercise of its powers, as such, to change the grade of the street, the change cannot be made by means of a viaduct; nor that the street conditions are not such as authorize the city to erect a viaduct for the purpose of changing the grade, if it has power to do so without first compensating complainants for the alleged taking of or damage to their property. The city, appearing alone, has tendered issue upon the theory that it is doing the work of itself, and under and by virtue solely of its own organic powers to grade streets, with, it is true, pecuniary aid from the parties named as co-defendants; and complainants have accepted the issue, and contend that the city has not, under its charter and the constitution of the state, power to change a grade of a street without first making compensation for damages resulting from an interference with the complainants' easement of access, light, and air, although there is no encroachment upon or invasion of complainants' premises.

The charter act, (chapter 3775 of the Statutes,) approved May 31, 1887, provides, in section 4 of article 3, that the mayor and city council shall have power, by ordinance, to make appropriations to alter, widen, extend, grade, or otherwise improve, clean, and keep in repair, streets, alleys, and sidewalks; and also enacts that it shall have power, in like manner, to take and appropriate grounds for widening streets, or parts thereof, when the public convenience may require it, provided the owner or owners thereof shall receive compensation for the same. The act further provides (section 8, art. 5) that the board of public works shall have exclusive power and control over the construction, supervision, cleaning, repairing, grading, and improving of all streets, and to fix and establish the grades of all streets and alleys, avenues and thoroughfares. These provisions give full power to fix and change the grade of streets, and they do not provide that any compensation shall be made by the city to abutting owners for any taking of or damage to their property, in fixing or changing the grade, and hence none can be required of the city against its will, or in the absence of a binding stipulation, unless there is a diversion of the street from street purposes, or other appropriation of the abutter's property, within the meaning of the constitutional provision heretofore mentioned.

The fact that a street railway may be put on a viaduct which a city lawfully erects, as a means of duly grading a street, will not render the viaduct otherwise or alone a diversion of the street from highway purposes, or be a ground for enjoining the erection of the viaduct for street purposes, even if the erection of the viaduct for the purpose of such a railway would be a diversion of the street, and the subject for an injunction. The construction of a viaduct for street purposes should not be interfered with, although the subsequent erection thereon of a street railway should, when about to be begun, be the subject of an injunction.

If the viaduct is being erected under the agreement among other purposes for that of a street railroad, or if it is being erected under the agreement for the purposes of carrying the street over the railroad tracks, which railroad companies are authorized under certain circumstances to do,—but whether independent of or subject to the constitutional provision as to making compensation for taking the easements of abutting owners we do not say,—the railroad companies were entitled to be heard. No such case has, however, been made before us. We have discussed and decided the only case presented, and our judgment is that the order refusing the injunction was proper, and should be affirmed.

It will be ordered accordingly.

(28 Fla. 631)

JACKSONVILLE, T. & K. W. RY. CO. v. ADAMS.

(*Supreme Court of Florida.* Dec. 21, 1891.)

EMINENT DOMAIN—DAMAGES—EJECTMENT.

1. A judgment in ejectment against a body having the power of eminent domain is not a bar

to the exercise by such body of such power as to the land recovered in the action of ejectment.

2. Where a body possessing the power of eminent domain has entered upon land without leave of the owner, and without complying with the law regulating the exercise of such power, it may condemn the property entered upon, and thereby secure the right to the legal possession and enjoyment thereof; and this, whether it has or has not been ousted from its former or illegal possession.

3. Where a railroad company, having the power of eminent domain, has entered upon land without the consent of the land-owner, and without complying with the law regulating the exercise of such power, and has constructed a railroad track thereon, the value of the improvements thus put by the company on the land cannot be included in estimating the damags sustained by the land-owner, in proceedings subsequently instituted under such law by the company or its legal successor, having similar power, to condemn the land, or an easement therein, to the company's use; and this, whether the company has been ousted from the former possession or not.

4. Where a railroad company, having the power of eminent domain, has entered upon land without the consent of the owner, and without a certain material requirement of the law regulating the exercise of such power having been complied with, and there has been a judgment in ejectment in favor of the land-owner against such company or its legal successor, a lessee for 90 years, and the judgment is affirmed on appeal, the appellate court may,—no conduct in bad faith upon the part of the company appearing—withhold its mandate of possession to allow a reasonable time for the institution and consummation of new condemnation proceedings. If the new condemnation proceedings are resisted by the land-owner, and are dismissed by the trial court, on the ground that there is no constitutional law authorizing the same, and this order is appealed from by the company, the appellate court may withhold its mandate for possession until the decision of such appeal; but it should do so only upon the express condition that its action shall not interfere with the land-owner's right to sue for mesne profits for the use or retention of the land by the company.

(*Syllabus by the Court.*)

Appeal from circuit court, Volusia county; JOHN D. BROOME, Judge.

Ejectment by Charles S. Adams, administrator of John S. Adams, deceased, against the Jacksonville, Tampa & Key West Railway Company. Judgment for plaintiff. Motion for new trial denied, and defendant appeals. Affirmed. Motion by defendant to withhold the mandate of possession until condemnation proceedings could be prosecuted. Motion allowed. And, pending a consideration of the subject, plaintiff moved that the mandate for possession be sent down. Motion denied.

A. W. Cockrell & Son, for plaintiff. *J. R. Parrott, T. M. Day, Jr.*, and *Fletcher & Warts*, for defendant.

RANEY, C. J. In the main opinion in this cause (27 Fla. —, 9 South. Rep. 2) a judgment in ejectment in favor of the appellee, who was plaintiff, was affirmed. Having discovered in our investigations that it was the practice in some appellate courts to withhold the mandate of possession until condemnation proceedings could be prosecuted, we suggested that any motion for such withholding must be made within 30 days. A motion of the character indicated was made by appellant and resisted by appellee, and the mandate for possession was withheld for full consideration of the point.

Pending our consideration of the subject the appellee moved that the mandate for possession should be sent down, the grounds of this motion being (1) that sufficient time had elapsed to enable the appellant to institute and consummate the proceedings contemplated in the order of the court withholding the mandate; (2) that proceedings had in fact been instituted and pursued to a final judgment of the circuit court of Volusia county, rendered August 10, 1891, refusing to confirm the condemnation of the lands now occupied by the appellant, and sought to be condemned,—such refusal being on the ground (urged by the appellee) that, since the adoption of the present constitution of this state, there has been no valid, constitutional legislation authorizing such condemnation.

As stated in the main opinion, the original condemnation proceedings were instituted in August, 1885, not by the appellant company, but by the Atlantic Coast, St. Johns & Indian River Railroad Company, of which the appellant company leased the road in December of the same year for the period of 99 years. It is now shown that on the 1st day of April of the present year, and within less than 30 days of the filing of the former opinion,—it having been filed March 4th,—the appellant company filed a petition in the circuit court of Volusia county, signed and sworn to by an attorney of the company, stating that the company exists under the laws of the state; that the railroad of the company is now constructed on and across the lands in question, (describing them,) and that such lands are essential for the use of the corporation, and that the corporation has made its survey and maps thereof, by which its road or line is designated, and that it has located its road according to such survey, and has filed certificate of such location, signed by the engineer of the corporation, in the office of the clerk of the circuit court of Volusia county; that the use of such lands is necessary for the purpose of operating the railroad, and that petitioner has not acquired the right to use the same; that petitioner is in possession of the portion of the land actually occupied by the railroad track; and that the appellee, administrator, etc., is in possession of the balance, and that he and Helen Maria Adams, in their own right, own or claim to own the land. The prayer of the petition is for an order for summoning a jury to appraise and value the land, and fix the amount of compensation to be paid to the owners, and for such proceedings as are requisite for the petitioner to acquire the right to hold and use the premises for its corporate purposes.

On the day last named the circuit judge made an order directing the sheriff to summon 12 disinterested freeholders, registered voters of Volusia county, as a jury to meet at the court-house on the 7th day of the same month, at an hour stated, to proceed under their oaths, duly administered so to do, to take steps to appraise

and value the land described in said petition and order, and to fix the amount of the compensation to be made to the owners of the land by the petitioning corporation. On the 8th of April the jury, who appear to have been sworn, met on the premises,—Charles S. Adams appearing for himself in person, and Helen M. Adams appearing by him as her attorney; and the jury then proceeded to view the land, and "heard the allegations of the parties," and "appraised, ascertained, and determined" the value of the tract of land proposed to be taken, and the damage that would be sustained by the owner by reason of the taking thereof, at $50, and they fixed the amount of compensation to be made to Charles S. Adams, as administrator, at the same amount, and found that he, as such administrator, had the sole estate therein; and they state in their report that such "report and verdict are concurred in by ten of the jurors." It is, however, signed by the entire 12.

To this report Charles S. Adams, as administrator and individually, and Helen M. Adams, filed objections, of which the fifteenth and subsequent are as follows: That, since the constitution of 1885 became operative, there are no constitutional legislative proceedings authorizing the condemnation proceedings herein sought to be instituted; (16) that chapter 3595, Acts 1885, as amended by chapter 3712, Acts 1887, does not preserve to the land-owner whose land is sought to be condemned "the right of trial by jury" secured by section 29 of article 16 of the constitution, and is void; (17) that such legislation, so far as it involves jury trials, is offensive to section 20 of article 3 of the constitution, which constitutional provision forbids the legislature from passing special or local laws in regard to summoning and impaneling grand and petit juries; (18) such legislation is offensive to section 3 of the declaration of rights,—"the right of trial by jury shall be secured to all, and remain inviolate forever;" (19) the sum of $50 is wholly inadequate as damages; (20) such legislation is offensive to section 11 of article 5 of the constitution, which ordains a separation of the jurisdiction of the circuit court in cases at law and in equity; and for other and further grounds apparent upon the face of the proceedings.

On the 10th day of August the circuit judge made an order sustaining the exceptions and protests, and refusing a confirmation of the report, and also refusing "to order further proceedings in this matter, on the ground of the unconstitutionality of the law authorizing the same," and dismissing the "case;" to all of which the petitioner excepted.

Upon the entry of this order the railroad company entered its appeal to the ensuing term of this court, the judge fixing the penalty of the appeal-bond at $300, which bond has been approved; and the transcript of appeal has been filed in this court, and citation issued, and service thereof acknowledged.

It is urged as a reason why the mandate should be issued, or should not be withheld, that the appellee will be entitled to damages on the basis of the value of the land, including the cross-ties and rails and road-bed or works put and constructed on the land by the company. This, in our judgment, is not the law. It is true that if persons or corporations vested with the power of eminent domain enter upon and appropriate private property to their use, without the consent of the owner, before taking the steps required by law to condemn the same, the owner may resort to trespass for damages, ejectment for possession, or to equity for an injunction against the use of the land. Still, where such an illegal entry has been made by a body possessing the power of eminent domain, it may condemn the property entered upon, and thus secure a right to the possession and enjoyment thereof. If an entry has been made by the express or implied consent of the land-owner, it is clear that he should not have the value of what has been put upon the land; and the better authority is that the same rule also applies in the absence of any consent by the owner. Lewis, Em. Dom. § 507; Baker v. Railroad Co., 57 Mo. 265.

Though, as a general rule, things affixed to the freehold so as to be a part thereof become, as against a trespasser or person entering tortiously and affixing them, the property of the owner of the soil, this rule is not applicable as against a body having the power of eminent domain, and entering without leave and making improvements for the public purpose for which it was created and given such power. The principle controlling the land-owner's right to damages in such cases is that he shall have compensation for the damage actually sustained by him, and no more, and that the trespasser's liability shall be likewise limited. This principle is affirmed in Mississippi, Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania, and Alabama. Railroad Co. v. Dickson, 63 Miss. 380; Morgan's Appeal, 39 Mich. 675; Railroad Co. v. Dunlap, 47 Mich. 456, 11 N. W. Rep. 271; Daniels v. Railroad Co., 41 Iowa, 52; Railroad Co. v. Goodwin, 111 Ill. 273; Greve v. Railway Co., 26 Minn. 66, 1 N. W. Rep. 816; Lyon v. Railroad Co., 42 Wis. 538; Navigation Co. v. Mosier, 14 Or. 519, 13 Pac. Rep. 300; Justice v. Railroad Co., 87 Pa. St. 28; Jones v. Railroad Co., 70 Ala. 227. See, also, Railroad Co. v. Booraem, 28 N. J. Eq. 450; Burgess v. Clark, 13 Ired. 109; Railroad Co. v. Deal, 90 N. C. 110; Railroad Co. v. Matthews, 60 Tex. 215; Dietrich v. Murdock, 42 Mo. 279; Railroad Co. v. Allen, 100 Ind. 409, 415, 416; Lewis, Em. Dom. § 507.

The railroad company, say the supreme court of Mississippi in the case from that state cited above, was a trespasser in constructing its road upon land over which it had not acquired the right of way, but it still had the right to acquire the right of way unaffected by the liability incurred for its trespass; and the trespass is not involved in the determination of the due compensation. The continuing right of the company to secure the right of way, in accordance with its charter, and the nature of its entry on the land and annexing chattels to the soil, distinguish the case from that of a trespasser who affixes chattels to the freehold; and

the rule of the common law, established when railroads were unknown, is not applicable. In the latter of the cases cited from Michigan, it being an appeal in a condemnation proceeding, a previous proceeding had been taken by the company, which had thereupon entered and built; and afterwards the condemnation was set aside by the supreme court, on appeal, because there had been no notice to Dunlap, the land-owner. Afterwards the company instituted the new condemnation proceedings. "The railroad company, whether rightfully or wrongfully," says the opinion, "laid this track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession, and in proceeding to obtain a legal and permanent right to occupy the land for this very purpose. There would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlap may have, for the tortious occupancy previous to these proceedings, or whatever right of property he might have in case the company abandoned the road entirely, and left the track untouched, we think that so long as it is in possession, and legal measures are proceeding to secure a right to retain it there, this structure belongs to the company, whether intruders or not." In Daniels v. Railroad Co., supra, Daniels, without whose permission the company had entered and built, recovered judgment in an action for possession against the company, and the judgment was affirmed on appeal, (Daniels v. Railroad Co., 35 Iowa, 129;) and then the company instituted condemnation proceedings. "Plaintiff," says the opinion, "has suffered no greater damage than would have occurred to him had the defendants pursued the course pointed out by the statute which they are now, by this proceeding, pursuing. By these proceedings plaintiff is not deprived of the title to the land. The defendant acquires nothing more than the right to occupy it for railroad purposes. Had they been instituted prior to or upon defendants' taking possession of the land, no different right would have been acquired by them than they obtain in the present action. In each case the measure of the plaintiff's damages is the same, namely, the value of the land, without regard to benefits resulting from the improvement." In the same state it is held that a railroad company acquires no right to the land until payment of damages. Henry v. Railway Co., 10 Iowa, 540. The just compensation required to be given, observes the supreme court of Illinois in Railroad Co. v. Goodwin, is for that which is taken from the owner, and which is of value to him, and not for something he never owned. In Justice v. Railroad Co., supra,—the Pennsylvania Case,—there had also been a judgment in ejectment in favor of the land-owners. The court held that the entry was not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having the right to enter and place the materials on the land taken for public use,—materials essential to the very purpose which the state has declared in the grant of the charter,—yet a trespass, by reason of the omission to do an act required for the security of the citizen, to-wit, to make compensation or give security for it; for which injury the citizen is entitled to redress, but not beyond his injury, nor extending to taking the personal chattels of the railroad company laid down for the benefit of the public. The salient features distinguishing the case from that of an ordinary trespass were held to be the right to enter on the land under the authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess the chattels, and the structures they compose, by a valid proceeding at law, notwithstanding the original illegality of the entry. The reasoning of the supreme court of Alabama in Jones v. Railroad Co., supra, is substantially the same as that of the Pennsylvania court.

The cases relied upon by the appellee to support his contention do not overcome the conclusions reached by us. In Railway Co. v. Stanley's Heirs, 35 N. J. Eq. 253, the same rule as to damages was enforced, and an injunction granted to restrain an action of ejectment. The original entry had, however, been made under an agreement between a predecessor railroad company and the land-owner, of which agreement such railroad company had not, nor had any of its successors, carried out the undertaking to erect a certain depot. It was remarked in this case, as pointed out by appellee's counsel, that on no other hypothesis than this agreement would the appellant have a standing in court to stay the land-owner's suit for possession; but of this language it is observed in Railroad Co. v. Kamlah, 42 N. J. Eq. 93, 98, 6 Atl. Rep. 444, that the court was not laying down the rule to be observed in all cases, but was speaking merely with reference to the particular circumstances of that case. Schroeder v. De Graff, 28 Minn. 299, 9 N. W. Rep. 857, was an action of trespass to recover damages against a railroad company for constructing a road across the plaintiff's land without his permission; and it was held that if the ties and rails had increased the value of the farm the fact of such increase should be considered in estimating the amount of damages, but, if the farm was in no way benefited or enhanced in value by the ties and rails being laid across it, no deduction from the damage actually done to the farm should be made on account of the value of the ties and rails. The question

of whether the value of the ties and rails should be excluded or be included in valuing the land on a condemnation proceeding was not before the court, nor mentioned. It is true the lower court instructed the jury, in connection with the doctrine just stated, that the ties and rails had become a part of the realty; but the theory of the decision as to the rule of damages was that the land-owner could not be made the unwilling purchaser of the ties and rails, or required to pay for them, by crediting their value on damages done the land in constructing the road. In Cohen v. Railroad Co., 34 Kan. 158, 8 Pac. Rep. 138, the railroad company had entered with the assent of the plaintiff or his agent, and the plaintiff sued in trespass. There was on the land at the time of the entry an old grade which had been constructed by another company and abandoned. It was held that the increased value given to the land by the presence of the old grade should be considered in estimating the damages, but that such increased value was not necessarily what it had cost to build the grade; yet it was also held that no recovery could be had for the increased value given the land by the improvements put on it by the defendant company. In this opinion it is, moreover, said: "It has even been held that where a railroad company enters upon land as a technical trespasser, and afterwards procures the land for its right of way by condemnation proceedings, it is not compelled to pay for the improvements which it itself made upon the land while it was technically a trespasser, and before it legally procured its right of way." Citing 87 Pa. St. 28; 41 Iowa, 52; 42 Wis. 538; 26 Minn. 66, 1 N. W. Rep. 816, supra. "This," observes the opinion, "seems like justice." The decision in Hunt v. Railway Co., 76 Mo. 115, is that where a railroad company, having obtained a decree for the condemnation of a tract of land without the knowledge of the owner, erected upon it a building of a permanent character for a depot, and afterwards the decree was held void, the building becomes a part of the realty, and could not be removed by the company. The facts in Price v. Ferry Co., 31 N. J. Eq. 31, were that a railroad was built on land on which complainant held a mortgage of prior date, duly recorded, and the charter of the company did not permit the building of the road there, but expressly prohibited it. The road was not built under condemnation proceedings, but under a grant of right of way from the mortgagor. The question was whether one having a lien on the railroad for building the same could have the track or improvements reserved from a sale under the mortgage. The opinion holds that there was no paramount power of condemnation, like that in Railroad Co. v. Booraem, 28 N. J. Eq. 450, cited supra,—no power (the right of eminent domain) to take the property superior to the right of both mortgagor and mortgagee; that where such power exists it confers the power to take the property on making just compensation, which compensation, in so far as the value of the land is concerned, is to be estimated as of the time when possession is taken, and therefore cannot include the value of improvements subsequently put on the property by the party entering under such right; but when the entry is not under that right the right to take the property on making compensation does not exist, and the party entering and improving does both subject to the right of the prior mortgagee to sell both the land and such improvements. Meriam v. Brown, 128 Mass. 391, is to the effect that a railroad corporation which has constructed its track upon a person's land without filing a written location or presenting a plan thereof, or paying or tendering to the land-owner any damages for the land so taken, cannot enter upon the land for the purpose of removing the rails laid upon the road-bed, and structures placed upon the land,—such property becomes a part of the realty; and the fact that the original entry and construction were made without objection from the mortgagor in possession cannot avail against the title acquired by the mortgagee by the subsequent foreclosure of the mortgage. The mortgage was of a date prior to the construction of the road. Railroad Co. v. Kinsey, 87 Ind. 514, decides that where a railroad company has entered, as it legally might, under condemnation proceedings, it having deposited the amount assessed by the appraisers, and there is an appeal, and on the appeal the assessment has been increased, but the company has not paid the increased amount, the owner may recover in ejectment without paying for the improvements placed on the land. In Graham v. Railroad Co., 36 Ind. 463, the conclusion reached is that where a railroad company has, without the consent of the owner, and without color of title, entered upon land, and occupied the same, building a depot and hotel thereon, and afterwards seeks to appropriate the land under the authority of law, the value of the land at the time of the legal appropriation, with the improvements thereon, constitutes the amount for which the company is liable to the owner of the land.

In California, in Railroad Co. v. Armstrong, 46 Cal. 85, condemnation proceeding had been commenced against a large number of land-owners, but there was no service as to the owners of one tract; yet pending such proceedings it was built upon by the railroad company. There was judgment as to the other lands, but none as to this tract, which the owners sold to Armstrong. Afterwards the proceeding was dismissed as to the particular tract, and new proceedings of condemnation were begun against Armstrong. There had been an order of court in the former proceeding allowing the railroad company to enter upon and retain possession of the lands pending the proceedings, and bond had been given as required by the statute. Answering the contention that the value of the improvements should be included in estimating damages in the second proceeding, it is said by the court: "Neither the constitution nor the statute contemplates that a person whose land is taken in the exercise of the right of eminent domain shall be entitled to anything

beyond a 'just compensation.' He is to be paid the damages he actually suffers, and nothing more. But to hold that in addition to the fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track, in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an overtechnical construction of it." In U. S. v. Land in Monterey Co., 47 Cal. 515, a condemnation proceeding was begun by the government in 1870 against lands which it had in 1854 entered upon against the will of the owners, erecting thereon a store building which it had ever since occupied as a light-house; and it was held that the value of the improvements should be included in estimating damages. "The law," says the opinion, "did not authorise the United States to take the possession of these lands *manu forti;* and their agents, in entering upon them and ejecting the defendants, were mere tort-feasors. The case is, in this important respect, wholly unlike that of Railroad Co. v. Armstrong, 46 Cal. 85. In that case the road track was constructed by the railroad company while its possession of the land of the defendant was rightful, being held at the time in pursuance of pending proceedings for its condemnation, and these proceedings having been dismissed after the construction of the track." The latter of these cases is also cited by the appellee. It does not pretend to overrule the former case, but distinguishes the two by the character of the original entry.

Of the cases cited by the appellee, that of Graham v. Railroad Co., 36 Ind. 463, alone can be claimed to be authority for the contention that in an authorized proceeding for condemnation the improvements put upon the land by a railroad company having the right to exercise the power of eminent domain, yet not doing so in a valid manner, should be included in estimating the land-owner's compensation for damages. If it be that the rule of the former of the California cases is not more applicable than that of the latter to the facts of the case before us, of which we are not at all satisfied, our views are not shaken by the latter case.

The clear weight of authority, the better reasoning, and true right of the matter are against the position of appellee.

II. The authorities at our hands bearing directly or by analogy on the subject of the power and duty of this court to suspend the warrant are those mentioned in the succeeding paragraph.

In Railroad Co. v. Jones, 59 Pa. St. 433, the railroad company had entered upon the land under an agreement to purchase, and had built its track thereon. The company failed to pay the purchase money, and there was a decree in favor of the vendors for the sale of the property for the amount due; and the same was sold by the sheriff under the decree, and the purchasers brought ejectment against the company. There had never been any condemnation proceedings against either the former owners or the purchasers at the sheriff's sale. It was said that the sheriff's vendees took the whole title to the land, the legal title of the vendors, and the equitable title of the railroad company, and not subject to any easement or right of the company to use any part of it for the track of its road. But it was held by the court that the company, under the provisions of its charter, had the undoubted right to appropriate the land, and to acquire a right to its use, upon making compensation to the owners for the damage sustained thereby; and that as the land was indispensably necessary to the company, and the company had the right indicated, it was but just and equitable that, while affirming the judgment in ejectment, all proceedings thereon should be ordered stayed for such reasonable time as might be necessary to enable the company to take proceedings to condemn the land; and that there was no doubt of the court's authority to make the order, or of the propriety of the order, under the circumstances. O'Hara v. Railroad Co., 2 Grant, Cas. 241. See, also, 5 U. S. Dig. (1st Series) p. 300, § 150. In Railroad Co. v. Bruce, 102 Pa. St. 23, a canal company which had condemned and acquired the easement of a right of way over, and not a fee in, the lands appropriated by it for canal purposes, afterwards became insolvent, and all its properties and franchises were sold to a railroad company; and it was held that the latter company could not construct tracks on such canal right of way without making compensation to the owner of the land, and that the owner of the fee was entitled, where such tracks had been laid without making or tendering compensation, to recover in ejectment against the railroad company; that the canal having been abandoned, as such, its charter as a highway went with it, and the use and occupation of the land reverted to the owner in fee. "We may," says the opinion, "here add, in order to avoid all mistakes and misapprehensions, that the defendants might secure a right of way and secure the work and property which it has put upon the plaintiff's land by having an assessment of damages as provided by law, and if the plaintiff should refuse a stay of execution until that can be accomplished the court below on application may for that purpose interpose its injunction." Citing Justice v. Railroad Co., 87 Pa. St. 28, in which execution had been stayed in the lower court. The case of Conger v. Railroad Co., 41 Iowa, 419, is one in which the railroad was built with the knowledge, but without any express permission, of the land-owner. The land-owner took proceedings to have the damages assessed, and afterwards brought ejectment; the damages not having been paid. The doctrine that the fact that the land-owner knowingly permits a railroad company to enter upon his land and build its road does not estop him from maintaining an injunction restraining the company from using the right of way without making compensation therefor, is fully recognized, (Hibbs v. Railroad Co., 39 Iowa, 340;) and it is asserted that there

is no difference in this respect between a proceeding for an injunction and an action of ejectment. The judgment in favor of the land-owner was affirmed, but the court said that the action was to be regarded as a mere means of coercing payment of the damages; that if the damages had not been assessed, the defendant might, notwithstanding the action, cause the damages to the land-owner to be assessed, and upon payment of them could have the execution, if issued, recalled, and would be entitled to the aid of a court of equity for that purpose; but that in this case, as the damages had been assessed, nothing but payment of them was wanting to entitle the defendant to the continued use of the plaintiff's land; and a suspension of the execution was ordered. In Railroad Co. v. Kamlah, 42 N. J. Eq. 93, 6 Atl. Rep. 444, Kamlah, claiming that he had never received compensation for land used by the railroad company, brought ejectment to recover the land, and thereupon the company obtained a preliminary injunction to stay the action, on the ground that it had the legal title to the land, but, being unable to establish it, prayed a discovery, and also insisted that, if it should be unable to establish its legal title, it had an equitable title, which equity ought to protect by decreeing that it retain possession of the premises, and consummate its right thereto by awarding just compensation to Kamlah. It was held, after answer, that the injunction should be retained on the ground that the possession of the premises was originally taken with the knowledge of Kamlah, and continued for about 20 years as part of the complainant's road, with defendant's acquiescence, during which time various negotiations had been had between the parties as to compensation, and that the company, the land being indispensable to it, might, by proceeding under its charter, condemn the land, or, if it had not such charter power to condemn, it might make compensation, to be ascertained and awarded in the court of equity. In this case it was said: "Where possession has been taken of land for a public work, and the work has been constructed upon it, but no compensation has been made for the land, if the company in taking possession has acted in good faith under acquiescence of the owner, or by mistake as to the property, or as to the validity of the authority given it so to occupy, and the property is in public use, equity will not permit the company to be disturbed in its possession, provided it make compensation, if equity shall so require." Bartleson v. City of Minneapolis, 33 Minn. 468, 23 N. W. Rep. 839, (decided June 15, 1885,) is a case in which there had been condemnation proceedings and an award of $400 in August, 1881. The law regulating the subject provided that after the award became final the city council should cause the amount thereof to be paid, and that in case such payment was not made within one year after the confirmation of the award or the determination of an appeal the proceedings should be deemed to be abandoned, and that before the payment of the award the owner should furnish an abstract of title showing himself to be entitled to the damages allowed, and that in case of neglect to furnish the abstract, or of doubt, the amount awarded should be set apart for whomsoever should be entitled to it, and should be paid to any person showing himself to be so entitled. It was admitted on the trial that the plaintiff was the owner, except for the condemnation proceedings shown by the defendant. No compensation for the land was ever paid or set apart until July 25, 1884, when the city council set apart in the city treasury the sum of $400. It was held that the condemnation proceedings were by the failure to pay or set apart the amount of the award within one year, *ipso facto*, abandoned, and that Bartleson was entitled to recover in ejectment. At the close of the opinion is the following observation: "To the suggestion that the court may grant to the city equitable relief in the premises, and, upon equitable considerations, sustain its possession, it is enough to say that, if the city could upon any case be relieved from the consequences of the council's failure to comply with the law, no such case is presented by the pleadings or made by the facts found." In the cases of Harrington v. Railroad Co., 17 Minn. 215, (Gil. 188,) and Lohman v. Railroad Co., 18 Minn. 174, (Gil. 157,) in the former of which cases no proceedings to condemn had been taken, and in the latter there was, as here, a failure of the commissioners to give notice to the land-owner, it was urged that the land-owner was entitled to an injunction against the further use of the premises by the railroad company; but a stay was allowed to permit the institution of condemnation proceedings. In the latter of these cases it is remarked: "But it appears that under this appeal, or by some arrangement of the parties, the defendant has constructed and is now operating the road over defendant's land, so that great public inconvenience would result if the injunction were to be enforced, and as it further appears from defendant's answer that the proceedings to condemn were taken in good faith, and with an honest purpose on the part of the plaintiff to comply with the law, we are of the opinion that the injunction should not be allowed to become operative until suitable opportunity is given to defendant to acquire the right to appropriate plaintiff's land, either by negotiation or by fresh proceedings to condemn." In Strong v. City of Brooklyn, 12 Hun, 453, the plaintiff recovered judgment for possession of a piece of land which the city was using for public purposes, and the city obtained an order staying the enforcement of the judgment on the ground that it was about to condemn the land. The order was reversed by two justices, they holding that generally stays of process are granted by reason of something which has taken place pending the litigation or after the rendition of the judgment, and that if no reason of that kind exists the judgment must have its full force, and that no distinction was to be made in the case of a body entitled to the

right of eminent domain. In Story v. Railroad Co., 90 N. Y. 122, 179, where it was held that the elevated street railroad structure which the company was at the commencement of the suit about to erect, and had since then actually erected, constituted a taking and appropriation of plaintiff's property without compensation, of the seven conclusions reached by the court, as summarized in the opinion of TRACY, J., the seventh was: "The injunction prohibiting the continuance of the road in Front street should not be issued until the railroad company has had reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same." In treating of injunctions to prevent the use of property until damages are paid, it is said by Lewis on Eminent Domain, § 634,—citing Young v. Harrison, 6 Ga. 130; Gammage v. Railroad Co., 65 Ga. 614; Lohman v. Railroad Co., 18 Minn. 174, (Gil. 157;) White v. Railroad Co., 7 Heisk. 518,—that where the right to relief exists at the time of filing the bill, but the defendant has the power to acquire the property, and an injunction will be prejudicial to the public or the defendant, and its postponement no detriment to the plaintiff, the court will withhold the injunction until a reasonable opportunity is afforded to ascertain and pay the compensation. The authorities sustain the text. See, also, Harrington v. Railroad Co., 17 Minn. 215, (Gil. 188.)

All of these cases, except that of Bartleson v. City of Minneapolis, 33 Minn. 468, 23 N. W. Rep. 839, and Strong v. City of Brooklyn, 12 Hun, 453, sustain either expressly or by analogy the power to withhold the mandate for the purpose desired in this cause; and the excepted cases are not, considering the facts of this case, authority against our power or duty to do so. The power of courts to temporarily stay the issuing of executions is exercised, says Mr. Freeman, in an almost infinite variety of circumstances, in order that the ends of justice may be accomplished. In many cases this power operates almost as a substitute for proceedings in equity, and enables the defendant to prevent an inequitable use of the judgment or writ. Freem. Ex'ns, § 32; Mitchell v. Duncan, 7 Fla. 13; Robinson v. Yon, 8 Fla. 350; Granger v. Craig, 85 N. Y. 619. The withholding of the writ of possession, in cases of this kind, rests upon the same principle that the withholding of an injunction is founded on.

There is no such difference between the constitution of our state and those of the states in which the above decisions were made as makes these decisions inapplicable here.

The power invoked is one liable to be abused, (Freem. Ex'ns, § 32,) and should, in our judgment, be exercised with extreme caution; but we are entirely satisfied that the case before us is a proper one for its exercise.

The facts of the case are, of course, such as necessitated the affirmance of the judgment in ejectment in favor of the appellee; yet it is true that the appellant is a lessee under the company by which the original condemnation proceedings were instituted, and that the appellee, whose action was not commenced till March, 1887, knew early in 1885 that the lands were occupied, which occupation must, as the lease was not made till December of that year, have been by the lessor company, although the appellee does not say which company it was. It is also true that there is in the record such evidence of notice having been given to the appellee by the condemnation commissioners, by advertisement, as renders the contest of the title by the appellant one of good faith, as it does its entry under the lease; and there is nothing in the record tending to show that the appellant has acted otherwise than in good faith and with honest purposes in any of these proceedings. Moreover, upon the rendition of our judgment affirming the recovery in ejectment, new condemnation proceedings were promptly instituted and duly prosecuted against the resistance of the appellee and the other owner of the land; and the circuit judge dismissed them on the ground that our legislation is invalid and unconstitutional. From this judgment an appeal has been taken to this court, and the appeal transcript has been filed. In view of this decision the railroad company has certainly done all it can do, unless and until the judgment appealed from shall be reversed. It is also entitled to a decision of the question on the appeal. If that judgment is erroneous, the company should not suffer from it. If it is right, any damage the appellee may sustain by reason of the possession of the land can be compensated in money, and is wholly inconsiderable, in comparison with the damage and inconvenience which the appellant and the public will incur should we refuse to withhold the mandate. To permit the mandate to go now would not only be contrary to the principle and practice announced and established by the above authorities, but, it seems, would, in view of our affirmance of the judgment in ejectment, put it beyond the power of the circuit court to grant any similar relief as to its own writ, unless we should direct the allowance of such relief. Freem. Ex'ns, § 32; Marysville v. Buchanan, 3 Cal. 212; Dibrell v. Eastland, 3 Yerg. 506. A judgment in ejectment is never a bar to condemnation proceedings, nor does it award any recovery of mesne profits for occupation of the land after its rendition; nor can the question of such subsequent mesne profits be considered in condemnation proceedings, they being the subject of an independent action. There has been no obstacle to the collection of the recovery for mesne profits and costs adjudged in the action of ejectment, even if, in view of what has passed at our bar, it could be thought that the same were not paid last spring. The withholding of the mandate should not interfere with appellee's right to sue for the mesne profits accruing subsequently to those recovered in the ejectment action; and, upon condition that it shall not, the mandate will be withheld till the further order of the court, and the motion of the appellee will be denied. It will be ordered accordingly.

ILLINOIS CENT. R. CO. v. CROSSETT.

(Supreme Court of Mississippi. Jan. 25, 1892.)

Appeal from circuit court, De Soto county; JAMES T. FANT, Judge.

Action by W. A. Crossett against the Illinois Central Railroad Company. Verdict for plaintiff. Defendant appeals. Reversed.

Mayes & Harris, for appellant. *Powel & Farley*, for appellee.

CAMPBELL, C. J. The verdict should be for the defendant on the record before us. The testimony of the engineer and fireman, corroborated by other witnesses, fully exculpates the defendant as to the injury to the calves. There is nothing in the evidence to suggest any other idea than that the calves were obscured from view until they were in danger, when it was too late to save them. The evidence of the employes of the defendant is probable, and fully corroborated, and uncontradicted in any material particular. It must be that the case, as presented before the learned circuit judge, was different in some facts from that before us, or he would not have permitted the verdict to stand. Reversed, and remanded for a new trial.

(69 Miss. 508)

STATE v. ALLEN *et al.*

(Supreme Court of Mississippi. Jan. 11, 1892.)

BONDS — RELEASE OF SURETY — ERASING NAME — NOTICE TO APPROVING OFFICER — RECEIVING VERDICT.

1. Sundry co-sureties signed a penal bond while in the hands of the principal obligor, on condition that such bond should not be a completed instrument until enough co-sureties had signed and justified, in the respective amounts signed by each, to make up the full penal sum, and the bond duly delivered to the proper officer for approval as required by law. After the requisite solvent co-sureties had signed, the name of one was erased by drawing a line through his signature, his name in the body of the bond and in the jurat, with the consent of the principal obligor, but without notice to the other sureties. The bond was subsequently delivered to the proper officer for approval, his attention called to the erasure, and the bond was then approved by him. *Held*, that the erasure, and discharge of the one co-surety, having released all those who signed after him, all the other co-sureties were discharged.

2. The officer who approved the bond was, in such case, chargeable with notice of all the circumstances.

3. Where the judge, who presided at the trial by interchange, had been called away after the jury retired, and they subsequently brought in a special verdict, not completely responsive, there having been no opportunity given for a more perfect response from the jury under fuller directions from the judge, the local resident judge properly received and entered the special verdict as returned.

4. Where counsel agree, in such case, in open court, that "on appeal the special verdict shall be considered with reference to the evidence as well as the pleadings," the appellate court will interpret such agreement to authorize the court to consider such facts as actually found by the jury which should have been found, and to dispose of the case accordingly.

Appeal from circuit court, Hinds county; C. H. CAMPBELL, Judge.

Action by the state of Mississippi against John M. Allen and others. Judgment for defendants. Plaintiff appeals. Affirmed.

T. M. Miller, Atty. Gen., for the State. *John M. Allen*, for appellees.

WOODS, J. For the last time this cause, which involves public and private interests alike, is before us for conclusive determination upon the decisive plea of *non est factum*, interposed by all the defendants yet remaining in court. This plea, which, under the rulings of the court below, must be understood to embrace all the matters sought to be set up in the further plea of defendants, marked "No. 10," avers in its essential parts that the bond sued on is not their act and deed, because they say, substantially, that under the proviso to section 1, c. 40, Acts 1880, the same being entitled "An act to require the employment of convicts on works of internal improvement and provide for the support of the penitentiary, without loss to the state," the board of public works, having first rejected all the bids received for the lease of the penitentiary, penitentiary property, and convicts for the term of six years, entered into a contract with J. S. Hamilton, J. A. Hoskins, and Robert H. Allen, constituting the firm of Hamilton, Allen & Co., in July, 1880, whereby, in consideration of the sum of $29,420, to be paid annually, the said penitentiary, property, and convicts were leased to said Hamilton, Allen & Co., for the term of six years, upon the terms and condition provided by law, and that said contract was properly executed by the respective parties thereto. That thereafter, as required by section 2 of said chapter 40, Acts 1880, the said lessees entered into a bond of the character of the one now sued on, the condition whereof was that the said lessees should faithfully perform their said contract of lease. That, the said section 2 of said chapter 40 requiring that said bond so executed should be approved by the board of public works, a form thereof was delivered to said Robert H. Allen, one of the lessees, to be circulated in the northern part of the state of Mississippi for signatures, with the understanding, and upon the condition, that, after the said Allen had procured thereto as many signatures as he reasonably could, the said form of bond was to be returned to the defendants Hamilton and Hoskins at Jackson, there to be circulated for other and further signatures; and when such signatures, additional to those who had signed prior to their signing the same, should make up the penalty prescribed in the bond, to-wit, $100,000, the said form of bond was to be signed by the principal obligors, the said lessees, and by them was to be delivered to the governor of the state, to be by him submitted to the board of public works for inspection and approval. That it was further understood and agreed that the form of the bond, or the bond, so circulated and signed as aforesaid, was not to be regarded by any of the securities signing the same as a completed instrument unless and until it should be signed by other securities, so as to make up the full penalty of the bond after it had been transmitted

by the said Allen to the said Hamilton and Hoskins for that purpose; the securities, as among themselves, signing for the amounts set opposite their names. That said bond, or form of bond, was not to be a completed instrument until all such other securities had signed the bond, according to the understanding and agreement before set out, and until it had been signed by the principal obligors, and thereupon deposited with the governor of the state, as *ex officio* president of the board of public works, to be by him handed to the said board of public works for approval, as required by law. That among other securities signing the bond after its said transmission to Hamilton and Hoskins, for circulation for signatures of such other securities, was one Philip Hart, a solvent security thereon, and worth the penalty of the bond; and that, after said Hart signed said bond, it was signed by R. Burdett, J. L. Hebron, and J. F. Townsend, as securities also, and was thereafter signed by the principal obligors. That the said bond was signed by these defendants, as securities, on the condition that it would not take effect as a bond, nor be a completed instrument, nor be delivered to the board of public works for approval, until the others signing—their co-sureties—would justify in an amount aggregating, with all the sums justified to by all the securities, the full penalty of the bond, to-wit, the sum of $100,000. That said Hart justified in the sum of $5,000, Burdett and Hebron in the sum of $8,000 each, and Townsend in the sum of $10,000; the several amounts justified to by all the securities aggregating something more than $100,000,—the penalty of the bond. That while all the securities were yet on the bond, it having been finally completed according to the understanding and condition on which these defendants signed, and before the same had been approved by the board of public works, while it was in the hands of the governor, as president *ex officio* of the board of public works, or in the hands of the principal obligors, or one of them, and while wholly out of the possession and control of these defendants, the said governor, or the said principal obligors, or one of them, permitted the said Hart to withdraw from said bond by the erasure of his (Hart's) name in the body of the bond, in its signature, and in its "acknowledgment," (*sic*,) at the request of Hart, and without the knowledge or consent of these defendants, or of any of the other securities, including Hebron, Burdett, and Townsend, who signed after Hart; and that this erasure of Hart's name was made prior to its delivery to and approval by the board of public works; and that the board of public works thereupon, with full knowledge of the facts, and without the authority and consent of the defendants, approved the bond, whereby the said Hebron, Burdett, and Townsend, as well as Hart, were released as the co-sureties of defendants, and whereby the amount for which the remaining securities justified was reduced far below $100,000; and, therefore, that they are released from liability on said bond.

Besides this general plea, which we have stated with much fullness, one of the defendants joining therein, viz., John M. Allen, presented and asked leave to file his individual plea of *non est factum*, numbered in the record 11, in which, besides much that had already been presented by him and his co-defendants to the plea just largely recited by us, he averred that he was informed by Robert H. Allen, the principal obligor who circulated the bond for signatures in North Mississippi, as hereinbefore circumstantially detailed, that the said J. F. Townsend would be his co-surety, if he, John M. Allen, should sign the bond; that he knew Townsend, and knew him to be a man of large means, and that he signed upon the understanding (additional to the conditions stated in the general plea of all the defendants) that Townsend should become his co-surety, and become liable on the bond with said defendant John M. Allen; that, with this additional understanding, John M. Allen signed, and that, as agreed and understood, said Townsend did subsequently sign, and justified in the sum of $10,000, but that Townsend and others had been released from liability upon said bond by reason of the erasure of the name of Philip Hart, as hereinbefore specifically narrated; that, moreover, after the bond had been signed by this defendant and a number of other securities in North Mississippi it was delivered to Robert H. Allen, one of the principal obligors, to be taken to Jackson, and circulated for other signatures, until enough signers as sureties should be obtained to qualify before the examining officer, so as to make the several sums for which the sureties could and would justify aggregate the sum of $100,000, and that the bond, when so completed, and when signed by the principal obligors, was to be then, and not before, delivered to the board of public works for approval. The court declined to allow this individual plea to be filed, when it was offered, holding, as appears in its order thereon in the record, that "the defense sought to be set up could be made under the 7th plea on which issue was joined." It is sufficient, for the present, to say that, in the progress of the trial, the course indicated by the learned judge in the court below was pursued, and evidence was offered, without objection, which tended to support this entire plea of said John M. Allen. The issue joined thus was submitted to a jury by which a special verdict was returned embracing, among others, not necessary to be mentioned, the following findings of fact, viz.: "We, the jury, agree and find that the erasure of the name of P. Hart was made from the bond sued on after the same had been signed by all the parties whose names appear thereon, including the principals, and that the erasure was made without the knowledge or consent of any other surety except Green, at the request of Hart, by the aid or procurement of one of the principals, J. S. Hamilton, in whose hands the bond was before and after Hart signed and before the same was delivered to the governor, and that the board of public works, when they were acting upon

the bond, had their attention called to the erasure. We further find, if the plaintiff is entitled to judgment on this finding, her damages are assessed at the sum of $44,082.11-100." On this finding the counsel for the state moved for judgment, but, the Hon. CHARLES H. CAMPBELL, judge of the fifth circuit court district, who had presided on the trial of the issue by interchange, having been called away before the jury returned the special verdict, and the presiding judge of the court, the Hon. J. B. CHRISMAN, feeling himself disqualified to make any order or render any judgment in the case, by consent, and to the end that an appeal might be had, and the controversy determined in this court, the motion of the state for judgment was denied, and judgment entered for these defendants, and the same was accordingly done, the Hon. CHARLES H. CAMPBELL finally signing the bill of exceptions at the request of counsel on both sides, in order that the case might reach this court on appeal.

The question first to be considered is this: Was the verdict responsive to the issue, and did it find all the material facts in favor of the defendants? In answer to the inquiry it is to be said that the findings of jury do not embrace any covering those parts of the plea which aver the understanding, agreement, or condition on which these defendants signed the bond when the same was being circulated for signatures; and, though the record shows abundant evidence offered by the defendants to have warranted a finding of these particular facts in favor of the defendants, and though the record demonstrates that the facts pleaded as to this understanding or condition of signing on the part of the defendants was not sought to be controverted, and is practically unassailed, and though, on the record before us, no other finding than one in favor of the defendants on these averments of the plea could be permitted to stand, and that a reversal on this ground would be a barren victory for the state if another trial should be awarded on the same facts, yet the proper determination of this contention would not be free from embarrassing difficulty if there were no other lights to guide us. But it is not to be forgotten that the judge who tried the case was not present when the jury returned this not completely responsive verdict, and that there was therefore no opportunity given for a more perfect response under fuller directions from an enlightened court. Of necessity, the special verdict was compelled to be received and entered just as the jury returned it. We are bound, too, to suppose that the learned and able lawyers who managed the cause on the respective sides saw and felt the full force of this view, and frankly met the exigency by an agreement embodied in the judgment of the court, which is in these words, viz.: "* * * It being agreed between counsel in open court that on appeal said special verdict shall be considered with reference to the evidence as well as the pleadings, and it is ordered that the clerk insert the same in the transcript when called for." Remembering the recognized ability and skill of the counsel who made this agreement and had the same embodied in the judgment appealed from, we are forbidden, for a moment even, to entertain the thought that it was only meant that we should examine and consider the evidence in the usual manner. The merest tyro in the profession perfectly knows that in every case where a bill of exceptions containing the evidence is taken and produced here it is our duty to consider the same without a request, much less on agreement of counsel, to that effect. To arrive at any correct interpretation of the language employed by counsel in this agreement, we are to bear in mind that the cause had been thrice tried in the court below, and twice heard before us on appeal, (7 South. Rep. 282; 8 South. Rep. 761;) that in this long and fiercely contested struggle every contention had been determined or had been eliminated except the issue presented by these defendants in their plea of *non est factum;* that final judgment had already been rendered against the principal obligors; that Hart, Hebron, Burdett, Townsend, and perhaps others, had been released by inexorable legal necessity; that the issue at last made by these defendants had been imperfectly responded to by the special verdict of a jury under most embarrassing circumstances; and that the whole case, on all the pleadings and multitudinous proofs, should be finally ended, if possible, by this court, on a last appeal. We take it to be true that by this agreement of counsel we are to examine this evidence in all its parts and in its entirety, and give it such effect as in law it is fairly entitled to, regardless of mere technical and formal requisites; and that, if the evidence satisfies us that on the point now being considered the jury could not have found against the defendants, and that a reversal for the third time in this court would be an idle and fruitless determination, then we shall consider that as found by the jury which should have been found, and proceed to examine the case on the real question presented in the record submitted to us. This is our understanding of the agreement, — an agreement eminently wise, and honorable to counsel, under the circumstances, we do not hesitate to affirm. Acting on this, our understanding, and looking at all the evidence in the record, we have no hesitation in declaring that the understanding and condition averred in the plea to have existed at the time defendants signed the bond are conclusively shown to have existed as averred in the pleadings.

We come now to consider the materiality and sufficiency of the defense presented by these defendants by their plea of *non est factum.* We have here a case freed from all difficulty growing out of the necessity of an assumption by the court that the complaining sureties signed the bond according to custom, while it was in the care of the principal obligors, with an understanding that the bond was to be circulated for additional signatures until sufficient solvent sureties, in number and amount, should sign and justify in the aggregate for the full penalty of the bond.

There is no occasion for resort to the reasonable presumption that these defendants signed with the understanding that others, sufficient in numbers and amount, would become their co-sureties, and that, when the bond in its full penalty had been properly signed by their co-sureties and by the principal obligors, it should then be regarded as completed, and should in that condition be delivered to the approving authority. The plea distinctly avers these conditions in express terms, and we have already said that the evidence supports the averments of the plea. This, then, is the case of a bond signed by the defendants on the understanding and condition that the instrument should be circulated for other and further signatures, and should not be regarded as completed, and should not be delivered to the approving authority, until other solvent securities should be obtained, who could and would justify, respectively, in such amounts as, added to the amounts set opposite the signatures to the bond of these defendants, would make in the aggregate the full penalty of the bond, to-wit, $100,000. We have this also: The bond was circulated further by the principal obligors, or some of them, for signatures of solvent sureties thereon, according to this express understanding and condition, on which these defendants consented to sign and become liable, and that additional sureties were found, and their signatures obtained to the bond, and that, still in pursuance of the distinct agreement made with these defendants, these additional co-sureties separately set opposite their respective signatures the amounts they were willing to justify to, and that the total amounts thus justified to by all the securities amounted to something more than the penalty of the bond, viz., $100,000. According to the condition of signing by these defendants, the bond was now completed, and was ready for delivery to the approving authority. The defendants were bound, with other sufficient solvent co-sureties, in the full penalty of the bond, the whole number of the securities, as among themselves, having set opposite their respective signatures the several amounts to which they could and would justify, and to which, in fact, they did respectively justify. While in this completed condition, and ready for delivery, according to the condition on which these defendants signed, the name of P. Hart, one of the additional co-sureties, was erased by drawing a pen-line through the signature, and where it appeared, with those of all the other sureties, in the body of the bond and in the jurat. All this was done at Hart's request, by one of the principal obligors, before the delivery of the bond to the approving authority, and without the knowledge or consent of any of the other sureties, either those signing before or those signing after Hart. In this altered condition the bond was delivered to the board of public works, the attention of the board called to its then condition, and the same then approved.

In this connection it is well to remark that the suit was originally against all the securities, Hart included. In the progress of the protracted litigation, however, Hart's non-liability being made manifest, the suit was dismissed as to him; and in the further progress of the cause, the non-liability of Hebron, Burdett, and Townsend being made manifest,—they having signed after Hart, and before the erasure of his name, and in reliance upon him as their co-surety,—they, too, were discharged and released from liability. It is not contended by counsel for appellees that the violation of a secret condition, on which sureties sign, by the principal to whom the instrument has been intrusted by the earlier signers, will avail to release the sureties whose principal has been thus trusted by them, and who has disregarded the trust reposed in him, without notice to the approving authority of the limitation upon the power of the principal and of his violation of the condition creating this limitation. And, on the other hand, it is not contended by the counsel for the state that those signing as securities upon the understanding and condition that a particular person shall become their co-surety will not be discharged from liability upon the bond so signed, if afterwards this particular person, with whom they were willing to be bound, shall actually sign, and subsequently his name shall be erased without their knowledge or consent. The reason is near at hand, and is stated by the state's attorney general, viz., the face of the altered bond would itself give notice of the facts and conditions. The statement of these admitted propositions demonstrates how much nearer together the learned counsel are in a correct and harmonious apprehension of the law than would be inferred from a glance at the great record before us. The two propositions, taken together, are a very fair epitome of the law applicable to the case at bar. Blended, they harmonize perfectly, and, thus blended, and properly amplified, they meet the necessities of the issue before us, and they are supported not alone by reason, the highest authority, but by an unbroken line of carefully considered precedents in every court of last resort, state and federal, in the United States, with one solitary exception, so far as protracted and repeated examination enables us to say. The secret condition by which a person signing as a security undertakes to protect himself cannot be successfully pleaded. By relying upon a secret condition with the principal obligor, the confiding surety has made it possible for his agent, the principal obligor, to mislead or defraud; and, if loss shall befall by reason of the trusted agent's disregard of the secret condition, that loss must be borne by the too confiding surety. The loss must be placed upon him whose trust in another made it possible for it to occur. In this class of cases, as in all others in life, he who trusts most must suffer most. The law is that a surety who undertakes, upon a secret understanding with his principal, to be bound for him and with him, must be held liable upon his principal's default, even though the principal

disregard and violate this secret condition to the loss and damage of the too trusting surety. But it is equally the law, and the complement of the announcement just made, that, if this secret condition is brought to the notice of the beneficiary in the instrument, or to the notice of the authorized agent of the beneficiary, and notice is had by the beneficiary, or his agent, of the departure from the condition by the principal, to whom the instrument has been intrusted, then the beneficiary, having it in his power to protect the surety as well as himself, if he act with prudence, after notice, cannot hold such surety liable if he receive and rest upon the bond signed upon condition by the surety, with condition broken by the principal, and notice thereof to the obligee in due time. In other words, a secret, undisclosed understanding by a surety in signing a bond will not avail to avoid liability, in the absence of any notice to the obligee of the violation of the condition by the principal; but with notice to the obligee, certainly when the condition has been disregarded in such manner as to increase the sureties' liability, the surety is not liable. It is admitted that if these defendants had signed the bond on condition that Hart should become their co-surety, and Hart had subsequently in fact become their co-surety, the defendants would not be liable if afterwards Hart's name had been erased from the bond, and he discharged, without the knowledge or consent of the defendants. What substantial distinction can be drawn between this admitted case and the real case in hand? Enlarge the imaginary case of the state's counsel, and let us suppose that the defendants signed with the understanding that Hart, Hebron, Burdett, and Townsend should become their co-sureties, and that they did actually become so, and subsequently all their names had been erased, all the sureties would clearly be released from liability. In such case, the condition is found, the violation of the condition is found, the increase of the liability of the remaining sureties is found, and notice of all these things by reason of the erasures of the names is found. On principle, how can this supposed case be distinguished from the real case? In the real case, the defendants signed on the understanding and condition that enough other solvent persons should sign, for such amounts as they could justify to, which, added to the amounts justified to by these defendants, would aggregate the full penalty of the bond. These other solvent sureties, sufficient in numbers and amounts, do accordingly actually sign, but, after the bond had been completed, in accordance with the original agreement between the defendants and one of the principal obligors, to-wit, Robert H. Allen, one of these added co-sureties, a solvent person, who had justified, as appeared on the face of the bond, for $5,000, has his name erased in the body, in the signature, and in the jurat of the bond, and thereby this retiring surety is released from liability. But, as perfectly appears from the record, by the inexorable logic of law, all the other solvent sureties signing after Hart have been released by virtue of the release of the one whose name was erased, the liability of these defendants largely increased, and notice on the face of the bond given, which, if followed up, would have disclosed the facts and the consequences flowing from them, as they now are plainly to be seen. We ask again, in reason and on principle, what is there to distinguish the supposed case from the real case at bar? In the former case, four certain named persons are to sign with these defendants; in the latter case, enough solvent persons are to sign with the defendants, in sums sufficient to make up the full penalty of the bond. In the first case, all four named sureties are discharged from liability by reason of the erasure of the name of the one of that number first signing, and those signing in reliance upon the four thus released must likewise be conceded to be released. Why shall not the like result follow the discharge of all the additional solvent sureties by reason of the erasure of the name of the first solvent surety signing? It seems clear to us that after the bond had been completed as agreed and conditioned by these defendants, and before it had been approved by the board of public works,—indeed, before it had been delivered to the board for approval,—a material alteration in the same was made, whereby the liability agreed to be assumed and actually assumed by the defendants had been largely increased without their consent, and with notice of this alteration to the approving authority; and the defendants are released from liability, unless they can be held, as insisted by the state, on another ground, to-wit, the want of notice of the understanding and condition of defendants' signing.

This view of the principal contention in the case at bar is in perfect harmony with the spirit and reason of the overwhelming current of adjudicated cases in the state and federal courts in this country. In some the facts are strikingly similar to the case before us; in more—in nearly all—the spirit and reason of the decisions are the same. We content ourselves with citing a few out of the great number examined. See Smith v. U. S., 2 Wall. 219; Smith v. Weld, 2 Pa. St. 54; Dickerman v. Miner, 43 Iowa, 508; State v. Craig, 58 Iowa, 238, 12 N. W. Rep. 301; State v. McGonigle, 101 Mo. 358, 13 S. W. Rep. 758; State v. Churchill, 48 Ark. 426, 3 S. W. Rep. 352, 880; Bank v. Sears, 4 Gray, 95; Commissioners v. Daum, 80 Ky. 388; Graves v. Tucker, 10 Smedes & M. 9; Nash v. Fugate, 24 Grat. 202, 32 Grat. 595; McCormick v. Bay City, 23 Mich. 457. On this branch of the case, it is now to be added that the surety John M. Allen signed on the conditions named in the general plea of himself and all the others, appellees, and that, besides, he shows that he signed with the understanding that one of the additional signers to the bond, J. F. Townsend, was to be his co-surety. It will be remembered that Townsend actually signed, as agreed, and that, signing after Hart, and prior to the erasure of Hart's name, he has been unavoidably released from liability, and the suit dismissed as to him, by reason of

Hart's release, on whose co-suretyship he, Townsend, relied, and on which he had the right to rely, the erasure of Hart's name being conceded to be notice to the approving authority of the condition on which Townsend signed. With Hart discharged by pitiless legal necessity, and with Townsend discharged by the same inexorable authority, because of his reliance on Hart as his co-surety, are we not driven irresistibly to the conclusion that John M. Allen is released by the same imperious necessity? If John M. Allen must be held released, as we say he must, how shall the other defendants, who signed after him, relying on his co-suretyship, be held? It is impossible to find any satisfactory answer to the inquiry.

We have already remarked that there appears to be one discordant note in the universal voice of adjudication. The laborious research of the attorney general of the state has produced many authorities bearing upon this particular subject, but a careful examination of them, with others unearthed in our own researches, produces the one solitary disagreeing view of the law. That is the case of Railroad v. Kitchin, 91 N. C. 39. The learned counsel concedes with caution that the court, in this opinion, goes too far in holding a surety liable who would seem to have been not liable, by the universal juridical judgment, outside of the state last referred to. The Kitchin Case is in violent conflict with the views herein advanced, and in irreconcilable antagonism to the long line of authorities hereinbefore noted. The doctrine of the Kitchin Case has been well declared by another court of last resort, in commenting on it, to be unsupported by precedent, and wanting in that strength of argument which gives power to the general rule.

There remains only to be considered the reach and value of the notice afforded to the board of public works by the erasure of Hart's name, to which, confessedly, their attention was directed by the governor of the state when the bond was submitted for approval. If we understand the state's position on this point, the contention is that the erasure of Hart's name, appearing thrice on the face of the bond, was notice which required inquiry by the board of public works into the circumstances of Hart's connection with the other sureties, or what undertaking they had with reference to him. We have already endeavored to demonstrate that, though the agreement of these defendants was not to sign with Hart by name, their agreement was to sign with other solvent sureties, and that Hart was accordingly secured as one of these contemplated solvent additional co-sureties, and afterwards released by the erasure of his name, whereby the other additional solvent sureties, Hebron, Burdett, and Townsend, were also released; and that the legal liability of the appellees is not other than it would be if Hart by name had been agreed upon as their co-surety. We conclude, therefore, whatever would have been notice to the board of public works if Hart had been agreed upon by name as a co-surety will be notice, also, under the averments of the plea, and the evidence in the case. It will not do to assume that, if inquiry had been made by the board of public works, the simple facts that the defendants signed the bond for circulation, and that they had no understanding with regard to Hart, and that he merely signed and then withdrew, would only have been discovered. That is the ground taken by the state, but its untenableness is demonstrable in a breath. The inquiry would have ascertained what the state admits, but, unless reason and law had been deaf and blind, it would have necessarily appeared also, in connection with the fact that the appellees signed the bond for circulation, that they coupled their signing with an express condition; and this condition was as readily ascertainable as the other fact of their signing for circulation, which, it is admitted, inquiry would have disclosed; and, while inquiry would have disclosed the fact that the appellees had no understanding with regard to Hart by name, the same inquiry would have disclosed the fact that they did have an understanding with reference to Hart and others as solvent co-sureties, and that the appellees were not consenting to Hart's release. Inquiry would, with equal certainty, have disclosed that Hebron, Burdett, and Townsend, the other co-sureties signing after Hart, signed relying on him as their co-surety, and that they were not consenting to his release. As is said, with a touch of grim humor, by counsel for appellees, "there is no telling what inquiry would not have ascertained." It might as forcibly be contended for the state that the erasure of Hart's name was only notice of that fact. That is not the position of the state's counsel, of course, but we think such ground might be as well defended as the position taken, which would cut off inquiry as soon as begun. If the doctrine of notice is not to be emasculated, we must continue to hold that whatever is sufficient to give notice to a party is notice of everything which inquiry, if made, would disclose. On the question of notice specifically our own court has long acted on this definition of notice, nor are we aware of any restrictive qualification put upon it elsewhere. This idea of the reach and value of notice underlies all the cases in which sureties have been released by erasures of names or other alterations appearing upon the face of an instrument on which recovery is sought. It seems superfluous to say more. See 16 Amer. & Eng. Enc. Law, 792, and note, with the countless cases therein cited; Parker v. Foy, 43 Miss. 260; Plant v. Shryock, 62 Miss. 824; Buck v. Raines, 50 Miss. 648.

Affirmed.

HARRIS v. STATE.

(*Supreme Court of Mississippi.* April Term, 1891.)

HOMICIDE—VERDICT—CONSTRUCTION.

Where, on a murder trial, the court instructs the jury that a verdict of "guilty as charged in the indictment" will be followed by capital punishment, such a verdict, signed by

each juror, fixes defendant's punishment at death, though the last juror's name is coupled with the words, 'opposed to capital punishment."

Appeal from circuit court, first district of Hinds county; J. B. CHRISMAN, Judge.

Anderson Harris was convicted of murder, and appeals. Affirmed.

S. S. Calhoon, for appellant. *Atty. Gen. Miller*, for the State.

WOODS, C. J. The sole remaining hope of life for the prisoner, outside of executive clemency, must now perish. It is submitted to us by the able counsel who represented the accused on his trial below, and who has generously appeared in this court also, that the verdict, "We, the jury, find the prisoner guilty as charged in the indictment," may be held by us to be a finding without capital punishment, because the name of the last juror is coupled with the words, "opposed to capital punishment," the verdict having been signed by each juror's own hand. The jury, and each member of it, must be presumed conclusively to have known what this verdict meant. The court had fully instructed the jury as to the form of verdict necessary, if the punishment was to be imprisonment for life; and with equal distinctness the jury had been instructed that the verdict of "guilty as charged in the indictment" would be followed by capital punishment. That one juror, who was opposed to capital punishment, joined eleven others, entertaining no such sentiment, in saying the prisoner was worthy of death, cannot be held other than a general verdict of guilty. We are painfully aware of our responsibility, but we can discharge it, under a sense of inexorable duty, in no other manner than by an affirmance of the judgment of the lower court. Affirmed.

HAIRSTON v. STATE.

(*Supreme Court of Mississippi.* May 18, 1891.)

HOMICIDE—EVIDENCE—DECLARATIONS OF DEFENDANT'S MISTRESS.

On a prosecution for murder, where it has been shown that at the time of the homicide defendant was living with a certain woman, the admission of evidence that, on the night of the homicide, the husband of deceased received a message from such woman, warning him not to go out of his house, is reversible error.

Appeal from circuit court, Lowndes county; HOUSTON, Judge.

Prosecution of Willis Hairston for murder. Defendant was convicted, and appeals. Reversed.

S. M. & W. C. Meek, for appellant. *Atty. Gen. Miller*, for the State.

COOPER, J. The verdict in this case rests upon circumstantial testimony so slight and inconclusive in its character as to scarcely tend towards the guilt of the appellant, and upon the positive testimony of one eye-witness. This witness testified that she was a guest at the house of deceased at the time she was killed; that late at night the accused and two others came to the house and called deceased, who was then asleep; that deceased got up, and went out, and immediately witness heard a blow and a groan, and, looking out, saw the body of deceased on the ground; that the accused and two other persons then took up the body, and carried it away; that the husband of the deceased and two other persons were at that time in the house; that witness, having seen the murder committed, made no alarm, and did not speak to any one of what she saw, for more than a week, nor until after the accused was arrested and charged with the crime; and for this almost incredible conduct gives no other explanation than that she was afraid of the accused. We are astonished that this story found credence with the jury. Whether a verdict resting upon such evidence should be permitted to stand, even in a case free from any error of law, it is unnecessary now to consider, since the judgment must be reversed on another ground. The evidence shows that at the time of the homicide the accused was living with one Milly Satterfield. On the trial the husband of deceased was permitted, over the objection of the accused, to testify that on the night of the homicide he "received a message from Milly Satterfield not to go out of my house." The only conceivable purpose of this evidence is that it suggested that Milly Satterfield had some reason to believe that the accused contemplated committing the crime, and that, living in the house with him, she received her information from some act or declaration of his. The evidence was too clearly incompetent to require comment, and for the error in admitting it the judgment is reversed, and a new trial awarded.

KELLOGG *et al.* v. HAMILTON.

(*Supreme Court of Mississippi.* April Term, 1891.)

CONVERSION—VALUE OF GOODS.

Where no direct evidence of value is offered in an action for the conversion of goods, but enough appears from the evidence to show that they were of some value, it is error for the trial court, the conversion being proven, to instruct the jury to find for defendant.

Appeal from circuit court, Copiah county; J. B. CHRISMAN, Judge.

Action by Charles P. Kellogg & Co. against J. G. Hamilton for the conversion of goods. Judgment for defendant. Plaintiffs appeal. Reversed.

R. B. Mayes, for appellant. *Ramsey & Willing* and *J. S. Seaton*, for appellee.

CAMPBELL, J. The testimony makes it certain that the defendant received and converted to his own use the goods of the plaintiffs, and while it is true that they did not, on the trial of the action, (in form trover,) offer evidence of the value of the goods, enough appeared from the evidence to show that they were of some value, and they should have had, at least, a verdict for a nominal sum, and it was erroneous to instruct the jury to find for the defendant. Reversed, and remanded for a new trial.

VICKSBURG, S. & P. R. CO. v. STOCKING.

(*Supreme Court of Mississippi.* April Term, 1891.)

CONTINUANCE—SURPRISE—AMENDMENT OF DECLARATION.

Where plaintiff, in an action against a carrier for the death of two horses, and for injuries sustained by other horses, testifies to the death of ten horses within two weeks after their delivery to him, and thereupon moves for leave to amend his declaration to make it conform to his evidence, which motion is allowed, it is error for the court to refuse defendant a continuance on the ground that it is unprepared to meet the new case thus presented.

Appeal from circuit court, Warren county; GEORGE ANDERSON, Special Judge.

Action by E. L. Stocking against the Vicksburg, Shreveport & Pacific Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Nugent & McWillie and *Birchett & Shelton*, for appellant. *Henry & Thompson*, for appellee.

WOODS, J. In both counts of the declaration, originally, a recovery was sought because of the death of two horses, in addition to injuries sustained by the surviving animals. When the plaintiff was examined as a witness, on the trial, on his own behalf, he testified to the death of ten horses within two weeks after the delivery of the stock to him by the carrier, and thereupon he moved the court for leave to amend his declaration to make it conform to his evidence; and leave was accordingly, and properly, given him to strike out the word "two," and insert the word "twelve," in the declaration, where used to designate the number of animals whose death resulted from the misconduct of the carrier in transporting the stock. To the proposed amendment, at the proper time, the defendant objected; and upon the overruling of this objection by the court, and after the amendment had been made, the defendant prayed a continuance, supporting this prayer by the affidavit of the agent and representative of defendant, because of surprise, as to the additional claim for the loss of ten horses other than those mentioned in the original declaration, and showing and stating that the loss of only two horses was averred in the pleadings, and that defendant had only prepared itself to meet the claim for the loss of the two horses, and was wholly unprepared to meet the new case presented by the amended declaration. The motion for continuance being denied, trial was then had, with the result of a verdict and judgment for plaintiff, and defendant appeals.

All proper amendments in pleading, necessary to present the whole case fairly, should be allowed, and such amendments should not operate to continue the case, as matter of right, to the party complaining of such amendment. After amendment, the application for continuance is addressed to the sound discretion of the court, and is to be entertained only in those exceptional cases in which it is made to appear that a refusal to continue will result in preventing the party against whom the amendment is made having a fair opportunity to meet the same, in a matter material in the controversy. In the case before us, the plaintiff in his original declaration had demanded damages against defendant in a large sum, and one element of these damages was averred to be the death of two horses. This averment was made long after the injuries complained of had occurred, and only on the trial was notice given of the death of ten other horses, which said deaths were shown to have taken place, by plaintiff's evidence, after the stock had been delivered to plaintiff by the carrier, and after the stock had been driven away from Vicksburg, and into the country. While it may be true that the plaintiff was not required in his declaration to aver the death of the two animals, yet having done so, and having stood upon that averment until he took the witness-stand upon the trial, his then springing upon the defendant the loss of ten other animals, dying under the circumstances already mentioned, and with no notice ever before given defendant of such additional loss, must be held to have been such surprise as operated to prevent the defendant's fairly meeting the plaintiff. It may be fairly said that the averment of the loss of two horses only, in the original complaint, warranted the defendant in concluding that it was called to respond to such loss, by death, only; and that, being so misled by plaintiff, the defendant was prejudicially surprised when plaintiff shifted his ground, and claimed the loss of ten other animals,—animals dying, not in course of transportation, and while in the carrier's charge, but after their delivery to the consignee; and this, without any notice to or knowledge of the defendant. Under the peculiar circumstances of this case, we are of opinion that the defendant should have had the continuance prayed. Reversed and remanded.

(23 Fla. 387)

INDIAN RIVER STEAM-BOAT CO. v. EAST COAST TRANSP. CO.

(*Supreme Court of Florida.* Dec. 21, 1891.)

INJUNCTION—MOTION TO DISSOLVE—DISCRETION OF COURT—RAILROAD COMPANY—RIGHT TO OWN AND LEASE DOCK.

1. Pending a motion to dissolve an injunction on bill and answer, exceptions are filed to portions of the answer not in response to the bill. The filing of such exceptions is of itself no objection to the dissolution of the injunction, where the portion of the answer not excepted to contains a sufficient denial of the equities of the bill.

2. A motion to dissolve an injunction on bill and answer involves the sufficiency of the equities of the bill to justify the writ in the first instance.

3. A court of chancery will not grant an injunction to restrain a trespass merely because it is a trespass; yet it will interfere by injunction where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where it is necessary to prevent a multiplicity of suits, and especially where the trespasser is alleged to be insolvent, and nothing can be realized on judgments that may be obtained against him at law. In such cases it will not do to simply allege that the complainant has no adequate remedy at law, and that his damages will be ir-

reparable. The court will not act upon his opinion or his fears in such matters, but he must state facts in his bill to enable the court to determine whether or not his alleged injury will be irreparable.

4. On motion to dissolve an injunction on bill and answer, where sufficient equities are stated in the bill, the court will look to such facts of the answer only as are responsive to the bill; and a respondent will not be permitted to rely upon new matter in avoidance, in his answer, not in response to the allegations upon which the equities of the bill are founded.

5. Under the practice of the court of chancery, since the adoption of the act of the legislature, (chapter 1098, Laws of Florida,) where the answer denies all the circumstances, upon which the equities of the bill are founded, or where the bill and accompanying evidence are fully met by the answer and its accompanying evidence, the chancellor will ordinarily dissolve an injunction; but this is not an inflexible rule, and the granting or dissolving of injunctions is lodged in the sound discretion of the court, to be governed by the nature and circumstances of each case.

6. A railroad corporation, under the laws of Florida, has the right to erect and maintain docks, wharves, and piers, as incident to its business, and to hold or dispose of them as may be deemed proper; but such corporation, engaged in the business of common carrier, has no right to lease the terminal point of its railroad track and terminal facility on a navigable stream to a steam-boat company, and thereby defeat the ingress and egress to and from said railroad track on the part of other competing lines of steam-boat companies.

7. The Indian River Steam-Boat Company leased from the Jacksonville, Tampa & Key West Railway Company 390 feet of the east end of its dock on the Indian river, at Titusville, on which dock was located the railroad track and terminal facility of said railroad company; and said railroad company covenanted and agreed in said lease to maintain the railroad track on said dock and bulk-head, and the trestle supporting said track, and to furnish proper and adequate facilities for transfer of local freight to and from said bulk-head. *Held*, on this state of facts, the said steam-boat company was not entitled to an injunction to restrain another steam boat company from landing at said railroad dock for the purpose of delivering and receiving freight to and from said railroad company.

8. The bill asked for an injunction to restrain respondents from using the dock at Titusville, and the premises appurtenant thereto, as their head-quarters and offices, and from using and occupying numerous other docks of complainant at other points on Indian river, and also that complainant be decreed the undisturbed possession of the same. A preliminary injunction was granted as to the dock at Titusville only. Respondents, upon the filing of the bill, answered, tendering an issue as to the docks other than at Titusville, and denied that they landed at the Titusville dock otherwise than for the purpose of delivering and receiving freight to and from said railroad company. *Held* that, while the decree of the court dissolving the temporary injunction on bill and answer was proper, it was error to dismiss the bill, as it cannot be said that no other relief was sought, except to restrain respondents from landing their boats at the Titusville dock.

(*Syllabus by the Court.*)

Appeal from circuit court, Brevard county; D. BROOME, Judge.

Bill by the Indian River Steam-Boat Company against the East Coast Transportation Company to restrain it from using certain docks. From a decree dissolving the injunction and dismissing the bill the steam-boat company appeals. Modified.

The other facts fully appear in the following statement by MABRY, J.:

The Indian River Steam-Boat Company, appellant here, by attorneys, presented to the judge of the fifth judicial circuit, at chambers, on the 24th day of November, A. D. 1890, a bill for an injunction against R. P. Paddison, George M. Robbins, and Walter S. Graham, associated and doing business as the East Coast Transportation Company, at Titusville, Brevard county, Fla. The case made in this bill is this: That the Indian River Steam-Boat Company is a corporation organized under the laws of Florida, with its usual place of business at Titusville, Brevard county, Fla., and its business is, and has been since the 7th day of April, A. D. 1886, the transportation of freight, passengers, and mail matter upon Indian river; that in conducting said business it owns and uses seven steam-boats, and during the winter season runs a daily line of steamers between Titusville and all points south and between Titusville and Melbourne on said river, and during the other portions of the year a daily line between Titusville and Melbourne, and a tri-weekly line between Titusville and all points south on said river; that the nature and extent of its business render the erection and maintenance of docks and piers at Titusville and elsewhere on said river necessary, and the right to do so is one of its charter privileges; that on the 9th day of February, A. D. 1889, it leased from the Jacksonville, Tampa & Key West Railway Company so much of a certain dock and pier at Titusville as then and now lies on the easterly side of a line drawn 20 feet west of the most westerly building now and then constructed on said pier, to the easterly line of the bulk-head, with all the rights and privileges thereunto appertaining, the same being about 396 feet of the east end of the said dock, and that said dock and pier extend only to such depth of water in said river as affords a safe landing to such boats as said company possesses, and one suitable to its business, and that said dock and pier do not interfere with the use or construction of other docks which are or may be constructed and maintained on adjacent property along the extensive water-front at Titusville; that said leased dock and buildings thereon have been constantly occupied and used by said Indian River Steam-Boat Company for the purpose aforesaid, and for its offices, head-quarters, and place of transacting most of its general business, since the 1st day of March, A. D. 1889, and that said company has agreed to pay an annual rental for said dock and pier of $500, payable quarterly, for the term of 3 years, and longer, unless a contrary agreement should be reached in the manner provided by the terms of said lease, and to keep said leased property in good repair, and perform certain other conditions enumerated therein, at great expense; that said rental has been paid, and all the other conditions fully performed, and said lease is in full force; that large and expensive additions have been made to said dock and pier by said Indian River Steam-Boat Company,

at a cost of $3,000, and still said dock and pier, and the accommodations thereon, are inadequate fully to accommodate the increasing business of said company.

A copy of the lease, bearing date February 9, 1889, is attached to the bill as an exhibit.

It is further alleged in said bill that the sole object of said appellant company in entering into said lease was that it might control premises adequate to the transaction of its business, and since the 1st day of March, A. D. 1889, it has so occupied and controlled said leased property, and no other person or company has occupied the same, except by the consent of the said Indian River Steam-Boat Company, and that said company has never held itself out as a general wharfinger, or permitted the public use of said leased property.

Further, that during the summer or fall of 1890 said Paddison, Robbins, and Graham purchased or procured a steam-boat, and are advertising to make regular trips upon said Indian river with one or more steam-boats for the carriage of passengers and freight, and are seeking to make their head-quarters and landing point at said leased dock or pier, and that they have been repeatedly informed by appellant company that said dock and pier were its private property, and that it could not and would not conduct the business of a wharfinger, or permit their boat to land thereat, but notwithstanding such notification they have persisted and still persist in landing, and do land, their said boat at said dock, through force of threats made by them that if they were deterred from landing, or hindered in any way in the transaction of their business at said dock, they would cause to be arrested the agents or employes of said steam-boat company, and that for each package or shipment of freight or other matter refused to be received upon said dock they would sue said steam-boat company for damages, and they threaten to continue daily to land at said dock, and use the same freely for all purposes connected with their business, without paying wharfage or other charges, and claim that said dock is public property, and they, in common with all other persons, are entitled to all the rights and privileges of said steam-boat company in and about said leased property; that if the said Paddison, Robbins, and Graham are permitted to succeed in freely using and occupying said leased property the entire public will also insist on doing so, and said premises will become worthless as a franchise right and a place for transacting its said business.

It is further alleged that said steam-boat company possesses the exclusive right to use and occupy said dock and pier for the purposes of its business, and that said respondents, Paddison, Robbins, and Graham, have no shadow of title or right to the use or occupation of said property, except through the courtesy of said steam-boat company, and that this cannot be extended to them, because said dock and pier are inadequate to accommodate the business of said company, and that there is neither dock frontage or storage room sufficient to accommodate even the seven boats of said company, and one or more of them must needs be moved to permit the landing of respondents' boats.

It is further alleged that there is another dock at Titusville, not owned or possessed by said steam-boat company, at which said respondents' boats can and frequently do land and transact business; that the winter business of said steam-boat company is larger than its summer and fall business, and such winter business has begun and is rapidly increasing, and said company is soon to add other steam-boats to its present service, and thus rendering imperative the use of all its dock room; that it is under contract to carry the United States mails upon said Indian river according to stated schedules and fixed time, and any violation thereof would subject said company to heavy penalties, and it is frequently necessary for said company to load and unload freight with the greatest dispatch, and to employ thereon a great number of men, in order to prevent delays in the carriage of perishable articles, and at the same time to comply with its said mail contract; that the use of said dock and pier by said respondents for any considerable time would cause inconvenience, delays, possible loss of connections, and prevent said company from properly conducting its business, and would cause it irreparable damage; that said complainant company believes that said respondents cannot be deterred from using said dock and pier except by the daily use of superior force, and that if such force be used, or if packages of freight carried by or consigned to said respondents be refused to be allowed a landing on said dock, said steam-boat company would be subjected to a multitude of vexatious suits; and that said company has no adequate remedy at law to prevent such immediate and irreparable injury.

It is further alleged in said bill that said steam-boat company is the exclusive owner or lessee, and is in exclusive possession, of a large number of other docks, at various points on said Indian river, which were erected and are maintained at great expense by said company for its exclusive use and benefit; that these docks are not public, nor do they interfere with the free navigation of the river, and said company does not hold itself out as doing the business of wharfinger at any of them, as said respondents well know; that said docks differ from the docks and pier at Titusville in this: that they are smaller, and not well provided with storage room for the care and protection of freight, and are not intended to be used as the head-quarters or places for conducting the general business of said company, and do not afford facilities more than adequate to the needs of its business; that said respondents, without any right or title whatever, are making free use of such docks for all the purposes of their said business, and threaten to continue the same, against the protests and express orders of said complainant company, and that they threaten to use said docks daily, or as

often as their business may require, by superior force, and to harass and annoy said company by a multitude of suits, should they in any manner be interfered with in the use of the same, or should wharfage be required of them.

It is further alleged that such interference with said docks, as above stated, would cause such litigation, expense, trouble, and delays as seriously to affect its business, prejudice its interests, and cause such irreparable damage that courts of law could not compensate it for the same, and that said complainant company believes that said respondents are not pecuniarily responsible for any and all damages which said company may suffer by reason of their repeated and threatened interferences with said docks, and that a judgment that might be recovered at law would be uncollectible against said respondents, and that said steam-boat company is under contract to transfer and deliver immediately large shipments of freight and materials which peculiarly tax all its facilities to the utmost, and render any interference with them especially harmful, and its rights would be unduly prejudiced if an injunction be not issued immediately, and without notice to defendants.

The prayer of the bill is that said respondents, their officers and agents, be restrained by injunction from further using or occupying said dock and pier at Titusville, or the premises or appurtenances thereto belonging, for the purpose of transacting thereat their business, except such business as they in common with all other citizens may properly transact with said company upon its private property, and from making said dock and pier the usual place for landing their boat, and for receiving and discharging freight and passengers thereat, and that said steam-boat company be decreed the undisturbed and undivided right of possession of said leased premises, and that said respondents, their officers and agents, be enjoined from further using said other docks as their place of landing boats, and from receiving and discharging freight and passengers thereat; and for such other or further relief as the nature of the case may require.

The president of the steam-boat company makes oath that he is acquainted with the facts stated in the bill, and they are true, except those alleged on information and belief; and, as to those matters, he believes they are true.

On this bill the judge at chambers granted a temporary injunction as to the dock and pier at Titusville upon the filing of a bond, in the sum of $500, to be approved by the clerk of the circuit court of Brevard county. The bond was filed in the office of said clerk on the 25th day of November, A. D. 1890, and writ of injunction issued, restraining and enjoining said Paddison, Robbins, and Graham, associated as the East Coast Transportation Company, from further using or occupying said dock and pier at Titusville for the purpose of receiving and discharging freight and passengers, and from making the same their usual place for landing their boats for said purpose, until the further order of the court.

On the 26th day of November, A. D. 1890, the respondents filed in said clerk's office their answer to the bill, and also mailed to the counsel for said steam-boat company a notice that application would be made to the judge of said circuit on the 2d day of December, A. D. 1890, for a dissolution of said temporary injunction.

The material averments in the answer are as follows: That the East Coast Transportation Company was G. F. Paddison, George M. Robbins, and Walter S. Graham, and not R P. Paddison, as stated in the bill, and, at the time of filing the answer, is a corporation existing under the laws of Florida, articles of association having been duly filed with the clerk of the circuit court of Brevard county on November 22, 1890, and on same day forwarded to the secretary of state at Tallahassee, Fla.; but respondents waive any benefit or advantage of the failure to denominate them as a corporation in complainant's bill, and appear in their corporate capacity, as the East Coast Transportation Company.

Respondents admit that the Indian River Steam-Boat Company is a corporation under the laws of Florida, and that it is engaged in the business and employs the steam-boats on the Indian river as alleged in its bill, and that the nature of its business renders the erection of docks and piers at Titusville and elsewhere on said river desirable; but respondents do not know, and, pray proof to, the extent of the charter-rights of said steam-boat company in the premises. Respondents admit the lease by the Jacksonville, Tampa & Key West Railway Company to said steam-boat company, the use of the dock and payment of rent as alleged, but deny that said lease is now in full force and effect, or ever was valid or effectual in law.

Respondents admit that said steam-boat company has made certain additions to the said wharf, on the south side, but does not know whether or not said company is fully accommodated thereby, and asks proof of said allegation.

Respondents deny that the sole object of said steam-boat company in entering into said lease with the Jacksonville, Tampa & Key West Railway Company was to control premises adequate to the transaction of its business, but aver that its said object therein was also to control the terminal facilities of the said Jacksonville, Tampa & Key West Railway Company on the Indian river at Titusville, and thus to prevent the use of said railroad terminal facilities by any competing line of steam-boats that might be put on said river, in order to preserve a monopoly of the transportation business of said river, and that said company has persistently denied the use of said railroad terminal facilities to respondents or to the general public since the lease aforesaid.

Respondents deny that said complainant corporation has never held itself out as a general wharfinger, or permitted the public the use of said leased property.

Respondents admit that they have purchased a steam-boat, and are advertising to make regular trips upon Indian river for the carriage of passengers and freight, but deny that they are seeking to make their head-quarters at the said dock, and say that they are landing at said dock for the purpose of receiving and delivering freight to and from the Jacksonville, Tampa & Key West Railway Company, under authority of a decree of the railroad commission of the state of Florida securing respondents in that right, a certified copy of which is attached to the answer.

Respondents admit that they were informed at one time by complainant corporation that it did not want to conduct the business of a wharfinger, but they aver that, after the said decree of the railroad commission, said corporation informed them that it would receive and receipt for all their freight at said dock on payment of a regular wharfage charge, and that respondents have continued to do business with said complainant corporation, as a general wharfinger, for the past three weeks, under said arrangement.

Respondents admit that they have intimated to the Jacksonville, Tampa & Key West Railway Company and its employes that if it violated the decree of the railroad commission, by refusing to accord to respondents, at the end of its dock and railroad at Titusville, the same privileges and advantages as it accords to said steam-boat company, notwithstanding its lease, that said neglect and refusal would be a violation of law, of which respondents would complain to the proper authorities of the state; but respondents have never threatened or otherwise intimidated the agents of said steam-boat company, except they have threatened to complain of said railroad company if the use of its terminal was not accorded to them; and they do not care how the said railroad company and said steam-boat company settle their differences in regard to the said dock, and have no concern except that said railroad company shall obey the said mandate of the railroad commission.

Respondents admit that they propose to land daily at said dock, or as often as it has business to transact there with the Jacksonville, Tampa & Key West Railway Company, and that said dock constitutes the charter terminal of said railroad company.

Respondents say they have paid wharfage to said steam-boat company, under protest, for the use of said dock; but they only paid the same to prevent a breach of the peace, and until they could obtain relief from the courts from such illegal exactions.

Respondents admit that they claim that said dock is public property, and that the public is entitled to a free landing at it, without wharfage or other toll, because said wharf occupies and is a part of a public street of the town of Titusville, as will appear by the further allegations of the answer.

Respondents deny that said complainant corporation possesses the exclusive right to use and occupy said dock, or that respondents have no right to the use thereof, and they deny that any of said complainant's boats have ever been moved to allow the landing of their boat, or that there will be any occasion therefor in the future.

Respondents admit that there is another dock at Titusville at which their boat frequently lands to transact other than railroad business, but respondents say that the water is frequently too low to admit of their boat approaching said wharf, and there is always great danger in so doing, and said dock is totally inadequate to the needs of respondents' business.

Respondents admit that said complainant's present wharf privileges may be inadequate, as alleged, and they suggest that said complainant get quarters of its own, instead of appropriating a public street and a railroad terminal.

Respondents admit that they cannot be deterred from using said property except by the daily use of superior force, and that the use of such force, or the neglect by the railroad company to properly conduct respondents' business at said wharf, would subject said railroad company and said steam-boat company to a multitude of vexatious suits.

Respondents deny that said complainant company is the exclusive owner or lessee of a large number of docks at various points on Indian river, or has not held itself out as a wharfinger at some of the docks it pretends to control, or that respondents have ever landed at any dock of which said company was entitled to the exclusive use.

Respondents say that the allegations of said bill as to wharf privileges, other than those at Titusville, are vague and uncertain, and they claim the same benefit in their answer as if they had demurred thereto for uncertainty.

Respondents further deny that they contemplate any such trespass upon said docks as the ordinary courts of law could not adequately compensate in damages for, or that they intend to trespass upon the rights, privileges, or property, in any way whatever, of said company.

Respondents deny that they are not pecuniarily responsible for any and all damages they may occasion said complainant company unlawfully, and they say they do not believe that said complainant company is solvent.

Respondents deny that there was any occasion for the application to enjoin them without notice, as alleged in said bill.

Respondents, further answering, say that in July, 1890, they complained to the railroad commission of the state of Florida that the Jacksonville, Tampa & Key West Railway Company, a railroad corporation operating a railroad in the state of Florida, discriminated against respondents by attempting to lease the exclusive use of its dock and river terminal to complainant company, by which said lease respondents, operating a competing line of steamboats, had been discriminated against in the receipt and delivery of freight to said

railway; that the said commission, by decision rendered on the 14th day of August, A. D. 1890, adjudged that the charter terminus of said railroad was the channel of Indian river, to which point said road had been constructed, and that the pier and dock at Titusville are a part and parcel of the main line of said railroad, and a necessary and indispensable facility which the law enjoins it to provide for the transportation of its business, and that said railroad company had attempted by said lease to the Indian River Steam-Boat Company to vest in it the exclusive use of said pier, and refused to grant the use of the same to the East Coast Transportation Company. Further, it was considered and held by the said railroad commission that the said Jacksonville, Tampa & Key West Railway Company was guilty of a violation of section 4, c. 3862, Laws Fla., and that said company do desist at once from such discrimination, and that it extend to the East Coast Transportation Company the same uses, services, facilities, and privileges at the end of said pier or wharf, in delivering and receiving freights from such company, as are extended by it to the said Indian River Steam-Boat Company. A certified copy of said proceedings and decision of said railroad commission is attached to the answer.

Respondents further aver that no proceedings have been had to set aside the said decision and order of said commission, and it is operative as a law of the state, and gives respondents the right to land at said dock and wharf for the purpose of receiving and delivering freight to and from said railroad; that said decision cannot be attacked in a collateral way, nor will an injunction lie to restrain the execution of the mandate of said commission, but the same can only be set aside or restrained by a court in a direct proceeding against said commission, as prescribed by section 21, c. 3862, Laws Fla.

Respondents allege the decision of said railroad commission as a complete bar to the relief prayed in complainant's bill, so far as it relates to the railroad wharf at Titusville, and they pray the same advantage thereof as if the same had been urged by way of plea to the bill of complaint.

Respondents further allege that the said lease by the Jacksonville, Tampa & Key West Railway Company to the said complainant company is not merely voidable, but the same is utterly void and worthless, upon its face, as repugnant to the common and statute laws of Florida, and a violation of the charter duties of said railroad, in attempting to exclude the general public from the use of a portion of its road, which is a public highway of the state, and a further violation of law, in that it attempts to give to said complainant corporation the exclusive use of said railroad terminal, to the exclusion of all other competing lines of steam-boats, including that of respondents.

Respondents further allege that the threats charged to have been made by respondents in said bill of complaint consisted solely in a notification sent by them to the president of said steam-boat company that he should comply with the above decision of the railroad commission and the laws of the state of Florida, or stand a trial for their violation; that said president is the active and responsible manager of the said Jacksonville, Tampa & Key West Railway Company, and it was in this latter capacity that it became his duty to obey the orders of said commission, and for the omission to do which respondents threatened to prosecute.

Respondents further say that they have a legal right to land at said wharf to receive and deliver freight to and from said railroad company, and that any interference with said right by complainant company, either by wharf charge or other restrictions, is a trespass upon their right, and that said lease from said railroad company is void in so far as it conflicts with their right to use said wharf.

Further answering, and in reply to that portion of the bill alleging that respondents claim said dock and wharf to be public property, and the public are entitled to the free use of same, they say that said wharf occupies and is a part of a public street of the town of Titusville, called "Broad Street;" that a map of the town-site of Titusville was placed on record by the proprietors thereof on the 9th day of February, A. D. 1878, when said town-site was a part of Volusia county, and that upon this map Broad street was shown as at present located, except that it was 106 feet instead of 100 feet wide; that a lot was purchased on the south side of said Broad street, (by said map,) and devoted to business purposes, and after that part of Volusia county, including Titusville, was joined to Brevard county, and in the year 1881, the original proprietors of said town-site had a map of said town placed on record in Brevard county, showing the streets substantially as on the first map, certified copies of portions of said maps being attached to the answer of respondents.

Respondents further aver that, upon the faith of the dedication of the streets shown on said maps, lots were bought, money invested, and the town built up by the public, and that said dedication and use of Broad street vested the right thereto in the community beyond the subsequent control of said original proprietors.

That the object in locating the town of Titusville upon the river was to enjoy its facilities as a highway, and, Broad street being one of the only two avenues leading to the river by which it could be reached from the interior of the town without going over private property, the right to pass over said street to the river was dedicated by said maps, and the terminus of said street at the river was used by the public in accordance with the dedication by the original proprietors from 1876 until its use was interrupted by said complainant in this suit.

Further, that in 1885 the Atlantic Coast, St. Johns & Indian River Railway Company procured from Mrs. Titus, the original proprietor of the town-site of Titusville, a deed to all of Broad street, notwithstanding said street had been dedicated to and accepted by the public in

1876, and that the lots fronting thereon had been nearly all disposed of by said original proprietor prior to her sale of said street; that no dedication of Broad street for general railway purposes was ever made, the only dedication of it being to the public to use as a street, as shown by said maps.

Respondents further allege that the Atlantic Coast, St. Johns & Indian River Railway Company commenced business in January, A. D. 1886, and soon thereafter leased its road to the Jacksonville, Tampa & Key West Railway Company, and that during the years 1886, 1887, and 1888 the use of Broad street, and the right to pass over the end of it to Indian river, was enjoyed equally by the railroad company and the public at large, although the street had been extended to the channel of the river by the railroad for the accommodation of its business, and the right of the public to a free landing at the end of said street, according to its original dedication, was not interrupted until the year 1889, when the said Jacksonville, Tampa & Key West Railway Company attempted to lease that part of the street where it had been extended to the channel of the river to the complainant, the said Indian River Steam-Boat Company.

Respondents also allege that no proceedings have ever been taken to condemn any portion of Broad street for railroad purposes; that the deed from Mrs. Titus to said railroad company in 1885 is void as far as it attempts to interrupt the easement of the public in said street; and that said railway company and its attempted lessee, the said complainant in this suit, are trespassers upon said street, which is public property, under the control of the town council of Titusville, and not in the Jacksonville, Tampa & Key West Railway Company or in said complainant.

In conclusion, respondents pray the same advantage of their answer as if they had pleaded or demurred to the bill of complaint.

Affidavits of W. B. Watson and S. M. Lorimer were filed on behalf of complainant company before the judge, at chambers, on January 2, A. D. 1891. These affidavits will be referred to in disposing of the questions to which they relate in the discussion of the case.

On the 3d day of January, A. D. 1891, the said complainant company filed with the judge, at chambers, a motion to strike from the files the answer of respondents, because it purports to be the answer of a corporation, and is not under its corporate seal; that, if said answer be considered the answer of individual stockholders, it is improper, as, to some or all of them, it was filed without leave first obtained; and because the motion to dissolve is based upon the answer, and must fail if there is no proper answer. Subsequent to the filing of this motion to strike, and without any action being had thereon by the court, complainant filed with the judge, at chambers, certain exceptions to the answer of respondents, on the grounds of scandal and impertinence. The portions of the answer alleged to be scandalous and impertinent are pointed out. No disposition seems to have been made of the exceptions, but on the 7th of January, A. D. 1891, the judge made the following decision on the motion to dissolve the injunction, viz.: "This cause coming on to be further heard on motion to dissolve the injunction, after hearing counsel for both parties it is ordered, adjudged, and decreed that the temporary injunction heretofore granted herein be dissolved, and, further, that the bill be dismissed without prejudice."

The Indian River Steam-Boat Company, complainant below, appeals from the decree dissolving the injunction and dismissing the bill.

Hamlin & Stewart, for appellant. *Robbins & Graham*, for appellees.

MABRY, J., (*after stating the facts.*) The question sought to be presented by the motion to strike the answer of respondents from the files does not properly arise. The bill was filed against R. P. Paddison, George M. Robbins, and Walter S. Graham, doing business as the East Coast Transportation Company. The answer alleges that G. F. Paddison, George M. Robbins, and Walter S. Graham composed the East Coast Transportation Company, and that R. P. Paddison was only an employe of said company. It is further stated in the answer that said company was then incorporated under the laws of Florida, but respondents waive the misnomer as to R. P. Paddison, and the failure to denominate them as a corporation in the bill. While they say they appear in their corporate capacity as the East Coast Transportation Company, in fact it is the answer of respondents individually, as they are sued.

Without a hearing on the motion to strike, complainant filed numerous exceptions to the answer, and said motion may be considered as abandoned.

The exceptions to the answer were filed after the motion to dissolve was made, and pending the consideration of said motion. It seems that an order *nisi* to dissolve an injunction, under the English chancery practice, obtained after exceptions to the answer have been filed, is irregular. Williams v. Davis, 1 Sim. & S. 262; Howes v. Howes, 1 Beav. 197. In Gibson v. Tilton, 1 Bland, Ch. 352, it is said by the chancellor: "On the hearing of a motion to dissolve an injunction, objections of every kind to the answer may be made, and are then in order, because the motion itself, in its very nature, is founded upon the correctness and sufficiency of the answer in every particular. Hence the plaintiff may, on the very day of hearing the motion, file exceptions to the answer, and have them then heard and decided upon. The defendant can have no cause to complain of surprise, because, by his motion, he calls upon the plaintiff to show cause why, after having well and sufficiently answered the bill, the injunction should not be dissolved; and having thus planted himself upon the sufficiency of his answer at that time, and for that purpose, he stands pledged to

sustain it in all respects, or he must fail in his motion." In Stilt v. Hilton, 31 N. J. Eq. 285, it was held that, where the answer sufficiently denied the grounds of equity upon which the injunction was granted, it will be dissolved, although exceptions to other parts of the answer have been filed. The court said: "The filing of exceptions to an answer is, of itself, no objection to the dissolution of an injunction. The court will consider the exceptions only for the purpose of ascertaining whether they relate to those parts of the bill on which the injunction was awarded." The exceptions to the answer in the case now under consideration are pointed specially at the portions setting up the decision of the railroad commission, and the location of the dock in question in a public street of the town of Titusville. The conclusion we have reached in reference to the effect of such portions of the answer on the issue before us, as will fully appear in a subsequent portion of this opinion, makes it unnecessary for us to consider the question of exceptions at all, as they relate to matters which have no bearing on questions settled here. We proceed to inquire, then, into the other matters presented for our consideration upon the appeal. In so far as the correctness of granting or dissolving the injunction is involved, it is clear that we have to deal only with the matters presented by the record in relation to the Titusville dock, as no injunction was granted as to any other.

The appellees, in contending here for an affirmance of the decree of the lower court in dissolving the injunction, do not question, it seems, the sufficiency of the bill in point of equities to justify the issuance of the injunction on an *ex parte* showing. Upon information of the existence of the bill, and the issuance of the writ, they filed an answer, and upon that moved to dissolve. This they had a right to do, but their motion to dissolve involves the sufficient equities of the bill to justify the writ in the first instance. We will therefore inquire if the bill justified the issuance of the injunction. The last case decided by Chancellor KENT (Jerome v. Ross, 7 Johns. Ch. 315) has been recognized as occupying a foremost place on the subject of equitable jurisdiction in matters of trespass. In this case the remedy of injunction was invoked to restrain a defendant from digging and carrying away rock from plaintiff's premises, and was denied on appeal by the learned chancellor. Nothing special was alleged as to the value of the rock, or the uses to which it could be applied. The principle announced here is that an injunction will not lie to enjoin a mere trespass, where the injury is not irremediable and destructive of the estate, and when the ordinary legal remedy in a court of law will afford adequate satisfaction. In Shipley v. Ritter, 7 Md. 408, it is said that, although an injunction will not be granted to restrain a trespasser merely because he is a trespasser, yet equity will interfere where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property as it had been held and enjoyed, or where it is necessary to prevent a multiplicity of suits. Here an injunction was decided to be proper to restrain the destruction of timber so situated with reference to a dwelling-house that it sheltered it from storms, and shaded it from the sun, and was ornamental to the grounds. A very clear view of the chancery court's powers in such cases is expressed in the case of Gause v. Perkins, 3 Jones, Eq. 177. It is here said, much difficulty occurs in defining what injury is irreparable. "The word means that which cannot be repaired, retrieved, put back again, atoned for." An example is given in this case of the destruction of the noble oaks in the state-house grove. "But the meaning of the word 'irreparable,' pointed at by this example, is not that which has been adopted by the courts either in England or in this state. Grass that is cut down cannot be made to grow again, but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: The injury must be of a peculiar nature, so that compensation in money cannot atone for it. Where, from its nature, it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable." There is nothing in the nature of a dock itself to make the landing of boats thereat a cause for equitable interposition. An injunction for this purpose was granted in the case of Dying Establishment v. Fitch, 1 Paige, 97. On appeal Chancellor WALWORTH dissolved it. He says, in dissolving this injunction, that "it is sufficient for the decision of the question immediately before the court that it does not appear that any serious damage or irreparable injury will take place if the defendants continue to run their boat and land their passengers, as they have heretofore done, until the complainants' rights are admitted by the answer or settled on the hearing. On the other hand, I can readily see that retaining the preliminary injunction may produce great injury to the defendants, and for which they would be entirely without remedy, if it should finally appear that they were only in the exercise of their legal rights." The view is expressed in this case that, while an injunction may issue to restrain a trespass, there must be something peculiar in the case to sustain the jurisdiction and bring it under the head of quieting possession, or to make a case of irreparable mischief, or the value of the inheritance must be put in jeopardy by a continuance of the trespass. It has been declared by our own court that "the object and purpose of an injunction is to preserve and keep things in the same state or condition, and to restrain an act which, if done, would be contrary to equity and good conscience; and it is the appropriate relief when the remedy at law is subsequent to the injury, and the effects cannot be adequately compensated." Railroad Co. v. Spratt, 12 Fla. 26. While it is said in this case that insolvency, alone, of the person against whom the injunction is asked, is not sufficient to give the court jurisdiction

to grant the writ, yet this fact may be taken in connection with other equitable grounds to aid the jurisdiction. Yonge v. McCormick, 6 Fla. 368. In Burns v. Sanderson, 13 Fla. 381, it was held that averments in a bill that defendant had interfered and intermeddled with the real estate described in the bill, and continues to do so, and has and still continues to forbid the tenants and lessees to pay the rent to the plaintiff, and has forcibly entered one of the buildings on the premises, does not lay a foundation for an injunction. It is said: "The bill does not allege that irreparable damage or mischief will ensue, nor does it state the facts complained of, so that the court may form its own conclusion in reference thereto." For all the alleged trespasses and grievances in this case there was an adequate remedy at law, and nothing was alleged to show that irreparable injury would result, and the remedy at law is inadequate to fully compensate for it.

It is to be observed, in considering the sufficiency of a bill to justify an injunction in cases of trespass, it will not do to simply allege that complainant has no adequate remedy at law, and that his damage will be irreparable. The courts will not act upon complainant's opinion, or even his fears, in such matters; but he must state facts in his bill to enable the court to determine whether or not his alleged injury will be irreparable.

Tested by the rules applicable to such cases, we think the equities of the bill in the case before us, in reference to the Titusville dock, are sufficient to justify the issuance, on proper application, of the writ of injunction. The bill alleges that the complainant company is engaged in operating boats on the Indian river, in the business of carrying freight and passengers, and is under a contract to carry the mails; that it has leased from the Jacksonville, Tampa & Key West Railway Company the portion of the dock and pier at Titusville particularly described in the bill, and has the exclusive right to use the same for the landing of its boats. Not only has it this right, but that it has been since March, A. D. 1889, in the exclusive use of said dock and pier, and its offices and head-quarters are there; that said dock and pier are inadequate to accommodate fully complainant's business; and that it has never held itself out as a wharfinger. The bill also alleges that the character of its traffic business—carrying perishable products—and its mail contract require complainant to act with great promptness in making connections, and a failure to do so would subject it to forfeiture and heavy penalties; that its winter business is much heavier than in the summer, and that the winter business had set in, was rapidly increasing, and that all the room on said dock was imperatively demanded to enable complainant to carry on its business, and meet its obligations under its mail contract; that the use of said dock by respondents for any considerable time would cause delays in loading and unloading, and possible loss of connections, and thereby cause irreparable damage; and, further, that complainant was under contract to transfer and deliver immediately large shipments of freight and materials, which particularly tax all its facilities to the utmost, and that any interference with said dock would at the time be especially injurious. It is then alleged that respondents have procured one or more boats, propose, and are engaged in, carrying freight and passengers on said river, and that they persist in landing their steam-boats at complainant's said dock through force and threats made by them that if they are deterred from landing, or hindered in any way in transacting their business, at said dock, they would cause to be arrested the agents and employes of complainant, and that, for each package of freight or other matter refused to be received upon said dock, they would sue complainant for damages, and that respondents threaten to continue daily to land at said dock, and to use the same freely for all purposes connected with their business, without the payment of wharfage or other charges; that notwithstanding the lease of said dock to complainant, and its exclusive occupation of the same, of all which respondents have been fully informed, they claim that said dock is public property, and they have the right, in common with all persons, to all the rights and privileges of complainant in and about the same; and that if respondents are permitted to succeed in freely using and occupying said leased premises the entire public will also insist on doing so, and the same will become worthless as a franchise and place of business for complainant.

It is further alleged that complainant apprehends that respondents cannot be deterred from using said property except by the daily use of superior force, and that if such force be used, or packages of freight consigned to them be refused, complainant would be subjected to a multitude of vexatious suits, and the use of said dock by respondents would necessitate the removal of complainant's boats at times therefrom, and would prevent it from properly conducting its business, storing its freight, mooring its boats, and would thereby cause it irreparable injury. Not only would said interference with said dock by respondents cause litigation, expense, delays such as seriously to affect its business, prejudice its rights, and cause irreparable damage, but that respondents are believed to be insolvent, and the judgments that might be recovered against them would be uncollectible. These averments are sufficient to justify the writ. See authorities above cited, and also Dudley v. Hurst, 67 Md. 44, 8 Atl. Rep. 901, 1 Amer. St. Rep. 368, and note; Burnley v. Cook, 13 Tex. 586; Rogers Locomotive & Machine Works v. Erie Ry. Co., 20 N. J. Eq. 379.

The motion to dissolve being based upon the answer of respondents, the justification of the decree of the court in dissolving the injunction must be found in the allegations of said answer, as respondents filed no additional evidence. In the beginning of an examination of the answer, we must keep in mind that, on motion to dis-

solve, respondents will not be permitted to rely upon new matter in avoidance, in their answer, not in response to the allegations upon which the equities of the bill are founded. It is stated in 2 High, Inj. (3d Ed.) § 1481, that "no principle of the law of injunction is better established than that where the equity of the bill is admitted by the answer, or is not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is not equivalent to a denial of complainant's equities, and the injunction will not be dissolved, but will be continued until a hearing of the cause." The numerous authorities cited in the notes sustain this proposition. In Yonge v. McCormick, 6 Fla. 368, it was decided that the court, on motion to dissolve an injunction, will look into such facts of the answer, only, as are responsive to the bill, and, where a new equity is set up in the answer to avoid that disclosed in the bill, it will not be considered. *Vide*, also, McKinne v. Dickenson, 24 Fla. 366, 5 South. Rep. 34. In their answer, respondents admit that they have purchased a steam-boat for the carriage of freight and passengers, and are landing the same at the said Titusville dock, and that they cannot be deterred from doing so except by the daily use of superior force. They say that they are landing at said dock for the purpose of receiving and delivering freight to and from the Jacksonville, Tampa & Key West Railway Company, under authority of a decree of the railroad commission of the state of Florida, securing respondents in that right. Respondents then allege in their answer, that in July, 1890, they complained to the railroad commission of the state of Florida that the Jacksonville, Tampa & Key West Railway Company, a railroad corporation operating a railroad in Florida, discriminated against respondents by attempting to lease the exclusive use of said dock and pier at Titusville, which was the river terminal of said railroad company, and that upon their complaint, and after due hearing, said commissioners decided on the 14th day of August, A. D. 1890, that the charter terminus of said railroad company was the channel of Indian river, to which point said road had been constructed, and that said dock and pier at Titusville are a part and parcel of the main line of said railroad, and a necessary and indispensable facility which the law enjoins it to provide for the transportation of its business; further that said railroad company, by said lease to said steam-boat company, had attempted to vest in it an exclusive use of said dock; and it was thereupon adjudged that said railroad company was guilty of an unjust discrimination, under section 4, c. 3862, Laws Fla., and that it at once desist, and extend to the East Coast Transportation Company the same uses, services, facilities, and privileges at the end of said dock as are extended to the complainant company. The decision of the railroad commission, a certified copy of which is filed as a part of the answer, is set up therein as a complete bar to the relief prayed in the bill. This decision was based upon proceedings instituted by the East Coast Transportation Company against the Jacksonville, Tampa & Key West Railway Company, and the complainant steam-boat company was not a party to it. While it is determined in said decision that during the years 1886, 1887, and 1888 the Jacksonville, Tampa & Key West Railway Company transacted all its business at the end of the said dock, and all its river freight was delivered at its freight-shed at the end of said dock, and that the said dock was a part and parcel of the main line of the railroad company, to which the Jacksonville, Tampa & Key West Railway Company succeeded by lease, and a necessary and indispensable facility for the transaction of its business, which the law enjoins it to provide, at the same time it was decided by the said commission that it had no jurisdiction of the Indian River Steam-Boat Company, and no order was made so far as this company was concerned.

It also appears by the said decision that the commission was proceeding under the last clause of section 4, c. 3862, Laws Fla., which provides that no common carrier subject to the provisions of this act shall "make any unjust discrimination in the receiving of freight from, or in the delivery of freight to, any competing lines of steam-boats in this state," and that they had not prescribed any rules and regulations defining or specifying what would be considered as acts of unjust discrimination under this clause, but deemed it advisable to let each case of alleged unjust discrimination rest upon its attending circumstances.

In the decision set up in the answer, the commission, on the complaint made, heard the facts, and decided against the Jacksonville, Tampa & Key West Railway Company as above stated. Appellees say that the decision has the force and effect of law, so far as their right to land at the said dock goes, and that the failure of the complainant company to allege and show this decision before the injunction was obtained was an imposition upon the court, and a just ground for dissolving the temporary injunction. On the other hand, the appellant company says that its lease was obtained from the said railroad company before the said decision was rendered, that it was not a party to the proceedings upon which said decision was based, and that the said railroad commission had no jurisdiction to adjudicate its rights in any manner whatever.

It will be observed that in this portion of the answer the decision of the commission is set up as a complete bar to the relief sought. The facts which the commission found and adjudicated to exist are not averred, but simply the decision of the commission is alleged as a sufficient defense to the equities of the bill. Under the rule above announced, we do not think the consideration of this portion of the answer comes properly before us. We are considering the correctness of the decision of the court in dissolving the temporary injunction, and the portion of the answer now under consideration is not in re-

sponse to any allegation in the bill, and sets up new matter in defense of the case made in the bill. It is not such a negation of the equities of the bill as to be a responsive denial of the circumstances upon which they are based, and hence we are not called upon to pass upon this portion of the answer. Counsel for appellees do not contend that the portion of the answer alleging the dock to be a part of a public street, called "Broad Street," in the town of Titusville, is in response to the equities of the bill, and entitled to consideration on the motion to dissolve. In view of the conclusion which we have reached on the other allegations of the bill, it becomes unnecessary for us to consider this portion of the answer. What are the other allegations, then, of the answer, responsive to the equities of the bill? It is evident that complainant's equity for the injunction depends upon the validity of its title or right to the dock in question. Confining ourselves to the allegations in reference to the Titusville dock,—the one in question,—we see that the complainant company claims an exclusive right to use, occupy, and land its boats at said dock. Its right to the exclusive use of this dock is derived, it is claimed, by lease from the Jacksonville, Tampa & Key West Railway Company. A copy of the lease is filed with the bill. The lease covers about 390 feet of the east end of the dock, and by the terms of the lease the railway company "covenants and agrees to maintain the railroad track on said pier and bulk-head, and trestle supporting said track, and to furnish proper and adequate facilities for transfer of local freights to and from said bulk-head." It is further alleged that said leased dock and buildings thereon have been constantly occupied and used by the complainant company for its offices, head-quarters, and place of transacting most of its general business, since the 1st day of March, A. D. 1889. Respondents deny that they are seeking to make their head-quarters at said dock, but say they are landing there for the purpose of receiving and delivering freight to and from the Jacksonville, Tampa & Key West Railway Company. There is nothing in the affidavits to show that respondents are making any attempt to occupy any houses or to establish head-quarters on said dock. It appears in one of the affidavits that at least two of the complainant company's boats were moved on one occasion to make room for respondents' boat to land at said dock. The landing at the dock by respondents' boat is admitted, but it is alleged to be for the purpose of receiving and delivering freight to and from the railroad company. Respondents admit the alleged lease from the Jacksonville, Tampa & Key West Railway Company, but they deny that said lease is now in full force and effect, or ever was valid or effectual in law. They aver that said dock, so leased, constitutes the charter terminal of said railroad company; and they deny that the sole object of said complainant company in entering into said lease with said railroad company was to control premises adequate to the transaction of its business, but they aver that its object therein was also to control the said terminal facilities of the said railroad company on the Indian river at Titusville, and thus to prevent the use of said railroad terminal facilities by any competing line of steam-boats that might be put on said river, in order to preserve a monopoly of the transportation business of said river, and that the use of said railroad terminal facilities has been denied to respondents and the public since said lease.

Respondents also allege that said lease by the Jacksonville, Tampa & Key West Railway Company to said complainant company is not merely voidable, but the same is utterly void and worthless, upon its face, as repugnant to the common and statute laws of Florida, and a violation of the charter duties of said railroad company, in attempting to exclude the general public from the use of a portion of its road, which is a public highway of the state, and a further violation of law, in that it attempts to give to said complainant company the exclusive use of said railroad terminal to the exclusion of all other competing lines of steam-boats, including that of respondents; and they deny the allegation that they are not pecuniarily responsible for any and all damages that they may occasion said complainant company.

The mere conclusions of law stated by respondents in their answer in reference to complainant's ownership or right to the said dock can have no weight in determining the questions before us. But independent of such statements, and of the allegations in reference to the railroad commission decision, and the location of the dock in the public street, the answer denies complainant's title or right to the exclusive use of the dock; and such denial is based upon the fact that said dock constitutes a portion of the track and the terminal facility of the Jacksonville, Tampa & Key West Railway Company, and the exercise of the right claimed by the complainant company would have the effect to exclude other competing lines of steam-boats from landing at said railroad terminal facility. The bill discloses the fact that complainant's right to the dock was derived from the Jacksonville, Tampa & Key West Railway Company, which is a common carrier of freight and passengers, and the lease shows that said railroad company covenanted with the complainant company to keep the railroad track on said dock in repair, and to furnish adequate facilities for landing local freights from said dock. The answer, in effect, says that complainant has no right, notwithstanding its lease, to exclude other competing lines of steam-boats from landing at said dock, because it is a part of a railroad track, and the terminal facility of a common carrier. William B. Watson, general superintendent of the complainant company, in his affidavit, states that he is personally familiar with the objects that prompted the lease of said dock from the Jacksonville, Tampa & Key West Railway Company; that the main object is truthfully stated in the bill of complaint,

and it was not the object of said steamboat company, in leasing said dock, to control the terminal facilities of said railroad company, or to prevent the use of said dock by any competing line that might be put on the river, in order to preserve a monopoly; that at the time of said lease there was no opposition line upon said river, nor was there any rumor or prospect that any such competing line would exist; that said dock was not then adequate to the needs of said complainant company, and said railway company did not deem it a good investment for it to expend money in enlarging said dock, and keeping the same in good repair, for the revenue that could be derived from it; that the terms of said lease were agreed upon between the railway company and complainant company as a fair and reasonable disposition of said property; and that the complainant company has expended more than $3,000 in adding to said dock since it went into possession of the same. It is also stated in the affidavit that all the dock room was needed for the complainant company in carrying on its business, and that it had never done a wharfinger business. The other portion of the affidavit has no reference to the lease. The other affidavit has no bearing on the subject of the lease.

The general rule on the subject of dissolutions of injunctions on bill and answer, prior to chapter 1098, Laws Fla., was that when the answer fully denied all the circumstances upon which the equity of the bill was based the injunction would be dissolved; but this was not an inflexible rule, and the granting and dissolving of injunctions was lodged in the sound discretion of the court, to be governed by the nature and circumstances of each case. Allen v. Hawley, 6 Fla. 143; Carter v. Bennett, Id. 214; Yonge v. McCormick, Id. 368; Hayden v. Thrasher, 20 Fla. 715. Under chapter 1098, Laws Fla., when "the defendant, in his answer, shall have denied the statements of the bill or of the accompanying affidavit, either party thereto shall have the right to introduce evidence in support or denial of the bill and accompanying affidavit or answer before the injunction or other summary order shall be dissolved, and the chancellor shall dissolve or continue the order, or may require security, according to the weight of the evidence." The old rule is modified by this statute to the extent of allowing either party to introduce evidence in corroboration or denial of the bill or answer, and affidavits before the hearing on the motion to dissolve, and that the chancellor shall then determine the matter according to the weight of the evidence. Sullivan v. Moreno, 19 Fla. 200; Fuller v. Cason, 26 Fla. 476, 7 South. Rep. 870. While the chancellor will ordinarily dissolve an injunction upon an answer denying all the equities of the bill, or where the bill and accompanying evidence are fully met by the answer and its accompanying evidence, it does not follow, as a matter of course, to do so in all cases. Where fraud is charged an illustration is found in the case of Hayden v. Thrasher, supra, that mere denials of fraud or of fraudulent intent, without a full explanation of the facts charged in the bill, will not be sufficient to justify a dissolution of the injunction rightly granted in the first instance. And so, in case an injunction is granted to prevent irreparable injury, the dissolution or continuance thereof rests in the sound discretion of the court, to be governed by the nature of the case. Fuller v. Cason, supra.

Are the averments of the answer, given above, sufficient to constitute a responsive denial of the equities of the bill upon which rests complainant's right to relief? In the case of Sullivan v. Moreno, supra, the complainant alleged that he and his grantor had for more than 30 years owned and possessed certain described parcels of land lying on the Bay of Pensacola, and during all of said time had been in the quiet possession and enjoyment of all the rights of a riparian owner, until the defendant wrongfully entered into possession of certain portions of the front of said property out in the waters of said bay, and commenced the erection of certain docks, which, if permitted, would exclude plaintiff from his rights, and do him irreparable injury. It is also averred that said docks will prevent navigation and perpetuate a nuisance. Defendant, in his answer, admitted that complainant had been in possession, and claimed to own the land mentioned in the bill, in respect to which riparian rights were asserted; but he denied that said lots ever did extend to the ordinary high-tide mark of Pensacola bay, and affirmed that said lots were always bounded on the part towards the bay by a public way, street, or common, and exhibited a certified copy of a deed showing that the lots claimed by complainant were bounded by said public street, way, or common. It was held that on this bill and answer, in the absence of other evidence, no injunction should have been granted, as the equities of the bill were completely negatived by the answer. So it was said in the cases of Allen v. Hawley and Carter v. Bennett, supra, that a denial in the answer of the circumstances upon which the equities of the bill are founded will be sufficient, ordinarily, to dissolve the injunction. In this connection it may be proper to state that in the affidavits of the general superintendent and agent of the complainant company, interposed after the answer was filed, it is not denied that the said dock is a part of the track, and constitutes the terminal facility, of the common carrier, the Jacksonville, Tampa & Key West Railway Company. It is true that one affidavit states that the motive in obtaining the lease was not to secure a monopoly, and exclude competing lines of steam-boats from landing at the terminal facility of said railroad company; but the facts set up in the answer in reference to the character of the dock are not denied in the affidavit, and the failure to do so is a circumstance weighing against the complainant company on this point. If what respondents have averred in connection with their denial of complainant's title or exclusive right to the dock be sufficient

to destroy the equities of complainant's bill, we think it is so responsive as to be considered on the motion to dissolve.

The remaining question, then, is, has sufficient been shown to defeat complainant's equity to have the injunction continued? It is not to be denied that said railroad company, or said complainant steam-boat company, has the right to erect and maintain docks, wharves, and piers as incidental to their business, and hold them or dispose of them as deemed proper. The bill alleges, and it is admitted, that the complainant steam-boat company is a corporation, and that the nature and extent of its business render the erection and maintenance of docks and piers at Titusville, and elsewhere on the Indian river, necessary, and the right to do so is one of its charter privileges, and under the laws of this state the Jacksonville, Tampa & Key West Railway Company is authorized to build and maintain docks and wharves as incidental to its business. If either company should erect a dock or wharf for its private use, we know of no law to prohibit it. At least, as the matter is now presented, without any allegation or proof that the exercise of such a right would transcend the powers of such corporations, or that it is the only facility of the kind in the particular place, we cannot hold that they have no such rights. Undoubtedly, if either company should erect a dock or wharf, and open it to the public for a general wharfage business, the public would have a right to use the same, under such reasonable regulations, and upon the payment of such charges, as the owner might fix, or as might be regulated by law. Packet Co. v. Aiken, 16 Fed. Rep. 890; Cannon v. New Orleans, 20 Wall. 577; Packet Co. v. Keokuk, 95 U. S. 80; Transportation Co. v. City of Parkersburg, 107 U. S. 691, 2 Sup. Ct. Rep. 732. But we are not dealing with the sole question of ownership or rights in reference to a dock or wharf. It is true that the bill characterizes the property in question as a dock or pier, and it appears that there are houses thereon, occupied by the complainant company as its offices and head-quarters, and that said dock has been enlarged by said company, by expending over $3,000 on it, since its said lease. No doubt there are portions of this said dock to which said company is entitled to the exclusive use. But it also appears that upon this dock is the track and terminus of a common carrier. The landing at said dock by respondents' boat for other purposes than delivering and receiving freight to and from said carrier is denied, and complainant company, in the affidavits filed, do not deny that the railroad track and terminal facility of the Jacksonville, Tampa & Key West Railway Company are located on said dock. In fact, the contract of lease shows that said railroad company covenanted with the complainant company to keep in repair and maintain said track, and afford facilities for delivering freight to the latter company. We do not overlook the fact that it is alleged in the bill that there is another dock at Titusville, not owned by complainant company, at which respondents can, and sometimes do, land their boat, and that said leased dock does not interfere with the use of said other dock, or those that may be constructed on the adjacent property along the extensive water-front at Titusville. It is not alleged, nor is it contended here, that the other dock mentioned, or those that may be constructed along the water-front, would offer respondents ingress and egress to the said railroad track and terminal facility. If it was designed by this allegation to show that respondents have another way of reaching said railroad on said dock for the purpose of delivering and receiving freight to and from said railroad, it is too indefinite to accomplish this object. No such effect is claimed for it here. The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian river by means of steam-boats, rent from a railroad common carrier its dock on said river, on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of receiving and delivering freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this. In the case of New England Exp. Co. v. Maine Cent. R. Co., 57 Me 188, the railroad company contracted with the Eastern Express Company to give them a certain specified space in the car attached to the passenger train, and to transport their agents and property on certain conditions, and agreeing specially that said railroad company would not grant or let any similar space in any car or cars attached to the passenger trains on its road to any other express company or persons during the continuance of said contract. This contract was declared to be void at common law, as being one obviously conferring a monopoly upon the express company. The chief justice, who delivered the opinion of the court, said: "Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply. All applying have an equal right to be transported, or have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation, they are liable to an action if they refuse to carry freight or passengers without just ground for refusal." In this case it was said, in effect, that the common carrier could not escape its common-law liability, or avoid the performance of its duties to the public, by fencing off a part of a car for the Eastern Express Company. Quot-

ing further the language of this opinion, it is said: "The very definition of a common carrier excludes the idea of the right to grant monopolies, or give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application. The corporations derive their chartered rights from the state. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so imposed as specially to benefit one and injure another. They cannot, having the means of transporting all, select from those who may apply some whom they will, and reject others whom they can but will not, carry. They cannot rightfully confer a monopoly upon individuals or corporations." In this case the contract with the express company was entered into before a statute was passed in the state of Maine giving all expressmen reasonable and equal terms, facilities, and accommodations, and the use of depots, buildings, and grounds, for the transaction of their business upon railroads in the state; but the court held that the railroad company had no right, before the passage of the act, to make such a contract. A contract similar in its nature was held void in International Exp. Co. v. Grand Trunk Railway of Canada, 81 Me. 92, 16 Atl. Rep. 370. The same doctrine was announced in the case of Sandford v. Railroad Co., 24 Pa. St. 378. Judge Lewis says in this case: "If it [the common carrier] possessed this power, it might build up one set of men, and destroy others; advance one kind of business, and break down another, and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate control. Like the customers of a grist-mill, they have a right to be served, all other things being equal, in the order of their application. A regulation, to be valid, must operate on all alike. If it deprives any persons of the benefits of the road, or grants exclusive privileges to others, it is against law, and void." In Bennett v. Dutton, 10 N. H. 481, the facts were that the defendant was the proprietor of a stage-coach running daily between Amherst and Nashua, which connected at the latter place with another coach, running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst, and onward to Francistown. A third person ran a coach to and from Nashua to Lowell. The defendant agreed with the proprietor of the coach connecting with his line that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day that they applied for passage to places above Nashua. It was here held that defendant was bound to receive the plaintiff; there being sufficient room, and no evidence that he was an unfit person, or that he had any design to injure defendant. In Marriott v. Railway Co., 1 C. B. (N. S.) 499, it was held that an arrangement made by a railway company with the proprietor of an omnibus running between a station on its railroad and another point, to provide omnibus accommodations for all passengers by any trains on said road, by which the proprietor of said omnibus was allowed the exclusive privilege of driving his vehicle into the station-yard of said railroad for the purpose of taking up and setting down passengers at the door of said railroad office, was a breach of the prohibition against granting unfair preferences. This decision was made under St. 17 & 18 Vict. prohibiting "undue and unreasonable" preference. Such a statute, however, has been regarded in America as declaratory of the common law, and the same result would be reached independent of the statute. Sandford v. Railroad Co., supra; 1 Wood, Ry. Law, p. 563, § 195. See, also, the following authorities bearing on this branch of the case: Railroad Co. v. Burrows, 33 Mich. 6; Rogers Locomotive & Machine Works v. Erie Ry. Co., 20 N. J. Eq. 379; Messenger v. Railroad Co., 36 N. J. Law, 407; Messenger v. Railroad Co., 37 N. J. Law, 531, McDuffee v. Railroad, 52 N. H. 430.

The respondents denied that they were insolvent, and there is nothing in the affidavits on this subject. In determining the propriety of dissolving or continuing an injunction, the chancellor may not only anticipate the character of the injury that may result to the complainant in the event he should finally succeed, but he can also consider the extent and character of the damage which defendant may sustain by means of the injunction. Dyeing Establishment v. Fitch, supra. The proceedings here do not call for a cancellation of the lease from the railroad company to the complainant steam-boat company, yet, from what has been said, it is evident that the latter company cannot avail itself of said lease to prevent the respondents from reaching the railroad track and terminal facility of the former company. State v. Railroad Co., 29 Conn. 538. The temporary injunction was dissolved by the chancellor on bill, answer, and affidavits. His action should not be disturbed unless we can see that a sound discretion has been abused.

The chancellor not only dissolved the injunction, but dismissed the bill. In dismissing the bill, we think, there was error. The bill alleged that respondents were using and occupying said dock and pier at Titusville, and the premises and appurtenances thereto, and also using and occupying numerous other docks at other points on said river. The injunction prayed was to restrain respondents from such use of said docks, and from making them the usual place for landing their boat, and that complainant be decreed the undisturbed and undivided possession of said docks. No injunction was granted as to any of the docks except the one at Titusville, but respondents answered, tendering an issue upon the averments as to the other docks. They deny that they are making their head-quarters on the Titusville dock, or using the same otherwise than as a landing at the railroad termi-

nus for the purpose of receiving and delivering freight from and to the said railroad. It was proper, we think, to dissolve the injunction restraining respondents from landing their boat at the Titusville dock, under the circumstances. Still, the bill states a case which would, if proven, entitle the complainant to the relief asked upon the final hearing, and it was not proper to dismiss its bill without an opportunity to sustain it in the usual way of making proof in such cases. It cannot be said that no other relief was sought in the bill, except to restrain respondents from landing their boat at the Titusville dock. Under the allegations here, and the circumstances of this case, the bill should not have been dismissed. 2 High, Inj. § 1477; Gray v. Baldwin, 8 Blackf. 164.

The decree of the chancellor, in so far as it dissolved the injunction, is affirmed, and, in so far as it dismissed the bill, is reversed; the costs of the appeal to be divided between the parties.

(44 La. Ann. 134)

FISHER *et al.* v. BOARD OF DIRECTORS OF CITY SCHOOLS OF NEW ORLEANS *et al.* (No. 10,888.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)[1]

PUBLIC SCHOOLS—BOARD OF DIRECTORS—TAXES—CERTIFICATES OF INDEBTEDNESS.

1. The board of directors of the public schools for New Orleans have the control of the school funds placed in their charge for the maintenance of the schools.

2. It devolves upon the board to compel corporations to comply with their ordinances levying taxes for the schools, if they fail to comply with their obligation in this respect.

3. The board of directors of schools has authority to stand in judgment; to institute or to defend suits.

4. A creditor of the school board has no right of action against the city of New Orleans to compel the city to recognize the validity of his claim.

5. School certificates of indebtedness by the board of directors of the public schools for the years 1874, 1875, and 1876 are not debts of the city of New Orleans, and actions for the purpose of having them recognized as valid claims can be maintained against the school board, as it is authorized to pass upon the validity of the evidence of indebtedness of every one who alleges that he is a creditor.

6. The city of New Orleans turns over amounts collected for schools to the treasurer of the school board. This officer notes the taxes of the different years, and applies the amount to the payment of certificates from the taxes of those years from which the creditors are entitled to payment.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Suit by Mrs. M. M. Fisher and husband against the board of directors of the city schools of New Orleans to recover on certain certificates. Judgment for plaintiffs. Defendants appeal. Modified. Rehearing refused.

Carleton Hunt, City Atty., for appellants. *Charles Louque*, for appellees.

BREAUX, J. Plaintiff sues, as owner of school certificates, to recover the sum of $8,097.17, with legal interest from judicial demand. These certificates were issued to teachers in 1874, 1875, and 1876 by the board of directors of the public schools, for salaries earned during those years. The petitioner prays for a judgment against the board of directors of the city schools, payable from the school-tax levied, prior to 1879, by the city of New Orleans. The defendants deny any indebtedness. Judgment was rendered recognizing plaintiff as a creditor of the school fund of the city of New Orleans for the amount claimed, with legal interest from judicial demand, to be paid, in due course, out of the school-tax levied prior to 1879. From this judgment the school board and the mayor of the city of New Orleans appeal. Plaintiff does not contend that her certificates are due by the city of New Orleans, but sues, she states in her brief, "to have whatever claims she has against the school fund recognized and paid whenever the city is enabled to collect those funds." Under the school law as it was when those certificates were issued, the city cannot be held as a debtor of the said plaintiff. The school board was an independent authority, organized under a separate act of incorporation, vesting them with distinct functions, free from all other local government. The schools were not city schools, but schools established by the state to instruct the children in the several parishes. They were styled the "common schools of the state," and were placed under the management of a "state board of directors." The state was divided into six school divisions, and superintendents were appointed in each, with salaries payable by the state treasurer out of the public school fund. The members of the school board for the city were appointed by the state board of education. Those boards employed teachers, fixed salaries, and incurred expenses for which they were responsible. They also issued certificates to teachers representing their salaries. The statute required an estimate of debts and expenditures by this board in October, each year, which was submitted to the city council. The latter complied with the requirements, and during the years 1874, 1875, and 1876 the sum of $844,677.16 was collected for the schools, and there was deposited in the hands of the school treasurer an amount of cash and certificates which more than balanced the said amount collected. The records disclose that, in compliance with an ordinance to carry into effect provisions of Act 49 of the general assembly of 1880, the authorized officers of the city of New Orleans received, in payment of municipal taxes due anterior to 1879, a part of the school certificates prior to that year. There are uncollected balances for the schools, due by tax debtors, which will form part of the fund for the payment of teachers' salaries of 1874, 1875, and 1876.

The question is one of recognition of the claim *vel non*. Judgment against the school board, recognising the claim, serves every purpose of a recognition. This body has authority to pass on the validity of any evidence of indebtedness against the school fund; to stand in judgment;

[1] Rehearing refused, February 8, 1892.

to institute and defend suits. One of its creditors has no right of action against the city of New Orleans to compel her to recognize the validity of a claim. If she fails to comply with the law relating to school funds, the board has authority to enforce compliance. It is not suggested by the pleadings there has been any failure in this respect. This court has decided that there is "no privity between the city of New Orleans and the holders of school certificates, who are exclusively creditors of the school board." Labatt v. New Orleans, 38 La. Ann. 289. The holders of these certificates had, under Act 36 of 1873, the right to recover payment out of the funds in the hands of the school treasurer levied for the years during which the salary was earned. Under that act the board, in contracting debts, was limited to the revenue of the year during which the salary was earned. Similar restriction is contained in Act No. 123 of 1874. According to the terms of the last-mentioned act, the remainder, after payment of the year for which collected, was to be applied to the expenses of the succeeding year. Under Act 49 of 1880, school certificates issued for 1874, 1875, and 1876 were made receivable for any taxes due prior to 1879. This had the effect of creating one fund for school indebtedness prior to said year. Under the present law, Act 81 of 1888, the board of directors have no authority to bind the city to the payment of any amount. They administer school affairs without any possible control on the part of the city authorities. The treasurer of New Orleans is *ex officio* treasurer of the board, and receives all funds collected for the support of the public schools. Upon him devolves the payment of payrolls and evidence of indebtedness to teachers and other employes of the board. He pays upon the order of the school board. Judgment against the school board for recognition of the claims serves every needful purpose for which suit has been brought. The judgment appealed from is amended by dismissing the claim against the city, and affirming the judgment against the board of school directors. As amended judgment is affirmed, at appellee's cost.

(44 La. Ann. 123)

PURVES v. GERMANIA INS. CO. (No. 10,852.)

SAME v. FIREMEN'S INS. CO. (No. 10,852.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)[1]

INSURANCE—CONDITIONS—WAIVER—ACTION ON POLICY.

1. The insured may either expressly or by implication waive the preliminary proof and the certificate of loss.

2. There was an implied, if not an express, waiver of the defects of the certificate.

3. The contract of insurance is one of indemnity.

4. The insurer obligates himself to make good such loss or damage as may be sustained, not exceeding the amount of the policy.

5. The evidence of the value of another plant than that destroyed by fire, and for which indemnity under a policy is claimed, tends to establish the value of the destroyed plant.

6. It is not conclusive, and will not be maintained, when a number of witnesses testified as to the capacity and value of the destroyed plant.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Actions by John T. Purves against the Germania Insurance Company and the Firemen's Insurance Company to recover on policies of insurance. The actions were consolidated, and a verdict and judgment entered for plaintiff. Defendants appeal. Modified. Rehearing refused.

Buck, Dinkelspiel & Hart, for appellants. *Joseph N. Wolfson,* (*B. R. Forman,* of counsel,) for appellee.

BREAUX, J. Plaintiff was the owner of generators, ferment tanks, mash-tubs, vinegar tanks, and such implements as are needful in carrying on the business of manufacturer of vinegar. He also had vinegar in tanks and in store at his plant, one-half of which was insured in the Germania Insurance Company in the sum of $5,000, and the other half, in a similar amount, in the Firemen's Insurance Company, as follows: On generators, ferment tanks, mash-tubs, and vinegar tanks, and such other implements usual to their trades as vinegar manufacturers, $5,500; on stock of vinegar in store and in tanks, $2,300; on boiler, pump, and machinery, $1,000; on stock of sugar and molasses in barrels, $950; on empty barrels, $200; on office furniture, $50; total, $10,000. The policy issued by the Firemen's Insurance Company is dated the 13th day of December, 1888, and that issued by the Germania Insurance Company is dated the 16th day of November, 1889. At the end of the year they were renewed and continued another year. At the time the policies were issued the property belonged to the Southern Vinegar Company. In March, 1889, it was sold to plaintiff for $4,000. The policies were transferred in due form. On the 3d day of July, 1890, the plant was nearly all destroyed by fire.

The following is a detailed list furnished by plaintiff: Sixty-two generators, each containing 30 bushels of beech shavings. Each generator contained 8,370 gallons of vinegar. Also 6 gallons of 90 grains vinegar, and 10 gallons of a lower grade. Thirty large generators, which contained, each, 120 bushels of beech shavings; and 8 barrels of 80 grains vinegar; besides 18 gallons, also, of a higher grade, and 25 of lower grades. Two tanks. Appurtenances on tanks. Six "knocked down" cisterns. Vinegar on hand, 6,550 gallons. Two tanks with 3,000 gallons low wines, $150; and three tanks with 9,000 gallons of mash.

The property is valued in the "proof of loss" at.....	$7,084.32
The property saved is valued	1,514.11
	$5,570.21

The generator is a vessel made of second-hand (oak) wine-casks. They are placed uprightly. They have a top and heading. The tops are perforated, and placed in the vessel, resting on the shavings; the others

[1] Rehearing refused February 8, 1892.

cover them. Beech shavings are placed in the vessel and pressed. Afterwards the generator is charged with vinegar, which saturates the shavings. Thus saturated, they will last as many as 15 years for vinegar manufacturing purposes. A preparation called "mash" is the first process. It consists of molasses water and yeast fermented. It is poured into stills and distilled into low wines. It passes to a receiving tank, and from it to the generator, where the vinegar is formed. The vinegar is daily drawn from the generators. The case was tried by jury; verdict was for plaintiff.

EXCEPTION.

The defendants' exception to the prematurity of the action presents the first question which arises for our decision. It was referred to the merits by consent of all parties. A few days subsequent to the fire the plaintiff sent his preliminary proofs to adjust the loss to the defendants. They were returned as incomplete. Others were written on the 16th of July, and a few days afterwards placed in defendants' hands, and they acknowledged the receipt in writing, mentioned no defects, and did not present any objection. One of these was mislaid. On the adjuster's request, another copy was furnished. In the certificate appended to the proof the notary did not certify that he was the nearest notary to the place of the fire, and that he had no interest in the loss. The plaintiff testifies that this omission was waived by the adjuster. The adjuster testifies that he only waived the clause of the policy relating to the notary's residence. On defendants' notice, plaintiff produced his books as required. He was also examined at length as to his loss, at which examination defendants' adjuster was present, and propounded such questions as he saw proper. The adjuster wrote out his estimate of loss, which was not accepted. On the 21st of August a certificate was made by another notary, setting forth that he was without interest or concern in the loss. Plaintiff testifies, substantially, that it was intended as cumulative, and not as a waiver of the final proof in possession of the defendants. In September the defects of the original certificates were called to plaintiff's attention, and he was notified that the 2d of that month was the date of proof. Considering that the first proof was returned for correction; that the second was retained by defendants; that the assured submitted his books, and that he was examined as to his loss by defendants; that a second copy was furnished of mislaid copy, and a second certificate was prepared as additional formality; that no notice of any defect was given prior to September, after further attempt at settlement had been abandoned,—the case will not be dismissed. If the adjuster's conduct would induce an honest belief that the proofs then being made were all the company required, and the assessed did so believe, the jury might find that formal proofs were waived. Wheeler v. Association, (Minn.) 47 N. W. Rep. 149. The facts in the case of Daul v. Insurance Co., 35 La. Ann. 99, are similar in many respects. The court held that the assured may waive preliminary proof, either expressly or by implication.

ON THE MERITS.

The contract of insurance is one of indemnity. The insurer obligates himself to make good such loss or damage as may be sustained, not exceeding the amount of the policy. The defendants contend that the amount claimed exceeds the value of the property, and that part of the property destroyed was not covered by the policy. In interpreting the contract we will commence by charging up the value of the property in regard to which there is less difference. The 30 large generators are not overvalued at $22 each,—$660. The witnesses do not materially differ about these, and the defendants substantially admit the correctness of the estimate. The records do not disclose that 62 generators at $8.50 is an overcharge; total, $527. The defendants admit that they are worth about $7 each. One of the witnesses for plaintiff, who is one of the directors of the defendant company the Germania, and who was president of the Southern Vinegar Company, from whom plaintiff bought the plant, testified that they cost a larger amount. With reference to the vinegar shavings, this witness said that it takes a bushel of shavings to every 10 gallons' capacity; that he bought the shavings, and in buying them followed that proportion; that while he was connected with the management they took out about half of the shavings, and charged the generators with fresh shavings. The witnesses differ materially respecting the number of bushels of shavings. We have determined to adopt that proportion in establishing the quantity in the small generators, viz., 10,354 @ 28 cents, $289.90. This proportion will not be followed in so far as relates to the large generators, for the reason that the companies have admitted a larger number; and one of their witnesses on the subject testified that 100 bushels were placed in several of these generators, charged under his direction. These large generators produced more, proportionally, than the small ones. The number of 100 is taken as correct; making, total, 3,000 bushels, @ 28 cents, $840. The quantity of vinegar in the tank has given rise to a number of estimates. The vinegar could not be measured in the generators at any time after they were charged, for the least handling would have destroyed them. After weighing the conflicting testimony, and endeavoring, as far as possible, to make it conform to a proportionate number of shavings used, we concluded that the 62 generators contained each 65 gallons of vinegar,—4,030 gallons, at 16 cents, $644.80. We make a proportionate deduction from the quantity of the vinegar fluid in the large generators to the number of bushels of shavings found by us, viz., five-sixths,—$1,440. The witnesses have all testified that the vinegar is all used in saturating the shavings, except possibly comparatively few gallons at the bottom of the generators. In throwing away part of the saturated shavings, as was proven, some of the vine-

gar must also have been lost. Of this we have kept account by making deductions as above. There are amounts charged for vinegar in process of manufacture and vinegar manufactured, in the generators at the time of the fire. The total is $241.-82. Part of this is for the manufactured article, not yet drawn; amount, $95.90. It was merchantable vinegar, which would have been drawn that day, had not the fire occurred. The remainder is for vinegar that settles at the bottom of the vessel. This remainder, viz., $145.92, is not sustained by the evidence. The plaintiff claims the value of two tanks and appurtenances destroyed, $76. This also is covered by the policy. The claim for "knocked down" cisterns is not within the terms of the insurance. On statement 2 of the "proof of loss," it is claimed under the following reference to the property in the policy, viz.: "One stock of vinegar in store and in tank, mash, and 'low wines.' The mixture in process of manufacture is not vinegar, and is not included within the terms of the policy insuring vinegar; nor is it included within the clause insuring implements of the plant. It was not an instrument of the plant, nor a tool, utensil, or vessel, and therefore it is not an implement. The president of the company, who insured the plant originally, so understood. The insured, testifying, says: "I claim nothing out of the company, nothing but the loss of the vinegar and the generators." It is proven that plaintiff lost, in addition, 6,550 of vinegar; that is, 5 barrels of vinegar, worth $458.50; and 17½ barrels of vinegar saved. Plaintiff admits in his testimony that there should be deducted an amount on statement 3 of $48.51, and from said $458.50. An amount, it is claimed, should be deducted for depreciation in the value of the property. The testimony to prove depreciation is conflicting. We have appraised the implements of the plant and the vinegar separately at their value. We did not consider the value of the plant as a whole. Its life is at least 10 years. It was established not long since. It had been repaired and improved. It was in good order. Our conclusion will not admit of deduction for deterioration. The value of the property destroyed amounts to $5,032.10; from which we deduct the amount for which the property damaged sold, $148.-26; vinegar sold, $48.51; balance, $4,835.-33.

The fermentation and distillation of mixtures in the manufacture of vinegar was a new subject to us. We have given it our best attention, and concluded that the verdict should be reduced to said amount. There being two judgments in the case as consolidated, each judgment is amended and the amount reduced.

John T. Purves v. *Germania Insurance Company, Consolidated.*

It is therefore ordered, adjudged, and decreed that the verdict and the judgment appealed from in said case be amended by reducing the same from $2,732.95 to $2,-417.65, with interest at the rate of 5 per cent. per annum on the last-mentioned amount from judicial demand. As amended, judgment is affirmed; plaintiff and appellee to pay costs of appeal.

John T. Purves v. *Firemen's Insurance Co., Consolidated*

It is ordered, adjudged, and decreed that the verdict and the judgment appealed from be amended by reducing it from $2,732.95 to $2,417.65, with interest thereon at 5 per cent. from judicial demand. As amended, judgment affirmed; plaintiff and appellee to pay costs of appeal.

(44 La. Ann. 142)

BILLGERY *et al.* v. ARNAULT, State Tax Collector. (No. 10,865.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)[1]

TAX-SALES—ACQUIESCENCE—INJUNCTION.

1. The plaintiff must prove his alleged ownership of the property advertised for the payment of taxes to enable him to maintain an injunction, and have the taxes canceled bearing on the property.

2. The title to part of the property was annulled by judgment.

3. To escape payment of the taxes on the part to which they have no title, they cannot maintain the position that their purchase of the judgment has had the effect of reviving the title it annuls.

4. By buying the judgment to which they were parties, and which had the effect of settling their indebtedness, they acquiesced in its correctness.

5. With reference to property not affected by the judgment and owned by plaintiffs.

6. The article 123 of the constitution of 1868 required the timely recordation of all mortgages or privileges to make them effectual against third persons.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Injunction by J. M. Billgery and others against L. Arnault, state tax collector, to restrain him from selling certain land for taxes. From a judgment dissolving their injunction plaintiffs appeal. Modified. Rehearing refused.

Frank Michinard, for appellants. *Wynne Rogers*, for appellee.

BREAUX, J. Petitioners as tutor and individually have obtained an injunction restraining the defendant state tax collector from selling their property for the state taxes for the years 1869, 1871, 1872, 1873, 1874, 1875, 1876, and 1878, under the provisions of Act 82 of 1884. They allege that these properties were purchased by the late Joseph Billgery, from whom they inherit, at a sheriff's sale on the 29th and 30th of September, 1874, under execution issued on a judgment for city taxes of 1873; that at the date of the purchase none of the privileges or mortgages securing the claims of the state were recorded in the mortgage office, to affect third persons, and that the assessments in the name of Francois Lacroix, subsequently to the adjudication, are illegal, null, and void; that the amount for which the property was adjudicated was ample to pay the claim of the state at the time, had

[1] Rehearing refused, February 8, 1892.

legal notice been given of their existence; that it was duly paid by the sheriff to the adjudicatee. Plaintiffs plead prescription of 3, 5, and 10 years. From a judgment rejecting their demand and dissolving their injunction plaintiffs appeal.

The plaintiffs are in error in alleging that the late Joseph Billgery bought at sheriff's sale, in 1874, all the property advertised for taxes, and the sale of which they enjoin. There are 21 different descriptions in the deed of 30th of September of that year, numbered, respectively, from 1 to 21, inclusive. Of these, 6 are advertised to be sold for taxes, viz., 10, 11, 12, 13, 18, and 19 of the advertisement annexed to plaintiffs' petition. No. 19 was not one of the lots in the transfer of 30th of September, 1874, and the records do not disclose that it was, at any time, transferred to plaintiffs' author, although it is described in the judgment in favor of Parker, administrator, as property adjudicated September, 1874. On the 1st day of July, 1875, Francois Lacroix, the tax debtor, mortgaged part of the property to Billgery, adjudicated to him (Billgery) at sheriff's sale on 30th September, 1874. Two of these properties, 4 and 13 of the act of mortgage, (Nos. 2 and 5 of the sheriff's deed, and 11 and 12 of the advertisement or tax-sale,) were thus mortgaged to secure $5,500. There were other lots included in the deed of mortgage, not at all involved in the tax issues of this case. In July, 1875, Joseph Billgery being dead, on the petition of E T. Parker, as administrator of the succession of Francois Lacroix, a judgment was rendered in favor of the plaintiff, decreeing the said succession to be the owner of the lots of ground and improvements described in nine different descriptions of the petition. Of these lots, the seventh is advertised to be sold, and is No. 10 of the advertisement; the second also, and is No. 11 of the advertisement; the fifth also, and is Nos. 12 and 13 of the advertisement; the eighth also, and is No. 19 of the advertisement; the first also, and is No. 18 of the advertisement, as described in the judgment. Lots 3, 4, 6, and 9 (the title to which is annulled by said judgment) are not advertised, and no taxes are claimed on them. In the petition in the case of Parker v. Billgery et al. the administrator prayed for a judgment setting aside and annulling the adjudication made September, 1874. This was avoided, the adjudication was not entirely annulled, but the court decreed that plaintiff should recover the before-described properties. The judgment does not refer to the remaining property adjudicated, nor to the adjudication sought to be annulled. In the judgment credit was given to the plaintiff Parker, administrator, for the rents of the property from the day of the said adjudication. Credit was given to the defendants for the sum paid by the adjudicatees to the sheriff as the price of adjudication; also for the taxes paid. After allowing the proper credits, the balance was against the heirs of Billgery in the sum of $999.75, which they were condemned to pay. In August, 1879, the defendants in said case, who are the plaintiffs in the present case, bought the judgment which had been rendered against them, and which recognized the title to the nine properties before mentioned to be in the succession of Francois Lacroix. They became the owners of the right of the plaintiff in that case, as established by the judgment they bought. The purchase price, when Billgery became the owner at the sheriff's sale, in 1874, for the payment of the city taxes, was $2,474. In allowing the credits before mentioned, the price of the said adjudication and the taxes were included. The plaintiffs are the owners of a judgment decreeing that they are not the owners of certain described property, and that they are indebted in a certain sum, which they have settled by buying the judgment. Being parties in thus buying, they have acquiesced in the terms of the judgment in such a manner as to preclude them from defeating the taxes previously assessed. They cannot be creditors and debtors of the same amount in one judgment. Eastin v. Dugat, 4 La. 399. Two of the properties having been mortgaged by Lacroix to Billgery in 1875 make it evident that these parties did not attach great importance to the title that the latter had acquired by the adjudication made to him.

Plaintiffs urge that an appeal was taken by them from the judgment they bought, and that it is pending at this time. There is such an appeal in this court, which remains undisposed of, for the reason that the defendants and appellants have become the owners of the judgment, and further proceedings are no longer possible. The titles to 10, 11, 12, 13, 18, and 19 of the advertisement have been annulled by the judgment before mentioned. Nineteen never was plaintiffs' property. The records do not disclose that Nos. 3, 4, 5, 7, 8, 9, 15, 16, 17 ever were the property of plaintiffs or their author; and they are therefore without interest. As to these, lot 4 of the adjudication and 14 of the advertisement is in the name of plaintiff's author, and all taxes of 1869, 1871, to and including 1877 are claimed. The same is true of lot 6 of the adjudication, and of the advertisement, with the exception that the delinquent list shows taxes due for 1874, 1875, 1876, and 1877. With reference to these two properties, no delinquent list was recorded at the time of the adjudication, in 1874. Article 123 of the constitution of 1868 required the recordation of all mortgages or privileges to make them effectual as against third persons. Jacob v. Preston, 31 La. Ann. 517; Succession of McCloskey, 32 La. Ann. 148.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by annulling and canceling the state taxes for the years claimed on lot 4 of the adjudication and 14 of the advertisement, and on lot 6 of the adjudication and the same number of the advertisement; and that as to these two lots (6 and 4) the injunction be made perpetual, and the taxes claimed on them annulled and canceled. With reference to lots 3, 4, 5, 7, 8, 9, 15, 16, and 17 of the advertisement, the judgment is affirmed. With reference to lots 10, 11, 12, 13, 18, and 19, they are to be sold for the payment of

any taxes assessed and properly recorded prior to 1878. Judgment is amended as above, at appellee's costs.

(44 La. Ann. 148)

BUTLER v. CLARKE. (No. 10,847.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)[1]

INSOLVENCY—PREFERENCES—ESTOPPEL.

1. Where an insolvent, before his cession, is the owner of certain promissory notes of a third person, which promissory notes are all separate and distinct obligations, and secured by separate, distinct, and successive mortgages, resting on the same piece of real property, and where the insolvent pledges these promissory notes to different creditors, the pledgee of the second mortgage note is an ordinary creditor as to the proceeds of the first mortgage note.

2. That is, these notes being different *res*, the fact that a creditor is the pledgee of the second mortgage note gives this creditor no preference to be paid over the general creditors, out of the proceeds of the first mortgage note.

3. The principle recognized in our jurisprudence, that the assignor of one of several concurrent mortgage notes, secured by the same mortgage, is estopped from contesting his assignee's right to be paid by preference over the concurrent notes retained by him, is fully discussed, and shown to be inapplicable to this case.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Proceedings by Thomas Butler against Mrs. M. O. Clarke to recover on a promissory note given by James Clarke. The syndic of the creditors of James Clarke, the Mutual National Bank of New Orleans, and Westfeldt Bros., interveners. From the judgment, the syndic, the Mutual National Bank, and Westfeldt Bros. appeal. Reversed. Rehearing refused.

Gilmore & Baldwin, (*Ernest T. Florance*, of counsel,) for J. Watts Kearney, syndic, appellant. *Singleton, Browne & Choate*, for appellee Mutual Nat. Bank. *Joseph C. Gilmore*, for appellees Westfeldt Bros.

FENNER, J. The parties have agreed upon a statement of facts in this case; and, although the statement is lengthy, we will not endanger its completeness by abbreviation. It is as follows: "The parties to the present proceedings are: (1) Thomas Butler, plaintiff; (2) Mrs. M. O. Clarke, defendant; (3) the syndic of the creditors of James Clarke, appearing in the place of the provisional syndic, intervener; (4) the Mutual National Bank of New Orleans, intervener; (5) Westfeldt Bros., a commercial firm of this city, interveners. Mrs. M. O. Clarke, a widow, is the mother of James Clarke. James Clarke, until his cession, in July, 1890, was engaged in business as wholesale dealer in coffee, in New Orleans, under the firm name of James Clarke & Co. In June, 1880, Mrs. M. O. Clarke was indebted to her son, James Clarke, in the sum of $4,832.22, as shown by an account rendered her at the time, and which account she acknowledged to be correct before a notary public. Mrs. M. O. Clarke liquidated this indebtedness by her own promissory note for $4,832.22, dated June 1, 1880, maturing one year after date, bearing interest at 8% per annum, from date, and secured this promissory note by a mortgage dated June 14, 1880, and duly inscribed. On July 31, 1883, Mrs. Clarke was similarly indebted to her son, James Clarke, in a second sum of $8,614.79, which sum she also liquidated by a promissory note, and secured this by a second mortgage, dated August 8, 1883, duly recorded. On December 31, 1885, she was indebted to James Clarke in the sum of $6,340.75; and she gave a promissory note for that amount, and secured it by a third mortgage, dated June 28, 1886, duly recorded. On the 1st of June, 1889, she was indebted to James Clarke in a fourth sum, of $9,115.71; and for the fourth time she gave to him her promissory note for a corresponding amount, and secured it by a fourth mortgage, dated September 7, 1889, duly recorded. On the 14th of June, 1890, she was indebted to James Clarke again in the full sum of $9,115.71; and she gave to the said James Clarke her promissory note for that amount, and secured it by a fifth mortgage, dated the 24th day of June, 1890, duly recorded. The mortgages all rest on the same piece of real estate, viz., a house situated at the corner of St. Charles avenue and Fourth street; but they are all separate and distinct from one another, and secure separate and distinct obligations, arising at different times. After these promissory notes of Mrs. M. O. Clarke—each secured by separate mortgage from its fellows—had been given by her, for value received, to James Clarke, they became the property of James Clarke. On September 8, 1888, James Clarke borrowed $5,000 from Thomas Butler, plaintiff in the present suit, and gave his promissory note therefor, payable one year after date, and secured his promissory note by pledging as collateral the first mortgage note of Mrs. M. O. Clarke, dated June 14, 1880, with a face value of $4,832.22, and with accrued interest at 8% per annum from date. On February 10, 1890, Clarke borowed from the Mutual National Bank $6,300, and gave his promissory note therefor, securing this promissory note by pledging as collateral a note of Philip Thompson for a like amount, which note was a valuable security, and worth its face value at maturity. This note of Philip Thompson, which had been pledged by James Clarke to the Mutual National Bank, was withdrawn by Clarke on May 7, 1890, the day of its maturity, when it would have been paid if not withdrawn. Instead of this note, there was pledged to the bank as collateral the mortgage note of Mrs. M. O. Clarke for $8,614.79, with accrued interest at 8% per annum; the note being dated July 31, 1883, and being the second one of the notes referred to above, and secured by the second mortgage in rank. The note of James Clarke, given to the Mutual National Bank, which this second mortgage note of Mrs. M. O. Clarke was given to secure, was originally for $6,300. This note of James Clarke, however, before his insolvency, was, by a payment of $4,000 thereupon, reduced to $2,300, so that the second mortgage note made by Mrs. M. O.

[1] Rehearing refused, February 8, 1892.

Clarke, amounting to $8,614.79, is now pledged to the Mutual National Bank to secure an amount due by James Clarke of $2,300. This note of Philip Thompson was withdrawn by Clarke in order to return it to Thompson, who had paid a note for the same amount, which he had received from Clarke and discounted. On the 6th of April, 1889, James Clarke obtained a loan from the Mutual National Bank of $5,000, and gave in pledge, to secure that loan, the third and fourth mortgage notes given by Mrs. M. O. Clarke, amounting, respectively, to $6,340.75 and $9,115.71, both with accrued interest. In June, 1890, James Clarke borrowed from Westfeldt Bros., of this city, $5,000, and gave his note therefor, and pledged as collateral security the fifth mortgage note given by Mrs. M. O. Clarke, amounting to $9,115.71. In July, 1890, James Clarke made a voluntary cession of all his property to his creditors. The petition and schedule were duly filed in this honorable court, in division A, under number 30,763, and John R. Picton was duly appointed provisional syndic. In September, 1890, the promissory note for $5,000, given by James Clarke to Thomas Butler, which was secured by a pledge of Mrs. M. O. Clarke's first mortgage note for $4,832.22, with accrued interest, fell due, and, being unpaid, Butler, the holder of the collateral security, provoked executory process against Mrs. M. O. Clarke in the present proceedings. A writ of seizure and sale was duly issued, and under that writ the real estate so mortgaged was sold, realizing in cash $15,200. Before the day of sale, interventions and oppositions filed brought the following parties before the court: (1) The Mutual National Bank, holding pledged to it as collateral (*a*) the second mortgage note of Mrs. M. O. Clarke, for $8,614.79, with accrued interest at 8% per annum, to secure a note of James Clarke for $2,300; and (*b*) the third and fourth mortgage notes of Mrs. M. O. Clarke, to secure a note of James Clarke for $5,000,—the bank claiming that under these pledges it should be paid out of what remains of the proceeds of the real estate after the claim of Thomas Butler is satisfied. (2) Westfeldt Bros., a commercial firm of this city, holding the fifth mortgage note of Mrs. M. O. Clarke, pledged to secure a note of James Clarke for $5,000. Westfeldt Bros. claim the right to be paid out of the proceeds of the real estate after the bank and Butler are satisfied. (3) The provisional syndic of the creditors of James Clarke. In place of the provisional syndic the definitive syndic now stands. The claim of the syndic is that the general creditors of James Clarke are entitled to have distributed among them the surplus that may remain on each mortgage note of Mrs. M. O. Clarke after the note of James Clarke that it has pledged to secure has been paid, and he and his claim are eliminated from the case. The Mutual National Bank filed proceedings in the civil district court, and applied for a writ of seizure and sale on the mortgage notes held by it, shortly after the proceedings instituted by Butler, and prior to the sale of the property."

The questions presented for our solution in this case arise out of conflicting rights in the distribution of the proceeds of sale of the mortgaged property. The syndic of James Clarke claims that all the mortgage notes of Mrs. M. O. Clarke belonged to James Clarke at the date of his cession, and passed by his cession to his creditors, who succeeded to all his rights therein; that the first mortgage note passed to the creditors unaffected by any privilege except that resulting from the pledge in favor of Thomas Butler, and that after the discharge of the debt due to Butler the surplus of the proceeds applicable to the payment of said first mortgage note must be paid over to the syndic for the benefit of the creditors; and that the same rule must be applied in the distribution of the proceeds applicable to the payment of each successive mortgage note. The Mutual National Bank and Westfeldt Bros. contend, on the other hand, that Clarke, being the pledgor and *quasi* assignor to them of the 2d, 3d, 4th, and 5th mortgage notes, is thereby disabled from competing with them in the distribution of the proceeds of sale of the mortgaged property, and from asserting any rights therein, until the debts due them are fully paid, and that the syndic, succeeding only to Clarke's rights, is equally disabled.

The bank and Westfeldt Bros. rely upon the following decisions of this court, which hold, in the language of the leading case, that, "when the holder of a claim secured by mortgage assigns a part of it, he cannot be permitted to come in competition with his assignee, if the pledge is insufficient to pay both." Salzman v. Creditors, 2 Rob. (La.) 241; Ventress v. Creditors, 20 La. Ann. 361; Mechanics v. Ferguson, 29 La. Ann. 549; Barkdull v. Herwig, 30 La. Ann. 621; Reine v. Jack, 31 La. Ann. 860; Abney v. Walmsley, 33 La. Ann. 590. Reference to these cases will show that they all deal with concurrent mortgage notes,—with debts arising from the same transaction, and secured by the same mortgage. They rest upon the equity that where the holder of several notes, representing the same debt and secured by the same mortgage, assigns part of the notes, and, with them, the mortgage securing them, and has received the full value, he should not be permitted, by any act of his, to prevent his assignee from recovering the sum which he has paid. The doctrine rests upon the authority of Troplong and Grenier. Troplong expressly confines it to the case stated by him as follows: "Pierre is creditor of Jacques for 50,000 francs, the price of an estate which he had sold. Pierre assigns a part of his credit to Sempronius who pays him therefor 24,000 francs. The immovable, being seized and sold, produces only 40,000 francs. Ought Peter and Sempronius to concur and bear the loss proportionally; or should Sempronius be paid by preference?" He concludes that concurrence would be unjust on the ground that "it would be altogether contrary to good faith that the vendor of part of the debt ceded, after having received the price, should come in, by his

own act, to prevent his assignee from recovering the sum disbursed by him." 1 Troplong, Priv. & Hyp. No. 367. Troplong refers to Grenier as holding the same view, and we find that Grenier assimilated the price to a part payment of the debt operating a *quasi* subrogation of the assignee to the rights of the assignor in the thing ceded, and its accessories, to the extent necessary to secure his reimbursement, and he says: "In such a case the subrogor could not be heard to claim payment of the amount remaining due to him until his subrogees had received the full amount of their subrogations; at least, in absence of an express convention to the contrary." 1 Grenier, Hyp. No. 93. It thus conclusively appears that the authorities have confined this doctrine to cases arising between the assignor and assignee of part of the same debt secured by the same mortgage. We are now asked, for the first time, to extend the same principle to the case of an assignor who, holding distinct credits, secured by different and successive mortgages on the same property, has transferred one of the credits, inferior in rank, and to hold that by such transfer he has not only practically subrogated the assignee to all his rights in the credit and accessory mortgage transferred, but in all other mortgages held by him on the same property. We have considered this subject very maturely, and from every point of view suggested in the able and ingenious briefs of counsel, but we can discover no principle of law which would justify the extension claimed. The debts represented by these several mortgage notes, and the several mortgages securing them, are as distinct as if they were the notes of different persons secured by mortgages on different properties. Clarke did not stand in the case of an assignor of part of a claim secured by a mortgage, and who is contesting his assignee's right to be paid out of the proceeds of that mortgage by preference over himself, as holder of the other part of said claim. On the contrary, the syndic concedes that each assignee is entitled to be first paid the full amount due him out of the whole avails of the mortgage securing it. But he says: "I hold a distinct claim against our common debtor, secured by a different mortgage, which I have not assigned or pledged to you in any manner, and on which you have no rights, legal or equitable. I yield your right to be paid by preference out of the proceeds applicable to the mortgage which I transferred to you; but you cannot interfere with my rights as holder of a different credit, secured by a different mortgage, which I never assigned to you in whole or in part." Not only are the facts of the instant case entirely different from those in which the principle invoked was applied, but the reasons which supported the application in the latter are entirely wanting in the former. What possible right, legal or equitable, can the assignee of one debt and mortgage acquire upon or against a distinct debt and mortgage not assigned? Or if we were to adopt the analogy to subrogation suggested by Grenier, we can understand that the party who had made a part payment, with subrogation of one of these mortgage notes, would be subrogated to the right of the holder in the note paid and in the mortgage securing it; but would any one contend that such subrogation extended to his rights in a distinct debt, secured by a different mortgage? We can discover no reason why the holder of distinct claims, secured by different mortgages, even on the same property, cannot assign one of them without waiving or prejudicing any of his rights as holder of the others.

In this case all the assignments are made by pledges. The first mortgage note was never pledged to anybody but Butler. He would have had the right to enforce his pledge either by selling the note itself or by foreclosing the mortgage. Suppose he had pursued the former course, and had sold the note for a price exceeding the debt due to him. To whom would the surplus have gone? There is no plausible ground for disputing that it would have gone to Clarke or his syndic, and the purchaser of the note would undoubtedly have been entitled to assert all his mortgage rights. Can a mere difference in the mode of enforcing this pledge affect Clarke's right to the surplus of the avails of the thing pledged over the debt for which it is pledged? The bank and Westfeldt Bros. no doubt feel themselves aggrieved in not collecting the whole of their claims; but we are bound to apply the law, and, moreover, to consider the rights and interest of other creditors. Under our law a man's property is the common pledge of his creditors. This common pledge the law permits, in certain cases, to be invaded by special preferences, such as privileges, pledges, and mortgages, when constituted according to law. Nevertheless, such permitted preferences are in derogation of the rights of the common pledge, and are to be strictly construed, and not extended beyond their plain legal meaning and effect. We think, in this case, that each one of these pledgees has acquired no preference, except to the extent of the debt secured by each pledge, and to be paid out of the proceeds applicable to payment of the particular note pledged, and that the surplus of the proceeds applicable to the payment of each pledged note, after paying the debt secured by that particular pledge, must be paid over to the syndic for distribution among the mass of the creditors. The above views eliminate the particular contentions urged by Westfeldt Bros. against the transactions of the Mutual National Bank. The Westfeldt Bros. have no rights here, except upon the particular *res* pledged to them, or its avails. The thing pledged to the bank was an entirely different *res;* and as it has never been extinguished, and as the proceeds applicable to its satisfaction must go either to the bank or to the syndic, Westfeldt Bros. have no interest in raising questions as to the validity of the bank's rights therein which the syndic has not propounded.

It is therefore ordered and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ad-

judged and decreed that the opposition of the syndic of the creditors of James Clarke be maintained, and that the fund in the hands of the sheriff, after paying the claim of plaintiff, Thomas Butler, the state, city, and drainage taxes, and the costs of these proceedings, be distributed in the following order: (1) To the syndic of James Clarke, the amount remaining due on the first mortgage note, after paying the claim of Butler; (2) to the Mutual National Bank, the sum of $2,300 with 8 per cent. interest from August 4, 1890, till paid; (3) to the syndic, the amount remaining due on the second mortgage note, after deducting the foregoing payment to the Mutual National Bank; (4) to the Mutual National Bank, the amount of the third mortgage note; (5) if any funds remain, to the Mutual National Bank, the amount of the fourth mortgage note; (6) to Westfeldt Bros., the amount of the fifth mortgage note. And it is further ordered that the oppositions of the Mutual National Bank and of Westfeldt Bros., in so far as they conflict herewith, be rejected.

(44 La. Ann. 183)

EYRICH v. HIS CREDITORS. (No. 10,914.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)[1]

RESPITE TO DEBTOR—RIGHTS OF CREDITOR—SECURITY.

The right to require security by a creditor from a debtor who has been granted a respite is absolute, under the provisions of Act 134 of 1888, and the creditor is not limited in time to require the security.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Application of J. C. Eyrich for a respite, which was granted by his creditors and confirmed by judgment. The American Book Company and others, who took no part in the proceedings of the creditors, took a rule to compel plaintiff to give security for their claims. Rule made absolute, and plaintiff appeals. Affirmed. Rehearing refused.

Gus A. Breaux, for appellant. *Rice & Armstrong* and *Ernest T. Florance*, for appellees.

MCENERY, J. J. C. Eyrich applied for a respite, which was unanimously granted by the creditors who appeared and voted at the meeting of creditors. The respite was confirmed by a judgment. Certain creditors, who took no part in the proceedings of the meeting of creditors, and who did not oppose the homologation of said proceedings, took a rule against the plaintiff to compel him to give security, in accordance with the provisions of Act 134 of 1888. The rule was made absolute, and the plaintiff appealed.

The question presented is, can a debtor who has obtained a respite by the unanimous vote of creditors appearing at the meeting of creditors be compelled to give security by a creditor who did not appear at said meeting, and who did not oppose his application for respite, and the homologation of the proceedings of the meeting of creditors? The act referred to provides that "any creditor who has not assented to the respite may require that the debtor shall furnish security that the property of which he is left in possession shall not be alienated, or, in case it is, that the money arising from the sale or mortgage of the same shall be employed in paying ratably the debts existing at the time of the respite." The creditor cannot exercise this right until the respite has been granted. He is not limited to any period of time beyond which he cannot exercise this right. It is an absolute right conferred by the statute. It does not appear that the complaining creditor either expressly or tacitly assented to the respite. Judgment affirmed.

[1] Rehearing refused, February 8, 1892.

(95 Ala. 70)

BLEDSOE *et al.* v. GARY *et al.*, (two cases.)

(*Supreme Court of Alabama.* Feb. 4, 1892.)

CITY COURT OF SELMA—POWERS OF JUDGE—EXEMPTIONS—CONTEST.

1. Under Acts 1875-76, p. 386, as amended by Acts 1876-77, p. 266, which provides that the judge of the city court of Selma shall have "all the powers and jurisdiction which are now or may hereafter be lawfully exercised by the judges of the circuit court and chancellors of this state, including the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne exeat*, and all other remedial writs;" and under Code 1886, § 2981, which provides that a writ of attachment may be issued by any judge of the circuit court, returnable to any county in the state,—the judge of the city court of Selma has authority to issue a writ of attachment returnable to any county in the state.

2. Where defendant files a declaration of exemption of personal property, and plaintiffs make affidavit and give bond for a contest, and attachment issues, but written notice of the levy is not served on defendant as required by Code, § 2520, defendant is not bound to contest; and where he voluntarily enters his appearence, and files an inventory of his personalty, it is error for the court to strike it from the files, and render judgment against him on the ground that the inventory was not filed sooner.

3. Where there is no waiver of exemption as to the kind of property on which a levy is sought to be made, but the right to make the levy is based on the institution of a contest in the mode prescribed by Code, § 2520, it is not necessary to indorse the fact of such contest on the process.

Appeals from circuit court, Marengo county; WILLIAM E. CLARKE, Judge.

Proceeding in attachment by Gary & Kennedy against Bledsoe Bros. Judgment for plaintiffs. Defendants appeal. Affirmed. Proceeding by Gary & Kennedy against Henry T. Bledsoe to contest a claim of exemption. Judgment for plaintiffs. Defendant appeals. Reversed.

These two cases involve the same questions, which arose from the levy of the same process, and hence are submitted together. The action was commenced by attachment, which was issued by the judge of the city court of Selma at the suit of Gary & Kennedy against H. T. Bledsoe and William Bledsoe, partners under the firm name of Bledsoe Bros., and was made returnable to the next term of the circuit court of Marengo county, to be held on the 1st day of March, 1890. The attachment was not levied on the property of the defendants, who were mer-

chants, because, prior to the issuance of the attachment, one of the firm, H. T. Bledsoe, purchased his brother's interest in the said property, and had filed his declaration of claim of exemptions thereto. The plaintiffs made the affidavit and bond required by the statute, and filed them with the sheriff, who then levied the attachment on the property claimed to be exempt. There was no indorsement on the writ at the time it was issued or levied, showing that the claim of exemptions was contested, or that the suit was on the debt for which the exemptions were waived. There was no notice given by the sheriff to the defendant H. T. Bledsoe that the claim of exemptions was contested. When the case came up for trial the defendant H. T. Bledsoe moved to dismiss the levy because there was no indorsement on the writ, or the affidavit securing the writ, showing that the claim of exemptions was contested, or that there was a waiver of exemptions. This motion was overruled, and the defendant duly excepted. The plaintiffs, by permission of the court, then wrote an indorsement on the writ, showing the contest of the claim of exemptions. The defendant then filed a plea in abatement, which raised the question whether the indorsement showing the contest could be made during the trial, and whether an indorsement which was so made was sufficient at law. The court refused to allow this plea to be filed. The plaintiffs made a written demand upon the defendant, prior to the first day of the term of the circuit court of Marengo county, to file, within the first three days of the term, an inventory, verified by affidavit, of his property, as required by statute. The defendant failed to file this inventory within the time required, and did not file the same until the next succeeding term of said court. At the fall term of said court the plaintiffs moved to strike from the file the inventory which was filed on the 22d of September, 1890, which motion was granted, and a judgment by default was rendered by the court against the defendant on the contest of the claim of exemptions. During the same term of the court a judgment was rendered in favor of the plaintiffs in the attachment suit against Bledsoe Bros. for the amount of their demand. The defendant H. T. Bledsoe filed a motion in arrest of the judgment, which raised the question whether the writ of attachment was void because issued by the judge of the city court of Selma, returnable at the next term of the circuit court of Marengo county. The defendant also moved in arrest of judgment on the ground that there was no notice of the levy of the attachment given to the defendant as required by the statute. Both of these motions were overruled, and the defendant excepted thereto. This appeal is prosecuted by both Bledsoe Bros. and Henry T. Bledsoe, and the various rulings of the lower court upon the motions and in rendering judgment by default are assigned as error.

G. B. Johnston, for appellants. *N. H. R. Dawson* and *John C. Anderson*, for appellees.

WALKER, J. The writ of attachment in this case was issued by the judge of the city court of Selma, and was made returnable to the next term of the circuit court of Marengo county. The judge of the city court of Selma was, by the terms of the act creating that court, and of the amendment thereto, clothed with "all the powers and jurisdiction which are now, or may hereafter be, lawfully exercised by the judges of the circuit court and chancellors of this state, including the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne exeat*, and all other remedial writs." Acts Ala. 1875-76, p. 386; Acts 1876-77, p. 266. This court has held that the language just quoted confers upon the judge of the city court the authority to issue, or to order the issue of, the writs referred to, returnable into any court of the state having jurisdiction of them. East & West R. Co. v. East Tennessee, V. & G. R. Co., 75 Ala. 275. Under the general statute, a writ of attachment may be issued by any judge of the circuit court, returnable to any county in the state. Code 1886, § 2931. The writs of attachment against property which are authorized by our statutes are remedial writs, within the meaning of the language above quoted. The plain effect of that language is to confer upon the judge of the city court of Selma the same authority to issue attachments returnable to any county in the state as is vested in the judges of the circuit court.

Before the levy of the writ of attachment the defendant Henry T. Bledsoe had filed in the office of the judge of probate his declaration stating and describing the personal property claimed by him as exempt, and such declaration had been duly recorded. As there was no indorsement on the process that there had been a waiver of exemptions as to personalty, the property embraced in the declaration was not subject to levy, unless the claim of exemptions was contested. Code, § 2519; Tonsmere v. Buckland, 88 Ala. 312, 6 South. Rep. 904. When a contest has been instituted in the mode prescribed by section 2520 of the Code, the officer holding the process shall proceed to make a levy, and within three days thereafter shall notify the defendant in writing of the same. The last clause of this section seems to require the officer to notify the defendant of the levy only, and not of the contest; but section 2522 speaks of the service of notice of contest in such a way as to indicate that the service of such notice is required in any contest of a claim of exemption to personal property. It seems to have been the intention of the legislature that the written notice to the defendant of the levy of process upon property which he had already claimed as exempt should also operate as notice to him of the institution of a contest of his claim of exemptions. Provision is also made elsewhere for notice to the defendant in all cases of the levy of a writ of attachment. Code, § 2937. Whether or not the contest itself should be mentioned in the written notice to the defendant, it is plain that he is not put to his defense of his claim of exemptions against process subsequently

issued until he has been notified in writing of the levy of such process. A person who has duly filed his declaration claiming personal property as exempt before the levy of process upon it is entitled to treat the filing of such declaration as a protection of the property therein described against process upon which the fact of a waiver of exemption is not indorsed, until, in the mode prescribed in the statute, he is brought into court to defend a contest of his claim of exemption. He is made a party to the contest by the service of written notice of the levy of the process. The service of such notice is the mode prescribed by the statute of citing the defendant to appear and support his claim of exemption. The provision for giving him notice is what secures to him the opportunity to be heard upon the question of the validity of his claim. Some such provision for notice to the defendant is necessary to give the statutory proceeding for a contest in such a case the character of due process of law. Betancourt v. Eberlin, 71 Ala. 461. At any rate, the requirement that notice shall be given is one not to be disregarded. In the present case the plaintiffs made the affidavit and bond for a contest in the mode prescribed by section 2520 of the Code, and the writ of attachment was levied on February 17, 1890. But there is nothing to show that the defendants were notified in writing of the levy, or that they had any actual notice thereof. The notice to the defendant H. T. Bledsoe to file an inventory makes no mention of the writ of attachment, and does not state that any process had been levied. On September 23, 1890, he waived his right to such notice by appearing and filing his inventory. He was not in default up to that time, because he had not been served with the statutory notice of the levy, and had done nothing to waive such notice. Prior to his voluntary appearance the steps had not been taken to entitle the plaintiffs to a judgment on the contest, the contestee not having been brought into court by the service of notice of the levy, which is required by the plain language of the statute. Code, § 2520; Fears v. Thompson, 82 Ala. 294, 2 South. Rep. 719; Hutcheson v. Powell, (Ala.) 9 South. Rep. 170. On the plaintiff's written demand, a defendant who has been made a party to a contest of his claim of exemption is required, under the penalty of having a judgment by default rendered against him in the contest, to file an inventory of his personal property. Code, § 2525. But a notice merely to file such inventory is insufficient to supply the want of the notice which is required to make the defendant a party to the contest. The law informs him that until he has received written notice of the levy of process he is not called upon to defend a contest of his previously filed declaration and claim of exemption, and until he has received such notice he can safely ignore the plaintiff's proceedings, so far as they purport to affect property already claimed as exempt. Until the defendant became a party to the contest, he was not bound to comply with the plaintiff's written demand for an inventory. He did not become a party to the contest until his voluntary appearance therein at the September term of the circuit court. He filed the inventory on the day of his voluntary appearance. The trial court erred in striking the inventory from the files on the ground that it had not been filed within the first three days of the previous term. The defendant had not then been put in the position to be bound by the plaintiffs' demand. When he voluntarily appeared he was not in default in any way, and it was incumbent on the plaintiffs to tender an issue on the claim. It was error to render judgment by default thereon against the defendant, because he was not then in default, as he had not been made a party to the contest in the mode prescribed by the statute. He had done nothing to relieve the plaintiffs of the duty of tendering an issue on the claim of exemptions. An issue should have been formed and tried as directed by the statute. Code, § 2526.

If there has been a waiver of exemption as to the kind of property on which the levy is sought to be made, the indorsement of that fact on the process is a prerequisite to the right to make the levy. Code, § 2519. If there has been no such waiver, and the right to make the levy is based upon the institution of a contest in the mode provided by section 2520 of the Code, there is no requirement that the facts of such contest shall be indorsed on the process. The defendant H. T. Bledsoe, in his plea in abatement, and in his motion to dismiss the levy of the attachment, seems to have erroneously assumed that the statute requires the fact of contest to be indorsed on the process. No such indorsement was required, and the absence thereof did not affect the validity of the levy. The indorsement made by the plaintiffs upon the writ at the time of the trial was useless and ineffectual. No injury resulted therefrom to the appellant. The appellant's plea in abatement, and his motion to dismiss the levy of the attachment, were both put upon the untenable ground that there should have been an indorsement on the writ of the fact that the claim of exemptions was contested; and for this reason both the plea and the motion were properly rejected. After these objections were disposed of, the appellant interposed a plea in bar to the complaint, without suggesting the objection that he had not been served with written notice of the levy of the attachment. He thereby waived the right to such notice, and a personal judgment could then be rendered against him, though he had not been served with any legal process at all. After a voluntary appearance, and the rendition of a personal judgment thereon, the objection because of the failure to give written notice of the levy of the writ of attachment was too late. That objection was cured by the voluntary appearance of the defendant. So far as the proceeding in the main case was concerned, we have discovered no error prejudicial to the appellant. The judgment in that branch of the case is af-

firmed. For the reason above stated the judgment rendered on the contest of the claim of exemptions is reversed, and that case is remanded.

(94 Ala. 333)

GAFFORD v. LOFTON.

(*Supreme Court of Alabama.* Jan. 14, 1892.)

CHATTEL MORTGAGES — ASSIGNMENT — RIGHTS OF ASSIGNEE.

Where a mortgage of personal property, and the note thereby secured, are embodied in the same instrument, an assignment indorsed thereon, and signed by the mortgagee, conveys to the assignee the legal title to the mortgaged property, and the assignee may sue for its recovery in his own name.

Appeal from circuit court, Covington county; JOHN P. HUBBARD, Judge.

Detinue by R. H. Gafford against W. C. Lofton. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

J. F. Jones, for appellant.

WALKER, J. The plaintiff claimed the personal property sued for under a mortgage executed by the defendant to one Rosenfield. The defendant's promissory note, and the mortgage to secure its payment, were embodied in one instrument. The mortgagee wrote and signed the transfer on the back of the instrument. The trial court held that, under the transfer to the plaintiff, he had no title to the property sued for, and that he could not recover in this action. Evidence of the mortgage, and of the transfer thereof, was excluded. This ruling was erroneous. An assignment indorsed and signed by the mortgagee upon a mortgage of personal property conveys the legal title to the mortgaged property, and the assignee can sue in his own name to recover possession thereof. Graham v. Newman, 21 Ala. 497; Tison v. Association, 57 Ala. 323. The one instrument containing both the note and the mortgage, the transfer carried the mortgagee's entire interest. Buell v. Underwood, 65 Ala. 285. The assignment conferred upon the assignee the same right which the mortgagee had had to maintain detinue for the recovery of the personal property conveyed by the mortgage, though there had been no foreclosure. 2 Brick. Dig. p. 252, § 63. No other question is presented for review. Reversed and remanded.

(94 Ala. 80)

SCOTT v. STATE.

(*Supreme Court of Alabama.* Jan. 14, 1892.)

CARRYING WEAPONS—EVIDENCE—STRIKING CAUSE FROM DOCKET.

1. On a trial for carrying a concealed pistol, it appeared from the undisputed evidence that defendant, with his hands in his pockets, rubbed up against an officer several times, whereupon the officer and another caught defendant's hands, and, on taking them out of his pockets, discovered a concealed pistol. *Held*, that such evidence was sufficient to justify a conviction. Chastang v. State, 3 South. Rep. 304, 83 Ala. 29, followed.

2. Crim. Code, § 4387, which provides that after a *capias* has issued for two terms, and returned, "Not found," the solicitor may, by leave of court, withdraw and file the indictment, with leave to reinstate the same when the ends of justice require it, is not mandatory, and the cause may remain on the docket if advisable, and the failure of the clerk to issue process did not operate a discontinuance, of which defendant could take advantage.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Indictment against Aleck Scott for carrying a concealed pistol. Verdict of guilty, and judgment thereon. Defendant appeals. Affirmed.

Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. At the October term, 1885, the defendant was indicted for the offense of carrying a concealed pistol. He was arrested in Jefferson county, of this state, in the month of July, 1891, and, in default of bail, the sheriff of that county committed him to jail. Upon the order of the judge of the city court of Montgomery he was removed to the jail of the county of Montgomery, and there held until put upon his trial for the offense for which he was indicted. The defendant moved to strike the cause from the docket, upon the ground "that the cause was commenced at the October term, 1885, and a *capias* was regularly issued, and returned, 'Not found;' and that nothing further was done in said cause until the 5th day of September, 1890, when an *alias capias* was issued, and said *capias* was executed by arresting the defendant," etc.; and "that said cause has been discontinued." The motion was overruled, and the defendant put upon trial upon the plea of not guilty. When the evidence was introduced and closed, the court charged the jury, if they believed the evidence, to find the defendant guilty.

After a *capias* has issued for two terms, and returned, "Not found," the solicitor may, by leave of the court, withdraw and file the indictment, with leave to reinstate the same when the ends of justice require such reinstatement. Crim. Code, § 4387. This provision is not mandatory, and, if deemed advisable, the cause may remain on the docket. The mere failure of the clerk in the performance of his ministerial duty to issue process will not operate a discontinuance, of which the defendant can take advantage. This rule was declared as early as the case of State v. Drinkard, 20 Ala. 13.

The evidence shows that "an officer, with a warrant for the arrest of another person, went out where the defendant lived in search of the person named in the warrant, and, while in search of him, the defendant, with his hands in his pocket, rubbed up against the officer several times; whereupon the officer, with the assistance of another, caught the defendant's hands, and took them out of his pockets, and that he had a pistol in the pocket, which was concealed." This evidence was not disputed. Venue having been proven, and the time when this occurred, there was no error in giving the general charge. The principles involved are the same as those declared in the case of Chastang v. State, 83 Ala. 29, 3 South. Rep. 304, and Bowdon v. State, 91 Ala. 61, 8 South. Rep. 694. Affirmed.

BIBB v. STATE.

(*Supreme Court of Alabama.* Jan. 26, 1892.)

CRIMES OF WIFE—COERCION BY HUSBAND.

On trial of a woman for a murder shown to have been committed by herself and husband, the court properly charged that the jury should consider defendant a *feme sole*, and properly refused to charge that, unless defendant acted willingly, she should be acquitted, the presumption that the wife acted under the coercion of the husband not being allowable in cases of homicide.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Judy Bibb was convicted of murder, and appeals. Affirmed.

Defendant was sentenced to the penitentiary for life. The state introduced evidence tending to prove that, before the finding of the indictment in this case, one Ed. Starke was killed by defendant and her husband, Joe Bibb, by cutting him with an axe, as was alleged in the indictment; that defendant held Starke from behind his back, holding his arms down, while her husband cut him in the head with the axe: and that, while the killing was being done, Joe Bibb was heard to say: "Hold him up, God damn it; hold him up." This is all the evidence, as set out in the bill of exceptions. The court, among other things, gave the jury the charge copied in the opinion, and to the giving of which defendant excepted, and she also excepted to the court's refusal to give the following charge: "Unless the jury believe that defendant acted willingly and voluntarily, they must acquit her."

B. C. Tarner and *Gordon McDonald*, for appellants. *Wm. L. Martin*, Atty. Gen., for the State.

CLOPTON, J. On the trial of defendant for murder, the court instructed the jury: "In the trial of this case on the issue of guilty or not guilty, the jury should not consider the defendant as otherwise than as a *feme sole*." There is no error in this charge. The presumption of the common law, that when the wife acts with her husband in the commission of a crime she acts under his coercion, and consequently without guilty intent, is not allowed in all offenses, in the administration of the criminal law. "It may not be positively settled," as has been well observed, "where the line of separation is, but for certain crimes the wife is responsible, although committed under the compulsion of her husband." 1 Benn. & H. Lead. Crim. Cas. 85. The exceptions ingrafted on the general rule are based on the nature, grade, and heinousness of the felony. Among these is murder. The rule that the law holds the wife answerable for murder, though committed in the presence of or in company with her husband, without any presumption that she acted under his coercion, and that she is punishable as much as if sole, is sustained by the great weight of authority. 1 Hale, P. C. 45; 1 Hawk. P. C. 4; 1 Cooley, Bl. Comm. 444; 1 Bish. Crim. Law, § 361; 14 Amer. & Eng. Enc. Law, 649. On the same principles, the charge asked by defendant was properly refused. Affirmed.

ADAMS v. CAMERON *et al.*

(*Supreme Court of Alabama.* Jan. 26, 1892.)

STATUTE OF LIMITATIONS—ESTOPPEL TO PLEAD.

Where the payee of a note asks the maker to renew the contract, and he replies that it would never run out of date, his personal representatives, in an action on the note after his death, are not estopped from pleading the statute of limitations.

Appeal from chancery court, Jackson county; THOMAS COBBS, Chancellor.

Action by J. B. Adams, administrator, against Mary J. Cameron and others. Judgment for defendants. Plaintiff appeals. Affirmed.

On the final submission of the cause the chancellor rendered his decree dismissing the bill, holding that there was no trust relation; that the indebtedness was a simple contract debt; and that the action was barred by the statute of limitations.

Wm. L. Martin, for appellant.

STONE, C. J. The object of this suit is to collect a bill single, or note under seal, executed September 23, 1861, by Daniel Cameron, by which he promised to pay Martha Cameron $600, one day after date. In November, 1862, there was a payment made on the note of $148, which is not denied by either party. In 1884, Daniel Cameron died leaving property, real and personal,—the real estate being in excess of 160 acres, and worth, probably, more than $2,000; personal estate worth some $300. He died intestate, leaving a widow and several children. No administration was had on the estate, but the widow and children continued to use and occupy the homestead and effects. Daniel and Martha Cameron were brother and sister, and lived very near each other. The bill in the present case was filed September 15, 1886, by Martha Cameron. She has since died, and the suit is now in the name of her administrator. The widow and heirs at law—children—of Daniel Cameron are made defendants. The object of the bill is to enforce payment of the bill single out of the estate left by Daniel Cameron. Among other defenses, the statute of limitations of 10 years is pleaded, that being our statutory limitation on such cause of action. Code 1886, § 2614. To forestall the defense of 10 years' limitation, the bill charges that Daniel Cameron made payments on said sealed note during each of the years 1869 or 1870, 1875, 1876, 1877, 1878, 1879, and 1883. These alleged payments were very small, never in excess of $2 in any one year, and sometimes as low as 25 cents. If, however, they were made as payments on the note, and, in each case, before the bar was complete, the statute is no bar to the recovery. Code, § 2628. The answers deny that any of these alleged payments were made, except the one in 1862, 24 years before this suit was commenced. The note is made an exhibit to the bill and purports to have two credits upon it, —one of $148, dated November, 1862; and the other of 25 cents, dated in March, 1883. A great deal of oral testimony was taken on each side. Some of it was illegal, and properly objected to on that account. In

forming our conclusions we have disregarded all such testimony, but consider it unnecessary to specify it. We think the testimony fails to show that any of the small sums of money which Daniel Cameron let his sister have after 1862 were intended or, in fact, were payments on the bill single. We therefore hold that the *prima facie* bar is not obviated by that line of proof.

It is contended, in the second place, that the real relation between Daniel Cameron and his sister was not that of debtor and creditor, but of voluntary trustee and *cestui que trust*. Vincent v. Rogers, 30 Ala. 471, and Whetstone v. Whetstone, 75 Ala. 495, are relied on in support of this contention. We find nothing in the record to sustain this view. The facts show only a plain case of debtor and creditor. There is some testimony tending to show that, before the 10 years expired after the execution of the bill single, Martha Cameron asked her brother to renew the contract, and that he replied it would never run out of date. It is contended for appellant that this estops appellees from interposing the defense of the statute of limitations. There are several answers to this. It was only a promise not to plead the statute of limitations, and the statute runs against that promise as well as against the bill single itself. We think it would inaugurate a very hazardous, if not injurious, practice, if we were to sanction this new and wide departure from the policy which dictated the statute of limitations. A second reason: Whether or not the statute of limitations would run was a question of law. Against such mistakes, as a rule, there is no redress in any court. Clark v. Hart, 57 Ala. 390; 1 Amer. & Eng. Enc. Law, 334; 2 Pom. Eq. § 842. So, on this aspect of the case, appellant is in this dilemma: If we treat the statement as a promise, it is barred by the statute of limitations; if we regard it as an assertion, it was a mistake of law, and not a ground of recovery. Affirmed.

(94 Ala. 272)

McADORY v. LOUISVILLE & N. R. CO.

(*Supreme Court of Alabama.* Jan. 27, 1892.)

NEGLIGENT KILLING—RECOVERY BY PERSONAL REPRESENTATIVE—MEASURE OF DAMAGES.

1. Under Code, § 2591, which provides that in certain cases a master is liable for the death of a servant, and that the damages shall be distributed according to the statute of distribution, the measure of damages, where the heirs are in no relation of dependence on deceased for support, is such sum as, with legal interest during the period of his expectancy of life, would produce at the expiration of such period a sum equal to the accumulations of his earnings for the same period, estimated on the basis of his health, ability, habits of sobriety, industry, economy, gross earnings, and expenditures.

2. Where a switchman, 20 years old, unmarried, healthy, sober, industrious, and economical, earning $2.20 per day, whose expectancy of life is 40 years, is negligently killed by a railroad company, and the *data* from which to ascertain his net earnings are very meager, a verdict of $9,895, which will produce at the end of 40 years a sum equal to four times the amount of his probable net earnings for that period, is excessive.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Action by M. J. McAdory, administrator of William E. Beavers, against the Louisville & Nashville Railroad Company, for the negligent killing of plaintiff's intestate. Verdict and judgment for plaintiff. New trial granted. Plaintiff appeals. Affirmed.

Plaintiff's intestate was a switchman in the service of the defendant at the time of the accident which resulted in his death. The court granted a new trial on the ground that the verdict, as assessed by the jury, was excessive. The evidence bearing on the measure of damages was undisputed, and it was substantially as follows: About two years before he was killed, plaintiff's intestate, then between 18 and 19 years of age, left his father's farm in Georgia, with a scanty supply of clothing, to go out into the world for himself. Prior to that time he was healthy, strong, sober, industrious, and economical. He went first to his uncle's in Atlanta. There we have no account of him. Sixteen months before his death he came to Birmingham, where his cousin was at work for one of the railroads. He did not secure employment for about three months, during which time his cousin paid his board, at $20 per month, and advanced him money for expenses, making in all $71. At the expiration of that time intestate secured employment with defendant for watching a street crossing, at $30 per month. He was subsequently promoted to watch another crossing, at $45 per month, and a short time before his death was again promoted to be a switchman, at a salary of $66⅔ per month. During the time he worked as switchman he lost no time from any cause, and during the whole time of his employment he was absent from work only two days. His foreman and several other witnesses testified that he was able and willing to work, and performed all his duties well. He was of rather slight physique, though he was strong and healthy. He was never known to drink intoxicating liquor, and spent neither time nor money foolishly. His landlady testified of him in the highest terms, saying he was not like other young men, but, when off duty, spent his time reading and improving himself. During his life in Birmingham he corresponded with his father and sister. Before intestate had begun receiving his increased salary he had repaid to his cousin the $71 borrowed, then he sent his sister $10, and at the time of his death had an abundant supply of good clothes, including one nice new suit that cost $22.50. He had a bank deposit of $25. His employer owed him $43.45, and his landlady found on his person, and turned over to his father, $1.90 in cash. He owed nothing whatever. He was paying, at the time of his death, $18 for board and lodging. American tables of mortality showed expectation of life to be about 40 years. From these facts the court below undertook to calculate the gross amount that intestate would probably have left at the end of his expectancy of life, and discounted that sum for

39 years at 8 per cent., arriving at the sum of $3,800.

Bowman & Harsh, for appellant. *Hewitt, Walker & Porter*, for appellee.

CLOPTON, J. Under the statute, which entitles the personal representative of an employe, whose death is caused by the negligence of the employer, to maintain an action, the measure of recoverable damages, established by this court, is the money value of the life. The recovery is limited to actual compensation for the pecuniary loss suffered by those entitled to inherit his estate according to the statute of distribution, allowing nothing for the pain which the deceased may be supposed to have suffered, or as solace to the grief of surviving relations. James v. Railroad Co., 92 Ala. 231, 9 South. Rep. 335. The courts have encountered great difficulty in establishing a clear and definite rule by which the pecuniary loss may be calculated with appropriate accuracy, especially when there is no *status* of dependency. In Railroad Co. v. Orr, 91 Ala. 548, 8 South. Rep. 360, it is said: "That the jury may have proper *data* from which a pecuniary compensation may be fixed, it is proper to admit evidence of the age, probable duration of life, habits of industry, means, business, earnings, health, skill of the deceased, reasonable future expectations; and perhaps there are other facts which should exert a just influence in determining the pecuniary damage sustained." And in James v. Railroad Co., supra, referring to this enumeration of the proper *data*, the court says: "All this we reaffirm, and add that net income and habits of economy should enter into the account as factors—important factors—in the ascertainment of accumulating capacity. This, at least, seems to be the proper standard by which to measure the damages." These are mentioned as circumstances and considerations to be taken into the account in ascertaining the accumulations of the deceased during the probable continuance of his life had he not been untimely cut off, as elements of the value of the life destroyed, not the value itself. In Railroad Co. v. Butler, 57 Pa. St. 335, after stating that the proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum recovered, it is observed: "And that loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his life-time, and which would have gone for the benefit of his children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure." True, this language is susceptible of the construction that the sum of the probable future accumulations is the measure of the pecuniary loss suffered by the surviving next of kin; but we do not suppose that the learned justice who rendered the opinion intended to be understood as laying down the rule that the net earnings during the period of the expectancy of life constitute the absolute measure of the present pecuniary value. In Railroad Co. v. Trammell, (Ala.) 9 South. Rep. 870, the employe annually earned $300, all of which he expended in the support of his family, consisting of himself and wife; and the probable duration of his life was about 27 years. The court below gave judgment for $2,500, on the theory that that sum would annually produce, at the legal rate of interest, a sum equal to the portion of his annual earnings expended in the support of his wife,—$200, as found by the court. This was held to be wrong, and the judgment excessive, for the reason that the wife would receive and expend all she would have gotten had her husband lived, and still have at the end of his probable life-time the principal of the judgment, which she would not have received at all but for his death. It is said: "The true measure of damages manifestly is that which gives such sum as, being put to interest, will each year, by taking a part of the principal and adding it to the interest, yield $150.00, this being the amount which the court ascertained was annually expended in the support of the wife; and so that the whole remaining principal, at the end of the twenty-seventh year, added to the interest on his balance for that year, will equal $150.00." The principle of the decision is that the pecuniary value to the wife of the husband's life is that sum which would yield her, during its probable duration, a benefit equal to what she would have derived from its continuance, and no more. In that case there was the relation of dependence, but no net earnings. In these respects it differs from the present case. When there is dependency, such as wife or child, and also net earnings, considerations enter into the calculation other than when no such relation exists, so that the strict rule therein adopted cannot be applied; but the principle is analogous.

Whatever may be the inherent difficulty of estimating the pecuniary value of human life, it is important and necessary, in view of the frequent occurrence of cases arising under the statute, that a clear and definite rule be established for the ascertainment, with reasonable certainty, of the pecuniary value of the life destroyed; so clear and definite, if practicable, that juries will be capable of applying it, when the facts of the particular case are shown. The application of any rule will be attended with more or less uncertainty, for in some respects the value is speculative. The precise loss cannot be calculated with exact accuracy. The net income which the deceased is earning at the time of his death may not have been continued for any considerable portion of the expected term of life. Sickness or accidental injuries may impair the accumulating capacity, and want of employment may diminish his earnings; while, on the other hand, they may be increased, as he may acquire skill and ability. While courts and juries are compelled to compute from reasonable probabilities, mere speculations should be discarded. The rule should be so formulated as to give the surviving next of kin full actual compensation for the pecuniary loss suffered by them, and at the same

time not unduly oppress the defendant. The present case devolves the duty of endeavoring to formulate a rule to govern in cases where there are net earnings, and no relation of dependence. As the statute[1] provides that the damages recovered shall be distributed according to the statute of distributions, they should be calculated in reference to the reasonable expectation of benefit for the continuance of the life. That benefit is the estate of the person killed, had he survived, consisting of the accumulations by his labor or skill, not including any income derived from property, or investments or employment of capital. In computing the pecuniary loss, the first term or unknown quantity to be ascertained is the aggregate amount of the net earnings at the end of the expected term of life, estimated on the basis of his health, ability to labor, habits of sobriety, industry, and economy, gross annual earnings and expenditures. The sum of such accumulations, however, is not the measure of the pecuniary value of the life at the time death resulted from the injury, but merely constitutes the benefit which his distributees would have received at the expiration of the period of probable duration, had he remained living till then. The object of inquiry is the value at the time of death of the probable future accumulations had the person not been killed. The rule that the aggregate amount of the net earnings is the measure of recovery, gives, presently, to the next of kin, the entire benefit, which they would not have been entitled to and would not have received until the expiration of the expected term of life. In this case, the probable duration of life being about 40 years, this rule would enable the distributees to realize the entire fruits of the accumulating capacity 40 years before they would or could have realized them had he lived; giving the accruing interest on the damages recovered during the whole period of the probable duration of life in excess of the actual pecuniary loss suffered by them. Considering that the pecuniary value of the life is to be calculated in reference to the reasonable expectation of advantage from its continuation, and that, had it continued for the period of probable duration, the distributees would not have received any benefit from its continuance until the termination of that period, a rule fixing the measure of damages at such sum as, with legal interest during the period of the expectancy of life added, would produce at its expiration a sum equal to the amount of the net earnings during the same period, seems to be founded on reason and principle, and just to all parties. By this rule the pecuniary value of the life is approximated with reasonable certainty, ample compensation afforded to the surviving next of kin, and the purposes of the statute fully accomplished. For example, if the probable duration of life be 25 years, and the net earnings $7,500, $2,500, with legal interest added, would produce, at the end of the twenty-fifth year, the aggregate amount of the net earnings; consequently that sum is the pecuniary value of the life, at the time of its destruction, to the distributees. This is substantially the principle on which the measure of damages is fixed in the case of Railway Co. v. Cowser, 57 Tex. 293, stated as follows: "Perhaps the nearest measure of damages approximating this reasonable certainty would be such sum as would purchase an annuity, if such security was in the market, equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances of the particular case, reasonably accessible in evidence, and including the probable duration of life, as shown by the approved tables." The evidence shows that plaintiff's intestate was at the time of his death between 20 and 21 years of age. He was unmarried, healthy, and of sober, industrious, and economical habits; was receiving $2.20 per day as wages; and his expectancy of life was about 40 years. The *data* from which to ascertain his net earnings are meager. The verdict of the jury was for $9,395.95. We presume that this sum was intended to cover the probable amount of his net earnings during the expectancy of life. Allowing that he worked every day, including Sundays, and received $2.20 for each day, his annual gross earnings would have been $803. The annual interest on the amount of the verdict is $751.67, which, added to the principal, would produce at the end of the fortieth year $39,462.75,—more than four times the value of the estate which the deceased would have accumulated by his labor had he lived the 40 years; fourfold the actual pecuniary loss suffered by the next of kin. It is obvious that the verdict goes far beyond any just rule of compensation, and is so largely in excess of the pecuniary value of his life to those entitled to inherit his estate as to render it the imperative duty of the court to grant a new trial. Rose v. Railroad Co., 39 Iowa, 246; Railway Co. v. Bayfield, 37 Mich. 205; Telfer v. Railroad Co., 30 N. J. Law, 188.

Affirmed.

[1] Code 1886, § 2591, relative to injuries suffered by servants through negligence of the master, provides: "If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor, and the damages therefor are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions."

(94 Ala. 35)

JACKSON v. STATE.

(*Supreme Court of Alabama.* Jan. 12, 1892.)

JURY — CHALLENGES — ASSAULT WITH INTENT TO KILL — INSTRUCTIONS.

1. A trial court, on being informed that a juror had been convicted of a felony and had not been pardoned, declined to exclude him unless he was challenged for that cause. Defendant thereupon challenged him for that cause, and the court sustained the challenge. *Held*, that defendant was not injured by the ruling of the court, as the exclusion of the juror was not charged to defendant as one of his peremptory challenges.

2. Where, in a criminal case, the court refused to exclude certain testimony when defendant first objected to it, and thereafter defendant objected to the exclusion of such testimony by the court, it was not an error of which defendant

could complain for the court to permit the testimony to remain before the jury.

3. At a trial for assault with intent to murder, it is not error for the court to refuse to charge that a "specific intent" must be shown, as the intent to take life may be inferred from the character of the assault, the use of a deadly weapon, and the attendant circumstances, and as such charge would tend to mislead the jury.

4. In respect to defendant's right to use a deadly weapon in resistance of an impending assault, it was not error for the court to charge that, "if defendant was assaulted by T. with a stick, then there arose for their consideration two propositions: *First*, whether defendant assaulted T. in heat of blood, which would reduce the offense to assault and battery; and, *second*, whether defendant assaulted T. with intent to take his life, with malice, and, if with malice, this would constitute assault with intent to murder."

5. It was not error for the court in such case to refuse to charge the jury that "if defendant struck the blow under the honest belief that his life was in danger, or that he was in fear of having great bodily harm inflicted upon him, then you cannot convict defendant of assault with intent to murder;" as, to justify the defensive use of a deadly weapon, the danger must be really or apparently imminent, and there must be no other reasonable mode of escape.

6. The fact that defendant had his assailant in his power, and could have killed him, but refrained from doing so, does not raise a presumption that the assault was without intent to take life.

Appeal from circuit court, Conecuh county; JOHN P. HUBBARD, Judge.

Charlie Jackson was indicted and tried for an assault with intent to murder one Alexander Thomas, was convicted of an assault and battery, and appeals. Affirmed.

The testimony introduced for the state tended to show that at a meeting of a "benevolent association," of which both the defendant and said Thomas were members, and of which one Jim Dunklin was secretary, the defendant and Alexander Thomas got into a dispute, which resulted in the defendant's cutting said Thomas several times. The state proved, against the objection and exception of the defendant, the circumstances of a difficulty between the defendant and Jim Dunklin which arose from the said Dunklin pulling the defendant off of the said Thomas. After the state had introduced all of this evidence, the court excluded all of said testimony as to the difficulty between defendant and Dunklin; but, upon defend ant's insisting upon its going into evidence, "inasmuch as it had been adduced," the court allowed this testimony to remain in evidence. The testimony for the defendant was in conflict with that introduced by the state as to the circumstances of the rencounter between the defendant and said Thomas, the evidence for the defendant tending to show that he struck in self-defense. The defendant proved, by certain witnesses, his general good character in the neighborhood in which he lived. The court, in connection with its general charge, charged the jury, among other things, as follows: (1) "When you come to look at the evidence in the case that he (defendant) is a man of good character, you cannot look at this to strengthen his testimony when he testifies, as a witness, for himself." (2) "The law says the assault must be with intent to take life with malice, to authorize conviction with intent to murder." (3) "If the jury should not find the defendant not guilty on the evidence, then, if they found that defendant was first assaulted by Alex. Thomas, with a stick, then there arose for their consideration two propositions: *First*, whether defendant assaulted Thomas in heat of blood, which would reduce the offense to assault and battery; and, *second*, whether the defendant assaulted Thomas with intent to take his life, with malice, and, if with malice, this would constitute assault with intent to murder." The defendant separately excepted to the giving of each of these portions of the general charge, and also excepted to the court's refusal to give the following written charges requested by him: (1) "The court charges the jury that the burden of proving the alleged intent is on the state, and if you are satisfied by the evidence that, at the time the defendant and Alex. Thomas were separated, [defendant] had one of his hands on the throat, and in the other hand he had an open knife, and had Alex. down under him, and did not cut him, but desisted from cutting of his own free will, a presumption arises that he did not have the intent to murder." (2) "The court charges the jury that the state is bound to prove that the defendant had the specific intent to murder Alex. Thomas, as charged in the indictment; and if the state has failed to prove to your satisfaction, beyond all reasonable doubt, that he had the intent to murder Alex. Thomas, you should find him not guilty of the intent to murder." (3) "The court charges the jury that, if the evidence leaves your minds in such a state or condition that you are unable to say whether or not the specific intent to murder existed beyond all reasonable doubt, you should find him not guilty of the higher grade of offense charged in the indictment, although you might find him guilty of the offense of assault and battery." (4) "The court charges the jury that defendant is charged with an assault with intent to murder Alex. Thomas with malice aforethought, and I charge you that the defendant must have formed, in his mind, the specific intent with malice aforethought, to take human life, or he is not guilty of this charge, and the evidence must show you that defendant formed this specific intent, beyond all reasonable doubt, or you should acquit him of this." (5) "The court charges the jury that if the proof shows you that defendant struck the blow under the honest belief that his life was in danger, or that he was in fear of having great bodily harm inflicted upon him by Alex. Thomas, that then you cannot convict defendant of an assault with intent to murder."

Stallworth & Burnett, for appellant.
Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. As we understand the facts, when it was made known to the trial court that A. G. Smith, one of the persons from whom a jury was to be selected, had been convicted of a felony in this state, and had not been pardoned,

the court declined to exclude him as a juror, unless he was challenged for that cause. The defendant thereupon challenged him for cause, and the court held the challenge well taken. So the juror Smith neither sat upon the jury, nor was his exclusion charged to the defendant as one of his peremptory challenges. It was impossible for this ruling to have done the defendant any injury, and the circuit court in thus ruling committed no error.

It is certainly much the safer and better practice to exclude illegal testimony when first objected to. This, because of the difficulty of eradicating from the minds of the jury the impression such testimony is liable to make. The succeeding altercation and encounter which the accused had with Dunklin could certainly shed no light on the question of his prior assault on Thomas, alleged to have been made with intent to murder him. If that testimony had been subsequently excluded from the jury, it would have healed the error. Smith v. Maxwell, 1 Stew. & P. 221; Huckabee v. Shepherd, 75 Ala. 342; Booker v. State, 76 Ala. 22; Cleveland v. State, 86 Ala. 1, 5 South. Rep. 426; Childs v. State, 55 Ala. 28; Dismukes v. State, 83 Ala. 287, 3 South. Rep. 671. The court announced it would withdraw all the testimony relating to the altercation and difficulty with Dunklin, to which exceptions had been reserved. This was objected to by defendant's counsel, and thereupon it was permitted to remain before the jury. This was not an error of which defendant can complain.

It is settled in this state that, when a defendant testifies in his own behalf in a criminal prosecution, his proven good character, unless first assailed, is not an evidential circumstance to which the jury may look in determining the credibility of his testimony. Morgan v. State, 88 Ala. 223, 6 South. Rep. 761; Gibson v. State, 89 Ala. 121, 8 South. Rep. 98.

An intent to take life is an essential element of the statutory felony, assault with intent to murder, and must be proved to the satisfaction of the jury. But, like the malicious intent in murder, it may be inferred by them from the character of the assault, the use of a deadly weapon, and the other attendant circumstances. No charge should be given which would authorize a conviction, without satisfactory proof that the prisoner entertained such intent. A charge, however, which adds other words or matter, by way of particularizing this necessary intent,—as that it must be positive, deliberate, actual, or specific, etc.,—tends to mislead the jury, and should not be given. This, not because the intent need not, as matter of law, be positive, deliberate, actual, and specific, to an extent which satisfies the minds of the jury, but because such mode of expression has a tendency to mislead them as to the true measure of convincing proof to authorize a verdict of guilty. Walls v. State, 90 Ala. 618, 8 South. Rep. 680; Allen v. State, 52 Ala. 391. Under the principles declared above, the circuit court did not err in giving the first and second charges excepted to, nor in refusing charges 2, 3, and 4 asked by defendant.

When one is menaced with an assault, several inquiries present themselves: *First.* Is he free from fault in bringing on the difficulty? *Second.* Is there reasonable room and ground for escape from the threatened injury? *Third.* Is the threatened assault of such character as, if perpetrated, is likely to produce death, or "grievous bodily harm," as that phrase is defined in the books? All these considerations enter into and qualify the right to resist with a deadly weapon. Meredith v. State, 60 Ala. 441; Washington v. State, 53 Ala. 29; Robinson v. State, 54 Ala. 86; Ex parte Nettles, 58 Ala. 268; Mitchell v. State, 60 Ala. 28; Ex parte Brown, 65 Ala. 446; Hadley v. State, 55 Ala. 31. Construed in the light of the authorities cited, and the principles we have many times declared, the circuit court committed no error in giving charge 3, excepted to, and in refusing charge 5, requested. Charge 3 places defendant's right to employ a deadly weapon in resistance of an impending assault in as favorable a light as the law authorizes. Charge 5, requested, is manifestly faulty. It requires more than "fear of having great bodily harm inflicted" to reduce an assault made with a deadly weapon below the grade of felony, if the intent to take life be found to have been entertained. To fully justify such defensive use of a deadly weapon, the danger must be really or apparently imminent, and there must be no other reasonable mode of escape. So, to repel the implication of malice, the party using the deadly weapon must be in real or apparent danger of losing his life, or of suffering grievous bodily harm, and must be free from fault in bringing on the difficulty. Even with these conditions, if there was a previously formed design to use such deadly weapon, this would supply the element of malice, unless the person so using the deadly weapon was in real or apparent peril of life or limb, and had no other reasonable mode of escape.

The facts postulated in the first charge asked, if found by the jury, would certainly be a circumstance to be weighed by them in determining whether there was an intent to take life. We suppose they were so weighed, for the jury failed to convict the defendant of an intent to murder. They could not, however, as matter of law, raise the presumption that there was no intent to take life. The defendant may have originally had such intent, and after inflicting many dangerous blows, and having his adversary in his power, he desisted from carrying out his original intention. This charge was properly refused. Affirmed.

(94 Ala. 524)

PEARCE *et al.* v. JENNINGS *et al.*

(*Supreme Court of Alabama.* Jan. 13, 1892.)

RECEIVERS — APPOINTMENT — ATTACHING CREDITORS.

An attachment creditor cannot have a receiver appointed for property alleged to have been fraudulently conveyed by his debtor to a third person, where the attachment could have been levied on the property, and possession thereof taken by the sheriff.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Action by Thomas W. Jennings and others against J. Hollie Pearce and others to set aside a transfer of personal property on the ground of fraud, and to have a receiver appointed. From a decree appointing a receiver, defendants appeal. Reversed.

Arrington & Graham, for appellants. *Richardson & Reese*, for appellees.

CLOPTON, J. We will not undertake to decide whether the bill shows that complainant has such interest in, title to, or incumbrance on the property in controversy as is essential, under section 3414 of the Code, to give courts of chancery jurisdiction of non-residents, when the object of the suit concerns personal property in this state. The bill shows, not only that a material defendant resides, and that the property which complainant seeks to reach is, in this state, but also that the non-resident defendant, who asserts an adverse claim, was found here, and personally served with process. This is sufficient, if there be no other objection, to authorize the court to take cognizance of the case.

The case made by the bill does not come within the class of cases in which a court of equity will intervene to aid a creditor with a lien in obtaining satisfaction by removing a fraudulent conveyance, obstructing the complete execution of the process of law. Though purporting to be in aid of proceedings at law, the bill is evidently filed under section 3544 of the Code, which provides: "A creditor without a lien may file a bill in chancery to discover or to subject to the payment of his debt any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed, by his debtor." As, however, no objection to this character and frame of the bill is made by demurrer or otherwise, we will not decide whether a creditor who has sued out an attachment at law, and had the same levied on personal property, whereby a lien is created in his favor, may, under the statute, file a bill to invoke the aid of the court in the enforcement of the inchoate and conditional lien acquired by the levy of the attachment, or, independently, a bill to subject the property levied on to the payment of the same debt on which the attachment is founded by removing a fraudulent conveyance. As this appeal involves only the question of the appointment of a receiver, the averments in respect to the suing out and levy of the attachment are important and material only as they affect the propriety of appointing a receiver. Receivership is adopted by courts of equity as a suitable and efficient mode of saving the subject of litigation from waste, loss, threatened destruction, material injury, or removal beyond the jurisdiction of the court,—its preservation for the benefit of the party ultimately decreed to have the right. Owing to the injustice often resulting therefrom, the authority to appoint a receiver, it has been frequently observed, should be exercised with caution and circumspection. As a general rule a receiver should not be appointed unless the court is able to see some resultant benefit to the party seeking the relief, not otherwise obtainable, or that some injury, not otherwise avoidable, will ensue from the refusal, and only when a reasonable necessity is shown. The circumstances charged in the bill and shown by the affidavits which, it is insisted, justify the appointment of a receiver, are that Henry Pearce, one of the defendants, who is indebted to complainant in a sum of about $1,200, is owner of the horses, mules, wagons, and other personal property described in the bill; that he has transferred or conveyed the same, by mortgage or other instrument, to his brother J. Hollis Pearce, for the purpose of hindering, delaying, or defrauding his creditors, especially complainant, and is arranging to remove the property out of this state as soon as he can settle the claim of the defendant Chandler, for the feed and pasturage of the stock, so that complainant will probably lose his debt, or have to sue for it in another state. Whether these facts, if unconnected with other considerations, would authorize the appointment of a receiver, it is unnecessary to decide. The bill also alleges that complainant had sued out an attachment against Henry Pearce, returnable to the city court of Montgomery, the court in which the bill is filed, on the ground that he resides out of the state of Alabama, and has had the attachment levied on the property in controversy, subject to the claim and lien of Chandler, who is summoned as garnishee.

As a general rule a court of equity will not appoint a receiver, in the absence of special circumstances showing a necessity for placing the property in the custody of the court, when the party seeking the relief has an adequate and complete remedy at law,—when he may obtain ample redress and protection by the usual course of legal proceedings. Inadequacy of the legal remedy is in such case requisite to call the authority into exercise. In Iron-Works Co. v. Foster, 54 Ala. 622, after observing that writs of injunction and equitable attachment are allowed only upon the execution of an adequate bond with sureties for the indemnification of the defendant, the court says: "And whenever either of these writs will afford protection to rights asserted by the plaintiff in a court of equity, and these rights are disputed, it should rarely appoint a receiver to take the property from the defendant." The same principle applies when the party resorting to this extraordinary relief has any other safe or expedient remedy. Speights v. Peters, 9 Gill. 472; Rice v. Railroad Co., 24 Minn. 464. High, Rec. § 10. An attachment at law, when a statutory ground exists for its issue, affords as ample redress and protection, in ordinary cases, as a receivership; fully securing the forthcoming of the property to answer any judgment obtained in the attachment suit, if found liable to the attachment. Complainant having sued out an attachment on the ground that defendant is a non-resident, and having had the writ levied on the property, as the bill avers, we

are unable to see what benefit, other or additional to that furnished by the legal remedy, can result to complainant from the appointment of a receiver, or any necessity for such appointment, unless circumstances are shown, rendering the attachment inadequate and inefficacious. As a circumstance having such effect, the bill avers that the property was in the possession of Chandler, who held it under a lien for the feed and pasturage of the stock, and that there is no way by which complainant can compel the enforcement of his lien; in other words, that a valid levy of the attachment cannot be made while Chandler is entitled to keep possession for the preservation and continuance of his lien. It may be conceded that property in the possession of a person having a lien thereon cannot be taken from him under an attachment against the general owner. It does not appear, however, from the facts averred in the bill, that Chandler had such lien as would prevent the levy of the attachment. He was an agistor. At common law, a person who pastures stock for hire has no lien; and by the statute only the keeper, owner, or proprietor of a livery-stable has a lien on the stock kept and fed by him. Code, § 3089; Bissell v. Pearce, 28 N. Y. 252. But, if he had a lien, it is shown by his own affidavit that his claim for the feed and pasturage of the stock had been fully paid before the receiver was appointed. The only impediment to the complete and full execution of the process at law was thereby removed. If, after its removal was known to complainant, he omitted to have the attachment levied, when a regular and valid levy could have been made, and the property lawfully taken into possession by the sheriff, the effectiveness of the remedy at law was lost by his own laches; and in such case he cannot come into equity and have a receiver.

On consideration of all the circumstances charged in the bill and shown by the affidavits, we are forced to the conclusion that complainant had a complete and adequate remedy at law, and that no necessity is shown for the appointment of a receiver. The order appointing a receiver must be reversed. Reversed and remanded.

WHISENANT v. GORDON.

(Supreme Court of Alabama. Jan. 27, 1892.)

SPECIFIC PERFORMANCE — SALE OF LAND — REDELIVERY OF DEED — REINVESTMENT OF TITLE.

1. In an action for specific performance it appeared that a woman had conveyed land to her son on condition that he would care for her and furnish her a life support; that the son had afterwards returned the deed, and that the mother had then conveyed the land to another. The last grantee contended that, though the son had never reconveyed to his mother the legal title, there was a binding agreement for such reconveyance, on which the mother had been restored to the possession. The son denied that he had ever agreed to reconvey, or that he ever agreed to a cancellation of the deed. On the return of the deed the mother left the son's house, and after that he contributed but little to her support. Several witnesses testified to conversations, in which the son said that he had returned the deed, and abandoned his claim to the land, because his mother was troublesome, and it would be worth more than the land to take care of her. Doubt was cast upon this testimony by the son's denial of any such conversations, and by the fact that one of the said witnesses had made an entirely different statement on a former trial. The son, after returning the deed, retained possession of the land for a considerable time, and there was evidence that before the last conveyance he sent a message to the grantee, warning her that if she bought the land she would buy a lawsuit. The amount paid by the said grantee was less than one-third of the value of the land. *Held*, that the agreement to reconvey was not so clearly established as to justify a decree for specific performance.

2. The redelivery of a deed to the grantor, though accompanied by a parol agreement to reconvey, does not operate to revest the title in the grantor, or estop the grantee from afterwards asserting his title.

Appeal from chancery court, Marshall county; S. K. MCSPADDEN, Chancellor.

Bill by Bethsheba Gordon against George E. Whisenant to restrain the execution of a judgment in ejectment in favor of the defendant, and to compel him to convey the legal title to the land in dispute. There was a judgment for complainant, and defendant appeals. Reversed.

John G. Winston, for appellant. *Brown, Holliday & Street*, for appellee.

WALKER, J. The parties to this suit claim the land in dispute under different conveyances from Mrs. Mary Whisenant. In October, 1877, she conveyed the land by deed to the appellant, who is her son. In October, 1881, she executed another conveyance of the same land to Mrs. Gordon, the appellee. It is not alleged or claimed that the appellant ever reconveyed the legal title to his mother. The claim is that by a parol agreement between them, made prior to the execution of the conveyance to Mrs. Gordon, the deed to the appellant was canceled, and by him surrendered to his mother, who was restored to the possession of the property. Mrs. Gordon acquired possession of the land under the deed to her, and remained in possession for several years, and until after the death of Mrs. Whisenant. The appellant having recovered a judgment against the appellee in a statutory action of ejectment for the land, the bill in this case was filed by the appellee to restrain the execution of the judgment in favor of the appellant, and to compel him to convey the legal title to the appellee. The legal title, which was vested in the appellant by the execution and delivery of the conveyance to him, has remained in him, as it could not be divested by the cancellation of that conveyance and its redelivery to the grantor therein. Bailey's Adm'r v. Campbell, 82 Ala. 342, 2 South. Rep. 646; Smith v. Cockrell, 66 Ala. 64; Kimball v. Greig, 47 Ala. 230. The appellee insists that though there has been no reconveyance of the legal title, yet there was a binding agreement for such reconveyance under which Mrs. Whisenant was restored to possession of the land, and that this agreement should be specifically enforced in favor of the appellee as Mrs. Whisenant's vendee. The appellant denies that he consented to a cancellation of the con-

veyance to him, or that he agreed that the title to the land should be reinvested in his mother. There is no competent direct evidence of such consent or agreement. The most that can be said of the proof in support of the claim set up by the bill is that it establishes certain facts which point to the conclusion that the arrangement between Mrs. Whisenant and her son, which was evidenced by her deed to him, was not fully carried out, but was abandoned. The deed to the appellant recites as a consideration the payment by him of the sum of one dollar, and also the further consideration that he is to take care of the grantor, and furnish her house-room, board, lodging, clothing, and medical attention when necessary during her life-time.

It appears from the evidence that Mrs. Whisenant removed from the land in dispute to the residence of the appellant about the time of the execution of her deed to him; that she lived with him between two and three years, when she left his residence, and thereafter lived elsewhere; that he redelivered the deed to her, and she had possession of it at the time of her execution of the conveyance to the appellee, when she delivered it to the latter; that, after the appellant redelivered his deed to his mother, and she left his residence, he contributed but little towards her support; and that, with knowledge of the deed to the appellee, he permitted the latter to obtain and keep undisturbed possession of the land until after his mother's death. The facts here referred to indicate that Mrs. Whisenant did not continue to receive from the appellant the care and support stipulated for in her deed to him, and that when he ceased to furnish her a home, and after she made a deed of the same land to another person, he abandoned possession of the land until after her death. One witness, who appears from his own statement not to be on friendly terms with the appellant, testifies to conversations in which the appellant said that he had returned the deed to his mother; that he was tired of her; that she was troublesome, and he would not be bothered with her for two such places; that he gave her back the deed, as she was wanting the land back, to sell it, or to make a support out of it for herself. Another witness testified: "I have heard him [the defendant] say that he was not going to cultivate the land; that he had given her up the deed, and that he was not going to have anything more to do with it; and said also that he thought he had pay for all he did for her; that she was troublesome and aggravating, and that he would never have anything more to do with her. * * * The defendant told me he had given back to his mother the deed, because she was so much trouble that he did not want to be bothered with her. He stated to me that he intended never to have anything more to do with her or the land, and also stated that he would not be bothered with her for two such places, and that she might live five or six years longer, and that it would be worth more than the land to care for her if she did live that long. He thought he had about got pay for all he had done for her." Doubt is cast upon this testimony by the appellant's explicit denial that he had any such conversations, and by the testimony of several other witnesses to the effect that when this witness was examined in the unlawful detainer case between the same parties he gave a materially different version of the statement made by the appellant to him. The evidence above referred to is what must be relied on to support the conclusion that when the appellant handed his deed back to his mother he abandoned his claim to the land, and that it was understood between them that she should be the owner of the land from that time. But there are several considerations in the way of accepting this conclusion with any confidence in its correctness. In the first place, even after rejecting a mass of incompetent evidence on both sides, we are still confronted with irreconcilable conflicts at every material point throughout the testimony. Furthermore, it appears that the appellant did not give up the land when he handed his deed back to his mother, but retained possession of it by his tenant for a considerable time thereafter. There is no competent evidence to show that he knew of or consented to the mutilation of his deed by tearing off the signature and acknowledgment. There is evidence tending to show that before the conveyance was made to the appellee a message was sent to her by the appellant, warning her that if she bought the land from his mother she would buy a lawsuit; and it is plain that the appellee was informed of the prior conveyance to the appellant, and yet refrained from making any inquiry of him as to his alleged relinquishment of his claim; and also that she paid less than one-third of the value of the land, which is a circumstance tending to show that there was doubt as to the ability of the seller to convey a good title, and that it was not clearly understood that the appellant had abandoned his claim. The result of the examination of the record is that we find that the appellee relies upon an alleged agreement by the appellant that his mother should again become the owner of the land; that there is an entire absence of direct evidence of the terms of the alleged agreement, or of the consideration to support it; and that the conclusion that there was any such agreement at all can be reached only by relying upon doubtful inferences from circumstances not established by clear and satisfactory proof. It cannot be said that it plainly appears from the evidence that the appellant's act in handing his deed back to his mother, and her act in removing from her son's residence, were done in the performance of a definite agreement between them that the son should cease to be the owner of the property which had been conveyed to him, and that the mother should be restored to the ownership. The utmost effect that can be given to the evidence as to the conduct of the mother and son is to concede that it suggests the probability that there was some such understanding between them. It was not incumbent

on the appellee to show that in the making of the alleged agreement by the appellant to reinvest his mother with the title the requirements of the statute of frauds were conformed to. Any objection because of such non-conformity was waived by the failure to interpose a defense on that ground, either by demurrer or answer. Shakespeare v. Alba, 76 Ala. 351. But the failure to plead the statute of frauds did not relieve the appellee of the duty of furnishing the full measure of proof which is required to justify a decree for the specific enforcement of a contract for the sale or conveyance of land. The terms of the contract must be definitely alleged, and established, as alleged, by clear and satisfactory proof. If the evidence fails to prove the contract, or any of its terms are left in doubt or uncertainty, a specific performance will be refused. Courts will not, in such cases, grope their way on inconclusive probabilities, or grant relief on merely persuasive testimony. The evidence must be such as to produce a clear conviction of the existence and terms of the contract as alleged. Carlisle v. Carlisle, 77 Ala. 339; Derrick v. Monette, 73 Ala. 75; Pike v. Pettus, 71 Ala. 98; Daniel v. Collins, 57 Ala. 625; Aday v. Echols, 18 Ala. 353; Bogan v. Daughdrill, 51 Ala. 312. Conveyances for the alienation of land are required to be in writing, and their execution must be accompanied by formalities the observance of which is calculated to remove all uncertainty as to the grantor's intention to divest himself of the title. The provision of the statute on this subject would fail in its purpose to prevent the divestiture of title to land by any act of equivocal meaning if the land-owner could be charged with the duty to convey by evidence which leaves it in doubt or uncertainty whether or not he intended to bind himself by a contract to part with his title. The testimony in this case is so conflicting, and the claim that the appellant agreed that his mother should be reinvested with the title to the property in dispute is so dependent upon inferences from circumstances of doubtful import, that the evidence cannot be regarded as so clearly establishing an agreement to reconvey as to justify a decree for its specific enforcement.

The appellee does not occupy the position of a *bona fide* purchaser without notice of the prior conveyance to the appellant, for, though that conveyance had not been recorded, yet it is plain from the evidence that the appellee was informed of its existence when the deed of later date was made to her. There is no evidence to show that the appellee in making her purchase was influenced by any representation or admission made by the appellant, or that she acted on any assurance from him that he no longer claimed the property. There is nothing upon which the appellee can rest a claim that the appellant estopped himself from asserting against her the title vested in him by the prior conveyance, unless such estoppel resulted from his act in redelivering that conveyance to his grantor, who thereafter undertook to convey the same land to the appellee. It is plain, as has been already stated, that the redelivery of the deed, and its destruction by the parties, are ineffectual to revest the estate in the grantor. It was not decided in Reavis v. Reavis, 50 Ala. 60, or in Carithers v. Lay, 51 Ala. 390, that the mere cancellation of a deed could operate as a divestiture of the title of the grantor therein, or to preclude him from asserting his title. Those cases merely recognize the equitable title of the real purchaser of land, who had paid the purchase money, and taken possession with the full consent of the person who was the grantee in the conveyance, which had been destroyed. It was not held in either of those cases that the consent of the grantee to the cancellation of his deed would estop him from claiming title under it. But it has been held by some courts that a grantee may estop himself from claiming title under his unrecorded deed by consenting to its cancellation, or by redelivering it to his grantor, with the intention that the latter should reacquire the property. Farrar v. Farrar, 4 N. H. 191; Trull v. Skinner, 17 Pick. 213; 1 Devlin, Deeds, § 302. The text-writer just quoted says: "These decisions, however, are confined to but a few states, and it is obvious that they must, in a measure, conflict with the provisions of the statute of frauds. If the rule that the cancellation of a deed or its redelivery to the grantor would operate to revest the title were adopted, it would permit the perpetration of the frauds which it was the design of the statute to prevent. The deed might be redelivered to the grantor for many other purposes than a transfer of the title. As in the cases cited in the following section the deed might be returned for the purpose of correction or acknowledgment, resort would have to be had to parol evidence in case of controversy, to determine the intention with which the redelivery was made. These decisions have frequently been referred to in other states, but always with disapproval. And as said by Mr. Justice COMPTON in a case in Arkansas, [Strawn v. Norris, 21 Ark. 80, 82:] 'It would not be easy to maintain the soundness of these decisions upon principle.'" 1 Devlin, Deeds, § 305. The contention in this case illustrates the unsatisfactory operation of such a rule of estoppel. Here only the bare fact of redelivery is clearly shown. That act was of equivocal import. It did not necessarily indicate that the grantor intended to give up the property. We now find the deed in mutilated condition, but the evidence does not show that the grantor consented to the mutilation, or treated that act as a cancellation of the conveyance. We have only the testimony of the witnesses to look to for information as to the circumstances attending the redelivery and mutilation of the instrument, and as to the acts and expressions of the parties indicating the presence or absence of an intention that the grantor should be restored to the ownership of the property. The mere act of redelivering the deed was without effect upon the title. The accompanying agreement of the parties, and not the mere act of redelivery, is the feature of the transac-

tion which must be relied upon as the basis of an estoppel. That agreement rests wholly in parol. As an agreement it is without effect upon the title to the land. The effort is to give it the same effect, by way of an estoppel upon the grantee to assert his legal title, as it would have had if it had been reduced to writing, and signed by the parties. If such a rule of estoppel is recognized, the result is that a change in the beneficial ownership of land may be effected by a mere parol agreement, proved only by the testimony of witnesses. We cannot recognize a rule of estoppel which would offer such temptations for fraudulent evasions of the requirements of the law upon the subject of conveyances for the alienation of land. We may add, in this connection, that the impression made upon us by the testimony of the appellee is that she acted on the erroneous supposition that the effect of the prior unrecorded conveyance was destroyed by the mere acts of redelivery and mutilation, rather than that she was misled, in making the purchase of the land, by any declaration or conduct of the appellant indicating his disavowal of all claim to the property. She was simply mistaken as to the law when she supposed that the appellant was bound by a transaction which in reality had no legal effect. Certainly it does not satisfactorily appear that she was induced to make the purchase by anything said or done by the appellant, and for this additional reason she is not in a position to claim that he has estopped himself from asserting his legal title. Morris v. Alston, (Ala.) 9 South. Rep. 315; Leinkauf v. Munter, 76 Ala. 194.

It is unnecessary to review the ruling made on the demurrer to the bill. Any want of proper allegations in the bill might be cured by amendment. Conceding the sufficiency of the bill, yet the evidence adduced does not warrant the granting of the relief prayed upon either of the grounds that the defendant had made a valid agreement to reconvey the land in dispute to the complainant's grantor, or that the defendant is estopped from asserting against the complainant the legal title vested in him by the prior conveyance. For the reason that the complainant's claim is not supported by sufficient evidence, the decree of the chancery court is reversed, and a decree will be here rendered dismissing the bill.

Reversed and rendered.

(95 Ala. 152)

CENTRAL RAILROAD & BANKING CO. OF GEORGIA v. INGRAM.

(*Supreme Court of Alabama.* Jan. 27, 1892.)

EVIDENCE — CONSISTENT STATEMENTS — INSTRUCTIONS.

1. In a suit against a railroad company for negligently killing plaintiff's mules, defendant's engineer testified that the immediate locality of the accident was enveloped in a dense fog, so that it was impossible to see the mules in time to avoid killing them, and that the fog arose from the bed of a creek, extended across the track, and was about 100 feet thick. *Held*, that this testimony was not inconsistent with testimony that the night was clear and starlight, and that there was no fog at a point three-quarters of a mile from the place of the accident, and that the fireman on the same train with the engineer testified that he could "not say there was any fog that night."

2. In such case, where there was nothing in the evidence inconsistent with defendant's evidence, which went to show that its employes were without fault, the court erred in refusing to charge the jury that, if they believed all the evidence in the case, they should find for defendant.

Appeal from circuit court, Russell county; J. M. CARMICHAEL, Judge.

Action by C. E. Ingram against the Central Railroad & Banking Company of Georgia. Judgment for plaintiff. Defendant appeals. Reversed.

James T. Norman, for appellant. *John V. Smith*, for appellee.

MCCLELLAN, J. The general affirmative charge was asked by the defendant (the Central Railroad & Banking Company of Georgia) below, and refused. The only exception reserved goes to that action of the trial court. The correctness of the ruling confessedly depends upon whether any evidence was adduced in conflict with, or which afforded an inference inconsistent with, the testimony of the engineer that the immediate locality of the casualty was so enveloped in a dense wall of fog as that it was impossible to see plaintiff's mules until too near them to avoid colliding with and killing them. This fog wall, he says, arose from the bed of a creek, along which was timber, was scarcely a hundred feet thick, and extended across the track. This testimony is not, we apprehend, unreasonable in itself; but, if so, the jury would have been free to disregard it, under the charge requested and refused. So, too, with respect to supposed contradictions in other parts of this witness' testimony. The giving of the charge asked would not have prevented the jury, had they seen proper, from discrediting the witness as to the existence of fog, and finding for the plaintiff, since the instruction was that they should find for defendant only in the event they believed all the evidence. The sole question, we repeat, therefore is, was there any evidence inconsistent with the testimony of the engineer as to the existence of the fog at the time and place of the casualty? Certainly neither the fact that the night was clear and starlight,—the accident occurred a little after 3 o'clock A. M.,—or that the dawn was fair and bright, is at all inconsistent with the theory of the existence of a fog wall at that particular point; for it is common knowledge that fogs of this character, arising from watercourses, usually, if indeed not always, occur only during very clear nights. Nor do we conceive that the testimony of the witness Smith affords any basis for an inference to be drawn by the jury that the engineer was mistaken as to the fog. Smith was three-fourths of a mile away. It was night. It does not appear that his attention was at all diverted to the point of the alleged fog. If it had been, it is not reasonable to suppose that he would at that distance and at that time have detected the wall of fog hanging over the bed of the creek, and among the trees

which lined its banks. It is common knowledge that such fogs, "after depositing a heavy dew, lie still in the valleys," over the water and damp ground from which they are exhaled; and it would have been singular, under the conditions shown by the evidence, if there had been any traces of fog at the place where Smith was. The evidence does not inform us how many creeks, swamps, and the like this train had passed over on that night; but the engineer testified that he had passed through a similar fog at Uchee creek, and, for aught that we can know, this was the only other point on the line traversed by the train which afforded the same aqueous and atmospheric conditions that existed at the point of the accident. So that we are unable to conceive how the fact that fog existed elsewhere only at Uchee creek could afford any inference that it did not exist at the place in question.

Another matter relied on to sustain the court's action is the testimony of the fireman. This witness testified as to the fog only this: "I cannot say there was any fog that night." This could mean no more than that the witness did not know at the time of the trial whether there was a fog at the time and place inquired about. How this ignorance arose—why he is unable to say that there was a fog—he does not undertake to inform the jury, as we construe his testimony. It may be that his attention was not on the alert, and hence he did not know at the time whether there was a fog; or it may be that he knew at the time that there was or that there was not such fog as the engineer deposed to, and has since forgotten what was the real fact in that connection. However that may be, one thing is certain,—he neither affirms nor denies the existence of the fog, directly or inferentially; and his evidence cannot, in any just sense, be said to corroborate or contradict that of the engineer, or to afford any basis for a legitimate inference in line with or inconsistent with the latter's testimony. Manifestly, the jury might have given full credence to every fact deposed to by the fireman, and full force to every inference deducible from his evidence, and yet have implicitly believed all that was deposed to by the engineer in respect of the existence of a dense fog at the place of the casualty. So far as the testimony of the fireman is concerned, therefore, the general charge requested should have been given.

There is no evidence in this record that any of the mules were stricken elsewhere than at the point which the engineer swears was enveloped in the fog. No indications of a collision at any other point are deposed to. All the animals which were killed outright were found at that place. Several hours afterwards one of the mules, which had been wounded in the collision, was found on the track at another place, a short distance from this, in the direction from which the train came. That it had gone to that place after the train passed is manifest from the fact that it was found on the track, where it could not have remained and lived while the train was passing; and that it might have come from the place where the other mules were killed is demonstrated by the fact that it was still able to move about, and was driven off the road. In the absence of any evidence of a collision at the point where this mule was found, it would be unreasonable to allow any inference, under the circumstances, to be drawn that it was stricken at that place. This fact, like the other circumstances to which we have alluded, —and this and those others constitute all the evidence relied on to afford an inference inconsistent with the evidence of the engineer,—affords nothing contradictory of or inconsistent with the evidence for the defendant, which went to show that its employes were without fault in respect of the occurrence; and the jury should have been instructed, as requested, that, if they believed all the evidence in the case, they should find for the defendant. Reversed and remanded.

(95 Ala. 3)

CROFT v. STATE.

(*Supreme Court of Alabama.* Jan. 28, 1892.)

CRIMINAL LAW—REASONABLE DOUBT—PROBABILITY OF INNOCENCE.

An instruction, in a criminal case, that a reasonable doubt of defendant's guilt is not the same as a probability of his innocence, but that such a doubt may exist when the evidence fails to establish a probability of innocence, is not objectionable on the ground that it is argumentative, or that the phrase "probability of innocence" is of such a character as to require explanation. Bain v. State, 74 Ala. 38 followed.

Appeal from circuit court, Etowah county; JOHN B. TALLY, Judge.

Prosecution against Will Croft. From a judgment of conviction defendant appeals. Reversed.

Wm. L. Martin, Atty. Gen., for the State.

MCCLELLAN, J. The only exception reserved on the trial below goes to the refusal of the court to give the following charge, requested by defendant: "A reasonable doubt of defendant's guilt is not the same as a probability of his innocence. A reasonable doubt of defendant's guilt may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence." There can be no doubt that the abstract proposition involved in this request is a sound one. Under the ruling in the case of Williams v. State, 52 Ala. 411, however, this charge would be condemned, as being confusing, in that it fails to enlighten the jury as to the meaning of the expression "probability of innocence." In that case the trial court refused to instruct the jury that "if, from all the evidence, there is a probability of the innocence of the defendants, the jury must find them not guilty;" and this court, holding that the refusal was proper, said: "It [the charge] would have involved the jury in doubt and uncertainty, unless it had been carefully explained to them what was intended by 'a probability of innocence.'" But in the subsequent case of Bain v. State, 74 Ala. 38, Williams' Case was overruled as to

the point under consideration, and it was held that a charge requested by the defendant to the effect that "a probability of defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal," should have been given. Reaffirming Bain's Case, our conclusion must be that there is nothing in the phrase "probability of innocence," as employed in the present case, which involves a tendency to confuse the jury, and that the request is not objectionable on that ground. Nor can it be contended that any other term or phrase of the proposed instruction was of a character to require explanation to avoid confusing the jury. So that, when taken as a whole, we are unable to perceive that the request belonged to that class of charges which is condemned in Railroad Co. v. Hall, 87 Ala. 723, 6 South. Rep. 277, as being ambiguous, involved, and metaphysical. The only other possible objection to it is that it is argumentative; and this, we think, is untenable. It is, of course, the right of a defendant to have the jury instructed as to the measure of proof necessary to his conviction, and the character of the doubt of his guilt which will justify—even require—his acquittal. This, it would seem, cannot be better or more intelligibly accomplished than by differentiating the reasonable doubt which demands a verdict of "not guilty" from other possible mental conditions which, though they too require acquittal, are not essential to that result; since, though they may not exist at all, yet there may be such a doubt reasonably arising from a fair consideration of all the evidence as would entitle the defendant to a favorable verdict. And there would appear, indeed, to be a sort of necessity for this differentiation between a reasonable doubt and a probability of innocence, in view of our decisions, which, to the mind of a layman, might admit of being contorted into a requirement that the jury should believe that the defendant is probably innocent before they would be justified in finding him not guilty. The charge, in our opinion, ought to have been given. The judgment is reversed, and the cause remanded.

(94 Ala. 68)

MITCHELL v. STATE.

(*Supreme Court of Alabama.* Jan. 28, 1892.)

CRIMINAL LAW—OBSTRUCTING RAILROAD TRACK—EVIDENCE—WITNESS—INSTRUCTIONS.

1. On a prosecution for obstructing a railroad track, where there is evidence that a crow-bar which had been kept at the depot near by was missing after the night the obstruction was placed on the track, that defendant was seen on the track that night with a crow-bar, and that a crow-bar was found next morning at the scene of the obstruction, evidence is admissible to show that the crow-bar so found was the same that was missing from the depot.

2. A witness, in identifying an article, stated that he could not tell positively whether it was the same. The court then told him that he could determine whether it was the same on the same principles that he would determine whether his hat or knife was his own, and he answered that he was satisfied that the article was the same. *Held*, that there was no error in the instruction to the witness, nor in the admission of his answer.

3. On a prosecution for obstructing a railroad track, where there is evidence that a shovel which had been left near the scene of the obstruction was found under defendant's house after his arrest, it is not improper to allow the shovel to be exhibited to the jury.

4. In a criminal case, on the cross-examination of a witness for the state, where it is not proposed to show that he has been before examined in the case, or in any case connected with or resembling it, it is not error to exclude a question as to how many times he has been a witness in court.

5. In a criminal case, where it is brought out on cross-examination that a witness for the state has been indicted for the same offense with which defendant is charged, it is competent for the state to rebut the inference which might be drawn from the circumstance, by proof that the witness has not been induced by any promise to testify against defendant.

6. Where defendant in a criminal case has testified in his own behalf, the state may, for the purpose of impeaching his credibility, ask witnesses the general character of defendant in the neighborhood in which he lived, without restricting the inquiry to his reputation for truth and veracity.

7. On a prosecution for obstructing a railroad track, defendant asked the court to instruct the jury: "In the absence of proof of the exact time when the obstruction was placed on the railroad, you are not authorized from the evidence to fix the exact time only from the evidence in the case; but when there is proof that defendant is seen at a certain place with a crow-bar, and the next morning at a certain place on the railroad, at a certain time, then it is competent for defendant to prove that he was elsewhere at the times and places; and if defendant has shown you this by proof, or the evidence in the case shows you at the times and places named and specified in the evidence, this is a circumstance in the case in favor of defendant; and if this, with the other evidence in the case, creates the abiding conviction in your mind that he has proven this, you must give him the benefit of it; and unless you believe from all the evidence, beyond all reasonable doubt, that defendant is guilty, then you must acquit him." *Held*, that the instruction was confused and involved, and argumentative, and was properly refused.

8. In a criminal case an instruction that if, after looking at all the evidence, there are two theories arising therefrom, one of which shows defendant's guilt, and the other of which shows his innocence, it is the duty of the jury to adopt that theory which shows his innocence, and acquit him, is properly refused, as it makes it the jury's duty to acquit if one phase of the evidence tends to exculpate defendant, whether they believe it or not.

9. It is improper to instruct the jury which of two conflicting theories of the evidence they shall accept.

10. Bad character may be proved against a witness for the purpose of impeaching his credibility, though the witnesses who testify as to his character fail to state that his character or reputation is such that he would not be believed when testifying on his oath.

Appeal from circuit court, Conecuh county; JOHN P. HUBBARD, Judge.

Indictment against George Mitchell for wantonly and maliciously placing obstructions on a railroad track. Defendant having been convicted, and sentenced to the penitentiary for five years, appeals. Affirmed.

There was evidence introduced by the state which tended to show that there had been an attempt to wreck a train on the Louisville & Nashville Railroad at a

short distance from Evergreen, in Conecuh county; that the section boss of the road-on coming to the place where the obstruc, tions were placed on the track, found a broken crow-bar and a broken jack-screw, together with other articles of obstruction; and that there was near the scene of the attempted wreck a shovel, which was afterwards found at the defendant's house. On the examination of one Deming, he testified that he was, and had been for some time, depot agent of the Louisville & Nashville road at Evergreen, and that he had a crow-bar at the depot which was used around the warehouse, and that he had not seen the crow-bar since the night of the attempted wreck. The witness was then shown the broken crow-bar, and asked if it was the crow-bar he used at the warehouse, to which he replied: "He could not tell positively, and would not like to swear positively to this being the identical bar." After the witness had further testified "that the crow-bar had been around his office, and had been used there for a long time, and that he had seen it there often," the court instructed the witness "that it was a question of identity, and that he could determine whether it was the crow-bar or not upon the same principles that he would determine whether his hat or knife was his own." On the question of identity being repeated to the witness, he answered: "I am satisfied that it is the same crow-bar we had at the depot." There was further evidence introduced by the state which tended to connect defendant, together with others, with the commission of the crime for which he was indicted. After proving that the shovel which had been left on the side of the road near the scene of the obstruction was found under the defendant's house after his arrest, the state offered the shovel in evidence, and the court overruled defendant's objection thereto. On the introduction of one Stewart as a witness for the state, after testifying that he was a special agent of the Louisville & Nashville Railroad, and had come up to investigate this obstruction of the track at Evergreen, and after he had given further testimony, defendant, on cross-examination, asked him this question: "You have been in court before frequently,—a witness in court frequently,—have you not?" The state objected to the question, and the court sustained the objection, and refused to allow the witness to answer. Upon the introduction of one Dick Agee as a witness for the state, and after he had sworn that, the morning after the train was attempted to be wrecked, he met defendant and one Mack Thomas on the road about one and a half or two hours by sun, in the morning, and both laughed, and said, "Oh, fellow, we liked to had something last night," the defendant, on cross-examination, asked said witness "if he was not indicted for the same offense for which the defendant was on trial;" and the witness answered, "Yes." Thereupon the solicitor asked this witness the following question: "I made you no promises, did I?" to which the witness answered, "You made me no promises." The defendant objected to both question and the answer, and duly excepted to the court's overruling his objection. After defendant had testified in his own behalf, the state introduced several witnesses for the purpose of impeaching him, and to each one of these witnesses the following question was propounded by the state: "Do you know the general character of George Mitchell, the defendant, in the neighborhood in which he lives?" Each of said witnesses answered "that he knew the general character of the defendant, and that defendant's character is bad." One witness said he was regarded as a "mean negro." The defendant objected to these questions, and also to the answers. The testimony for defendant tended to prove an *alibi*.

The defendant requested the court to give the following written charges, and separately excepted to the refusal of the court to give each of them as asked: (4) "The court charges the jury that, in the absence of proof of the exact time when the obstruction was placed on the railroad, you are not authorized from the evidence to fix the exact time only from the evidence in the case; but when there is proof that defendant is seen at a certain place with a crow-bar, and the next morning at a certain place on the railroad, at a certain time, then it is competent for the defendant to prove that he was elsewhere at the times and places; and if the defendant has shown you this by proof, or the evidence in the case shows you, at the times and places named and specified in the evidence, this is a circumstance in the case in favor of the defendant; and if this, with the other evidence in the case, creates the abiding conviction in your mind that he has proven this, you must give him the benefit of it; and unless you believe from all the evidence, beyond all reasonable doubt, that defendant is guilty, then you must acquit him." (9) "The court charges the jury that it is your duty to look at all the evidence in the case, and if, after looking at all the evidence, there are two theories arising from the evidence in the case, one of which shows his guilt, and the other shows his innocence, then it is your duty to adopt that theory which shows his innocence, and acquit him." (10) "The court charges the jury that while it is competent for the state to show that defendant is a man of bad character, to affect the weight of his testimony, this but throws a shade on the testimony that is not so dark as that if the evidence should go further, and show not only that he has the character of being a 'mean negro,' but his character for truth and veracity is bad, and he would not be believed on oath in a court of justice by the witnesses or witness; and if there is no evidence that the witness or witnesses would not believe him, in a court of justice, on oath, then you must not look at his testimony with this shade upon it."

Stallworth & Burnett, for appellant.
Wm. L. Martin, Atty. Gen., for the State.

WALKER, J. There was evidence tending to show that a crow-bar which had been kept in the depot at Evergreen had been missing from that place since the

night the obstruction was put on the track; that the defendant was seen on the track that night with a crow-bar; and that a crow-bar was found the next morning at the scene of the obstruction. Evidence was admissible to show that the crowbar which was found there was the same one which was missing from the depot. On the question of the identification of persons or things, a witness may be allowed to speak as to his opinion or belief. He may be certain and free from doubt, or he may not be fully assured of the correctness of his conclusions. He may state the result of his examination of the person or object sought to be identified, and it is proper for him so to express himself as to inform the jury whether his statement is made confidently or doubtingly. The testimony is not to be excluded because the witness does not speak with positive assurance. Turner v. McFee, 61 Ala. 468; Walker v. State, 58 Ala. 393; 1 Greenl. Ev. § 440; 1 Whart. Ev. § 511. There was no error in the instruction to the witness Deming on the question as to the identity of the crow-bar, and the answer of the witness, after such instruction, was properly admitted.

There was evidence tending to show that a shovel which had been left on the side of the railroad near the scene of the obstruction was found under the defendant's house after his arrest. It was not improper to permit this shovel to be produced and exhibited to the jury. Watkins v. State, 89 Ala. 82, 8 South. Rep. 184; Holly v. State, 75 Ala. 14.

On the cross-examination of one of the witnesses for the state he was asked as to the number of times he had been in court and had testified. It was not proposed to be shown that this witness had been examined in this case before, or had testified in other cases having any connection with or resemblance to this one. We are unable to discover the pertinency or relevancy of the inquiry. It seems plain that the defendant could not have been prejudiced by the action of the court in sustaining the objection to the question.

One of the witnesses for the state had been indicted for the same offense with which the defendant was charged. It was competent for the state to rebut the inference which might be drawn from this circumstance, which was brought out on a cross-examination, by proof that the witness had not been induced, by any promise in reference to his own case, to testify against the defendant.

The defendant testified in his own behalf. It was competent for the state to impeach his credibility. For this purpose, inquiry into his general character or reputation was proper. Such inquiry was not restricted to his reputation for truth and veracity. It was proper to ask a witness if he knew the general character of the defendant in the neighborhood in which he lived. McInerny v. Irvin, 90 Ala. 275, 7 South. Rep. 841; Ward v. State, 28 Ala. 53. No objection was interposed to the answers of the several witnesses to that question.

The fourth charge requested by the defendant is confused and involved; besides, it is plainly argumentative in character; and for that reason, also, the court was justified in refusing to give it. Railway Co. v. Hale, 90 Ala. 8, 8 South. Rep. 142; Hussey v. State, 86 Ala. 34, 5 South. Rep. 484; Snider v. Burks, 84 Ala. 53, 4 South. Rep. 225. Obedience to charge No. 9 would have made it the duty of the jury to acquit the defendant if one phase of the evidence tended to exculpate him, whether they believed that evidence or not. It is improper for the court to instruct the jury which of two conflicting theories of the evidence they shall accept. Fonville v. State, 91 Ala. 39, 8 South. Rep. 688. Bad character may be proved against a witness for the purpose of impeaching his credibility, although the witnesses who testify as to his character fail to state that his character or reputation is such that he would not be believed when testifying on his oath in a court of justice. This consideration discloses one of several objectionable features in charge No. 10. That charge was properly refused. The other exceptions reserved by the defendant during the progress of the trial are obviously without merit. Affirmed.

(94 Ala. 535)

THOMPSON v. STATE.

(*Supreme Court of Alabama.* Jan. 28, 1892.)

LARCENY—WHAT CONSTITUTES.

On a prosecution for larceny, where the evidence shows that defendant struck the hand of a person who was showing him money, but does not show whether he got the money, or merely knocked it to the ground, where it was lost, it is error to refuse to charge that defendant cannot be convicted unless he got the money into his hands or actual possession, since that only would constitute larceny.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Indictment against Amos Thompson for larceny. Defendant was convicted, and appeals. Reversed.

At the trial the court refused defendant's request to charge: (1) "The jury must believe, beyond a reasonable doubt, that the defendant got the money into his hands, or actual possession, before they can convict him of larceny."

R. L. Harmon, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

WALKER, J. The witness for the state testified that he held out his open hand, with two silver dollars therein, showing the money to the defendant; that the defendant struck witness' hand, and the money was either knocked out of his hand, or was taken by the defendant, he could not tell positively which. It was after 12 o'clock at night, and the witness did not see the money either in defendant's possession or on the ground. The court charged the jury: "If the jury find from the evidence that the defendant, with a felonious intent, grabbed for the money, but did not get it, but only knocked it from the owner's hand with a felonious intent, this would be a sufficient carrying away of the money, although defendant never got possession at any time of said money." This charge was erroneous. To

constitute larceny, there must be a felonious taking and carrying away of personal property. There must be such a caption that the accused acquires dominion over the property, followed by such an asportation or carrying away as to supersede the possession of the owner for an appreciable period of time. Though the owner's possession is disturbed, yet the offense is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody or control. Frazier v. State, 85 Ala. 17, 4 South. Rep. 691; Croom v. State, 71 Ala. 14; Edmonds v. State, 70 Ala. 8; Wolf v. State, 41 Ala. 412. It is not enough that the money was knocked out of the owner's hand, if it fell to the ground, and the defendant never got control of it. The defendant was not guilty of larceny, if he did not get the money under his control. If the attempt merely caused the money to fall from the owner's hand to the ground, and the defendant ran off without getting it, the larceny was not consummated, as the dominion of the trespasser was not complete. Charge No. 1 was a proper statement of the law as applicable to the evidence above referred to, and it should have been given. Reversed and remanded.

(96 Ala. 178)

FESTORAZZI *et al.* v. ST. JOSEPH'S CATHOLIC CHURCH.

(*Supreme Court of Alabama.* Feb., 1892.)

APPEAL—INTERLOCUTORY DECREE.

An appeal will not lie from a decree overruling a demurrer to a cross-bill.

Appeal from chancery court, Mobile county; W. H. TAYLOE, Chancellor.

Action by S. Festorazzi and another, as executors, against St. Joseph's Catholic Church. From a decree overruling plaintiffs' demurrer to defendant's cross-bill, plaintiffs appeal. Dismissed.

Hannis Taylor, Overall & Bestor, and *Fred. G. Bromberg,* for appellants. *Gaylord B. & F. B. Clark,* for appellee.

WALKER, J. This is an appeal from a decree overruling a demurrer to a cross-bill. There is no authority for an appeal from such an interlocutory decree. Barclay v. Spragins, 80 Ala. 357; Jones v. Iron Co., 90 Ala. 545, 8 South. Rep. 132; Code 1886, § 3612. The court being without authority to entertain the appeal, it must be dismissed.

(95 Ala. 249)

F. S. & H. ROSENBERG v. H. B. CLAFLIN CO.

(*Supreme Court of Alabama.* Feb. 8, 1892.)

ATTACHMENT—DEFECTIVE WRIT—WAIVER—PLEADING—AMENDMENT—APPEAL.

1. Where the record fails to show that defendant's motion to require plaintiff to give security for costs was insisted on, the motion is presumed to have been waived.

2. Though Code, § 2995, provides that a suit commenced by attachment is triable at the return-term of the writ, if the levy has been made and notice thereof given 20 days before the commencement of such term, defendant, by a general appearance, waives plaintiff's failure to serve the notice within proper time.

3. A defendant in attachment, by filing pleas involving a recognition of the service of the writ, and by going to trial without objection, enters a general appearance, within Code, § 2996, providing that, if the defendant appears and pleads, the cause proceeds as in suits commenced by summons and complaint.

4. Under Code, § 2998, providing that plaintiff, before or during trial, must be permitted to amend any defect of form or substance in the affidavit, and no attachment must be dismissed for any defect therein, if the plaintiff will make a sufficient affidavit, a plaintiff corporation, having stated its name correctly in the original affidavit, may file an amended affidavit averring its corporate character.

5. An unverified plea denying plaintiff's corporate character will be stricken out, under Acts 1888–89, p. 57, providing that plaintiff cannot be required to prove its corporate existence unless the same is denied by verified plea.

6. An order sustaining a demurrer cannot be reviewed on appeal, where the record fails to show the grounds of the demurrer.

7. Where two pleas present the general issue, an error in sustaining a demurrer to one of them is harmless.

Appeal from circuit court, Dallas county; JOHN MOORE, Judge.

Action by the H. B. Claflin Company against F. S. & H. Rosenberg in the nature of attachment proceedings. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was commenced by attachment. Defendant filed 13 pleas, the tenth and eleventh of which are not found in the record. The second and third pleas alleged that the plaintiff was a foreign corporation, and had not complied with the constitutional and statutory provisions which authorized it to do business in this state. The original affidavit upon which the attachment was issued did not describe the plaintiff as a corporation, but, by permission of the court, the plaintiff amended this affidavit, as well as its complaint, by describing the plaintiff as a body corporate. The defendant moved to dissolve and dismiss the attachment, and dismiss the levy, on the ground that the original and amended affidavit made a new cause of action, and because no notice of the levy of the attachment sued out by H. B. Claflin Company, a body corporate, had been served on the defendant. The court overruled these motions. On motion of the plaintiff, the court ordered the defendant's pleas numbered 1, 4, 5, 6, 8, and 9 to be stricken from the file, and the court sustained the plaintiff's demurrer to plea No. 13.

Gaston A. Robbins, for appellant. *Dawson & Pitts,* for appellee.

WALKER, J. 1. The record fails to show that any action was taken by the circuit court on the motion of the defendant to require the plaintiff to give security for the costs. As it does not appear that the motion was insisted on, or even called to the attention of the court, the presumption on appeal is that it was abandoned or waived. Hutcheson v. Powell, (Ala.) 9 South. Rep. 170; Covington Co. v. Kinney, 45 Ala. 176; Dougherty v. Colquitt, 2 Ala. 337.

2. A suit commenced by attachment is triable at the return-term of the writ, if the levy has been made and notice thereof given 20 days before the commencement of

such term. Code, § 2995. If the notice of the levy has not then been given, and the defendant does not appear, the case cannot be tried at that term; but it may be continued, and notice of the levy may be given thereafter. No reason is perceived why the mere failure of the officer to serve the notice at the proper time should confer on the defendant the right to have the attachment dismissed. However that may be, it is plain that nothing remains to be accomplished by a service of the notice, if the defendant voluntarily appears and pleads to the complaint. The purpose of the notice is to afford the defendant the opportunity to appear and make defense. A general appearance dispenses with the necessity of a formal notice, and is a waiver of any previous irregularity in the service of process. Lampley v. Beavels, 25 Ala. 534; Moore v. Easley, 18 Ala. 619; Peebles v. Weir, 60 Ala. 413.

The appearance of the defendant in this case was not limited to the purpose of the motion to quash the levy and to dissolve and dismiss the attachment. It recognized the case as in court by filing a number of pleas, several of which involved a recognition of the service of the writ of attachment, and by going to trial, without objection, so far as the record discloses. All objections because of the failure of the officer to serve written notice of the levy were waived by this general appearance. If the defendant in attachment appears and pleads, the cause proceeds as in suits commenced by summons and complaint. Code, § 2996. In claiming that the motion to quash the levy and to dissolve and dismiss the attachment should have been granted because of the failure to serve written notice of the levy, the appellant urges an objection which has been removed by themselves.

3. The original affidavit for the attachment correctly stated the name of the plaintiff, but did not describe it either as a partnership or as a corporation. The plaintiff was permitted to file an amended affidavit, in which its corporate character is duly stated. It has been held that the absence of an allegation of the plaintiff's corporate capacity in an original complaint filed by a corporation could not be regarded as a failure to name any plaintiff at all, and that an amendment of the complaint by stating the plaintiff's corporate character should be allowed. Insurance Co. v. Roberts, 60 Ala. 431; Alabama Conference, etc., v. Price, 42 Ala. 47. Such an amendment is a mere correction of the description of a plaintiff, already named. It does not amount to a departure from the original complaint, to the institution of a new action, or to the introduction of a different party plaintiff. A similar amendment of the affidavit in an attachment case is plainly authorized by the provision of the statute that the plaintiff, before or during the trial, must be permitted to amend any defect of form or substance in the affidavit; and no attachment must be dismissed for any defect in the affidavit, if the plaintiff, his agent or attorney, will make a sufficient affidavit. Code, § 2998. The mandate of the statute that the attachment law must be liberally construed to advance its manifest intent need not be invoked to justify this conclusion. The sufficiency of the defendant's pleas numbered 4, 5, 6, 7, 8, and 9 depended upon the correctness of the assumption that the suit was not commenced by the plaintiff corporation, because its corporate capacity was not stated in the original affidavit. That assumption was erroneous, and there was no error in striking the above-mentioned pleas from the files. None of them presented a valid defense to the suit.

4. The first plea was a denial that the plaintiff is a corporation authorized to maintain this suit. This plea was insufficient, because it was not sworn to. It presented an issue as to the existence of the plaintiff as a corporation. The plaintiff cannot be required to prove its corporate existence, unless the same is denied by a plea verified by affidavit. Acts Ala. 1888–89, p. 57.

5. No demurrer to the thirteenth plea is found in the record. As there is nothing to show what were the grounds of the demurrer, we are unable to review the ruling of the court in sustaining it. However erroneous that ruling may have been, it involved no injury to the appellant. The plea amounted only to the general issue. Railroad Co. v. Trammell, (Ala.) 9 South. Rep. 870. The twelfth plea amounted to the same thing. Under this plea the defendant had the full benefit of all matter of defense that would have been available to it under the thirteenth plea. Sustaining the demurrer to the latter plea was, for this reason, error without injury, if error at all. Manning v. Maroney, 87 Ala. 563, 6 South. Rep. 343. We have discovered no error in the record, and the judgment of the circuit court must be affirmed.

(94 Ala. 55)

HORNSBY v. STATE.

(*Supreme Court of Alabama.* Feb. 3, 1892.)

DRAWING JURY—MURDER—INDICTMENT—EVIDENCE—DECLARATIONS UNDER ARREST—INSTRUCTIONS.

1. Under Act 1888–89, p. 430, amending Act 1886–87, p. 151, § 4, and providing that, as far as it applies to Pike county, the names of the persons from whom jurors are to be drawn shall be placed in fifteen boxes, one for each precinct in the county, a jury for the trial of a capital case in Pike county must be drawn from fifteen boxes, instead of from one box, as provided in the original act.

2. An indictment which charges that "defendant unlawfully and with malice aforethought killed P. by stabbing him with a knife or other weapon," is demurrable, as the alternative averment, "or other weapon," insufficiently describes the means used.

3. Where a count in an indictment is in the alternative, with one of the averments good and the other charged in the alternative bad, and no objection is taken to the indictment, a general verdict of guilty will be referred to the good averment, and a judgment on conviction sustained. State v. Coleman, 5 Port. (Ala.) 40, followed.

4. It is not error for a court in a criminal case to refuse to permit defendant to inquire of a juror on his *voir dire* whether he is willing to accord a negro as fair a trial as a white person, as neither party to the action has a right to interrogate a juror before he is challenged.

5. The mere facts that defendant was under arrest for homicide, and that the officer who had

him in charge was armed, are not sufficient to exclude a statement of defendant to the officer concerning the homicide, and how it occurred.

6. Defendant alleged that deceased was killed by falling on a broken wagon-spoke, and offered in evidence a piece of wood, claimed to be similar in shape to the wagon-spoke when the homicide occurred. *Held*, that the court did not err in excluding the piece of wood, as the wagon-spoke itself was in evidence, and as it was a matter of proof whether its appearance differed from what it was at the time of the death of deceased.

7. In such case, the testimony of a witness that at the time the spoke was cut from the wheel he called the attention of a person to it, and asked him to preserve it, was properly excluded as hearsay.

8. It is error to charge the jury that, "if defendant killed P. with a deadly weapon, it is presumed to be murder," where such charge is unaccompanied with the further statement, "unless the evidence which proves the killing rebuts the presumption."

9. It is not error for the court to refuse to charge that, in order to find defendant guilty, the jury must be convinced beyond a reasonable doubt, both that defendant took the life of deceased and that he did it with premeditation and deliberation.

10. A charge that "manslaughter in the first degree is the voluntary depriving a human being of life," is erroneous, in that it omits the important qualifying clauses "unlawful" and "without malice."

11. On a trial for murder, a charge that the "absence of all evidence of motive affords a strong presumption of innocence," is misleading, for, if the offense is clearly made out by other evidence, it is not necessary for the state to go further, and also prove a motive.

12. On a trial for murder defendant requested the court to charge that the burden was on the state to prove the guilt of the accused, and was not necessarily on defendant to explain suspicions; that circumstances and suspicion were not enough; that conviction beyond a reasonable doubt was what the law required; and that, if any facts or circumstances established by the evidence were absolutely inconsistent with the supposition of guilt, the defendant must be acquitted. *Held*, that the requests to charge were properly refused, as they were misleading and argumentative.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

L. Hornsby was convicted of murder in the second degree, and appeals. Reversed.

Upon the formation of the jury, as the names of the jurors summoned for the trial were drawn from the box, and were examined on their *voir dire* as to the cause of challenge, the defendant requested the court to ask the persons so drawn "If they were willing to accord to the defendant, who was a negro, as fair a trial as if he was a white man." The court refused to propound said question to the persons so drawn, and defendant excepted. The evidence introduced by the state tended to show that when the deceased, who was drunk, was riding home with the defendant in a wagon they were heard talking in a loud voice. One of the persons exclaimed, with an oath, "Don't throw me out!" That just shortly after that the defendant was seen driving at a rapid pace alone in the wagon, and the deceased was afterwards found in the road about where the exclamations were heard, with his throat cut. That the defendant went up to the plantation on which he lived, and told the proprietor, one Col. Perdue, "that a man had gotten tangled up in the wheels of the wagon, and he had better go down and see to him; that he did not know how badly he was hurt;" and that, upon Col. Perdue's going down the road, he found deceased lying in the road, dead, with a wound in his neck. The evidence further shows that the defendant fled when the officer went to arrest him; that the officer, in arresting the defendant while he was fleeing, drew a pistol on him, and carried him back to the house in which he lived; that while he was sitting at the door, waiting for his coat to be brought to him, and while he was in the custody of the officer, who had a pistol drawn, and was holding it in his hand, but was not threatening, nor pointing it towards, the defendant, a statement was made by the defendant to the officer to the effect that the deceased fell out of the wagon, and got his head hung in the wheel, and stuck a wagon-spoke in his neck. The defendant objected to the introduction of this testimony, and moved to exclude the same, on the ground that it was not voluntarily made by the defendant. The court overruled this motion, and the defendant duly excepted. The defendant's testimony tended to show that the deceased came to his death by accident; that he fell out of the wagon, and caught his head in the wheel, which had a broken spoke in it, and that this spoke stuck in the deceased's throat, which wound caused his death. The defendant offered to introduce in evidence a piece of wood, which was cut, and which purported to be similar to the broken spoke at the time the accident occurred. The state objected to the introduction in evidence of this piece of wood. The court sustained the objection, and the defendant excepted. The broken spoke had previously been cut out of the wheel, and introduced in evidence by the state, but the evidence was in conflict as to whether the spoke was, at the time of the injury, sharpened. One witness testified that he examined the spoke at the time it was cut out of the wheel, and called Col. Perdue's attention to it, and asked him to preserve it. The state objected to the latter part of this evidence, which objection the court sustained, and the defendant excepted. The court in its general charge, among other things, instructed the jury as follows: "Murder in the first and second degrees differ, in that in murder in the first degree there must be deliberation and premeditation; whereas, in murder in the second degree, these elements of deliberation and premeditation or formed design are absent or wanting; murder in the first degree being more atrocious than murder in the second degree, by reason of deliberation and premeditation." To the giving of this charge the defendant duly excepted. At the request of the solicitor the court gave the following written charges: (1) "The court charges the jury that if they believe from the evidence beyond a reasonable doubt that the defendant killed Jerre Perdue with a deadly weapon, it is presumed to be murder, and it devolves upon the defendant to reasonably satisfy

the minds of the jury by evidence that he is guilty of a less crime, or acted in self-defense." (2) "The court further charges the jury that the expressions that, unless the evidence against the defendant should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they must find him not guilty. That the evidence of the state should be so convincing as to leave the mind of the jury to the conclusion that the accused cannot be guiltless are but strong expressions of that full measure of proof which the law exacts before it will sanction a conviction of a criminal offense, all of which only means that the jury must be convinced beyond a reasonable doubt." (3) "The court further charges the jury that the doubt which requires an acquittal must be actual and substantial, not mere possibility or speculation. It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt." To the giving of each of these charges defendant separately excepted, and also separately excepted to the refusal of the court to give the following written charges asked by him: (1) "If the jury have no reasonable doubt that defendant took the life of deceased, and they are in doubt whether the act done was a deliberate, premeditated act, or the result of heat of blood, excited by an attack made or threatened by deceased, their finding must be for manslaughter in the first degree." (2) "The jury are instructed that manslaughter in the first degree is the voluntary depriving a human being of life." (3) "The plea of not guilty puts in issue every constituent of the crime of homicide, and, although the jury may not know or be satisfied beyond a reasonable doubt how the death of the deceased was brought about, yet if they are not satisfied beyond such doubt that defendant did the act with premeditation, then they cannot convict him of either degree of murder." (4) "In criminal prosecution, the weight and sufficiency of the evidence are for the jury. The guilt of the accused should be fully proved. It is not enough that the weight of the evidence points to his guilt. It must do more. It must point to his guilt with such force and certainty as to exclude every reasonable supposition of innocence. Circumstances may point to a party accused, may create suspicion of his guilt, and there may be no explanation of them; still they may fall far short of producing that satisfied conviction which leaves on the mind no reasonable doubt. The burden is on the state to prove the guilt of the accused, and is not necessarily on the defendant to explain suspicions. Circumstances, suspicion, without more, is not enough. Conviction—conviction beyond a reasonable doubt—is what the law requires." (5) "The jury are instructed that, if there is an absence of all evidence of an inducing cause to guilt,—that is, a motive,—it affords a strong presumption of innocence." (6) "The jury are instructed that the supposition of guilt should flow naturally from the facts proven, and be consistent with them all. They should make an examination of all the facts of the case, free from bias or prejudice; and an examination of the case on both sides, in its aspects of favor or disfavor. They should avoid precipitancy or haste in drawing their inferences, and resist any tendency to jump at conclusions, without examining all the facts of the case, and allowing them every interpretation which they will reasonably admit. The process of coming to a conclusion is to be a natural one without the use of any mental violence in straining facts beyond their real significance. If any of the facts or circumstances established by the evidence be absolutely inconsistent with the supposition of guilt, the jury must acquit." (7) "The defendant cannot be convicted of the higher degree charged in the indictment unless the jury are convinced beyond a reasonable doubt that the defendant took the life of the deceased intentionally, and with premeditation and deliberation; and if the jury are satisfied beyond a reasonable doubt that deceased came to his death at the hands of defendant, and they are in doubt whether the death was occasioned by the deliberate act of defendant, or that it was done accidentally, they must acquit."

Gardner & Wiley, for appellants. *Wm. L. Martin*, Atty. Gen., for the State.

COLEMAN, J. The defendant was arraigned upon an indictment for murder, to which he pleaded, "Not guilty." Afterwards, but before the day fixed for his trial, he filed a plea to the effect that the special *venire* was drawn from 15 different boxes, and not "a single box," as required by law. The proper way to reach a *venire* not drawn in accordance with law is by a motion to quash the *venire* There was no ruling of the court upon this plea, and the record fails to show that the attention of the court was called to it. Pretermitting the fact that there is no ruling to which an exception was taken or legal question is reserved upon this point, (Ex parte Knight, 61 Ala. 486,) we are of opinion the *venire* was properly drawn. Section 4 of the act of 1886–87, p. 151, which provides that jurors shall be drawn from a box, was amended by the act of 1888–89, p. 430, so far as it applied to Pike county. By the latter act it is provided that the names of the persons from whom the jurors are to be drawn shall be placed in fifteen boxes,—one box for each precinct in the county. The fifteen boxes are here clearly substituted for the one box mentioned in the original act, and it must be so regarded when a jury is to be drawn for the trial of a capital case as provided in section 10 of the act. The record shows the special *venire* was drawn according to law.

The indictment charges that the defendant unlawfully and with malice aforethought killed Jerre Perdue, by stabbing him with a knife or other weapon, against the peace and dignity of the state of Alabama. Section 4383 of the Criminal Code provides: "When the offense may be com-

mitted by different means, or with different intents, such means or intents may be charged in the same count in the alternative." In the case of Horton v. State, 53 Ala. 493, it was declared that the purpose of the statute "is to dispense with a multiplicity of counts. Permitting one, by alternative averments of different offenses, to serve the purpose of several counts, it follows that each alternative averment must present an indictable offense, or the indictment is insufficient, as, at common law, the separate count, not presenting an indictable offense, would be bad." We think this to be a correct exposition of the statute, which permits the averments in the alternative, in one count, of the means by which an offense may be committed. Burdine v. State, 25 Ala. 60. The indictment must be examined, under the rules of the common law, as if it contained two counts; the first charging that the offense was committed by stabbing with a knife, and the second by stabbing with a weapon. The first count undoubtedly would be sufficient. Is there such a description of the means in the second as to make it a good count? At common law it was necessary to set forth in an indictment for murder the means by which the offense was committed; and, if by a weapon, it was necessary to say what the weapon was, or allege it to be unknown to the grand jury. 2 Bish. Crim. Proc. § 514; 1 East, P. C. 341. The form given in the Criminal Code retains a description of the means used, as by shooting him with a pistol or gun, or by striking him with an iron weight, etc. Section 4378 provides that when the means are unknown it may be so averred in the indictment. We hold that the alternative averment "or other weapon" insufficiently describes the means used, and rendered the indictment demurrable.

Instead of demurring to the indictment, the defendant pleaded "not guilty," and after conviction moved in arrest of judgment, upon the ground that the indictment was defective. We are of opinion that the particular defect complained of is not available on motion in arrest of judgment, but, to be available, advantage must be taken of the defect before trial and conviction. The authorities are uniform, and on principle must be correct, that averments in the alternative in one count are mere substitutes for so many different counts. The validity of such forms are maintainable in a great measure upon this principle. As was held in Burdine v. State, 25 Ala., supra, the defendant is as well informed when he is charged in the alternative, as if he had been charged in different counts; and it is upon this principle that each alternative averment must present an indictable offense. In the case of State v. Coleman, 5 Port. (Ala.) 40, it was stated that "it seems now well settled that, when there is a verdict and judgment on an indictment with good and bad counts, the judgment shall not be arrested or reversed, but that the finding of the jury will be upheld by the good counts; for it will be presumed that the court, and, of consequence, the jury, were controlled in their actions by a reference to the good counts." This ruling of the court has been uniformly approved. 1 Brick. Dig. p. 501, § 761; May v. State, 85 Ala. 16, 5 South. Rep. 14; Glenn v. State, 60 Ala. 104. It would seem to follow from these authorities that when a count is in the alternative, with some of the averments good and others charged in the alternative are bad, and no objection is taken to the indictment, a general verdict of guilty will be referred to the good averments, and a judgment on conviction will be sustained. Under any other rule no attorney of any skill would interpose a demurrer or other objection where an indictment was defective by reason of having bad counts or insufficient averments. He would simply take the chances of an acquittal, and, failing in this, would move in arrest of judgment, and thereby secure the discharge of the defendant or a new trial. To sustain a judgment of conviction there must be a good count in the indictment, or if there is but one count, containing charges in the alternative, there must be one or more good and sufficient averments. There may be some decisions not altogether consistent with the rule here laid down, but we think this the better practice, and in harmony with the principles of law declared in the cases cited supra.

There is no rule of law which authorizes the defendant to inquire of a person summoned as a juror, upon his *voir dire*, whether he was willing to accord to a negro as fair trial as he would to a white person. The statute lays down the rule for ascertaining the qualifications of jurors, and the cause of challenge. As was said in Bales v. State, 63 Ala. 38: "We know of no authority, and we perceive no reason, for any such speculative, inquisitorial practice, consuming needlessly the time of the court, and offensive to the persons subjected to it. The rule is ancient that neither party has a right to interrogate a juror before he is challenged." Hawes v. State, 88 Ala. 66, 7 South. Rep. 302; Lundy v. State, 91 Ala. 100, 9 South. Rep. 189.

The statement of the defendant in regard to the killing, and how it occurred, seems to have been wholly voluntary. The facts that he was under arrest, and that the officer who had him in charge was armed, alone are not sufficient to exclude such statements. There must be some improper influence, proceeding from the person to whom the confessions are made, or from some other person, or arising from the surrounding circumstances, to exclude the statement of a defendant upon the ground that they were not freely and voluntarily made. The mere fact of arrest, and his being guarded by an officer who is armed, is not sufficient. The statements of the defendant, if true and believed, moreover tended to exculpate, and not to criminate, him. Redd v. State, 69 Ala. 259; Spicer v. State, Id. 163; Meinaka v. State, 55 Ala. 47; Dodson v. State, 86 Ala. 63, 5 South. Rep. 485.

There was no error in sustaining an objection to the introduction of the piece of

wood claimed to be similar in shape to the wagon-spoke as it was said to be when the homicide occurred. The wagon-spoke itself was in evidence, and, if its appearance from any cause differed from what it was at the time of the death of deceased, this was a matter of proof. To permit the introduction of another piece of wood, and evidence to show its similarity, merely presented a collateral, controverted issue, calculated to confuse the jury, and draw their minds from the main issue. The conversation between the witness and Col. Perdue in regard to the shape of the spoke was mere hearsay, and properly excluded.

The definition of murder in the first degree given by the court in its general charge is not, as an abstract proposition of law, absolutely correct. As we interpret the charge, it holds that whenever there is a formed design to take life, and life is taken in pursuance thereof, that will constitute the offense of murder in the first degree, without regard to other facts in the case. There may be a formed design to take life by one acting entirely in self-defense. If a party is without fault in provoking a difficulty, if there is no reasonable way open to him to retreat and escape, and if the assault upon him is of such a character as to endanger his life, or such as to impress a reasonable man that to save his own life it is necessary to strike, he may strike in self-defense, and with the formed design to take life, and if death to his assailant ensues, under such circumstances, it will be excusable homicide. No particular duration of time for the existence of formed design is necessary to raise the offense to murder when the formed design is the product of malice, premeditation, deliberation, and not engendered by passion suddenly aroused, upon sufficient provocation, or the necessities which justify a striking in self-defense. The law does not require one to retreat from his own castle. In law his castle is the wall, the limit of retreat. He may take life with a formed design here in resisting assault apparently dangerous to his life or limb, or in the necessary protection of his dwelling, and it may be excusable homicide, although, under like circumstances at another place, he would be bound to retreat, and, failing to do so, he would not be excusable. Lee v. State, 92 Ala. 19, 9 South. Rep. 407. An officer of the law having a writ to execute, having reasonable grounds to apprehend resistance, may, in some cases, arm himself, with a formed design to take life if it becomes necessary in the discharge of the duties imposed upon him by law. In some cases a person is justified in taking life to prevent the commission of a felony, although done with a formed design. A person guilty of manslaughter may have instantaneously formed the design to take life, but to make it manslaughter there must be an absence of malice, deliberation, and premeditation. The design in such case is the result of sudden passion upon sufficient provocation, as distinguished from that formed design which results from malice, deliberation, premeditation. As was said in Harrington v. State, 83 Ala. 15, 16, 3 South. Rep. 425, and reaffirmed in Williams v. State, 83 Ala. 17, 3 South. Rep. 616: "In order to constitute manslaughter in the first degree there must be either a positive intention to kill, or an act of violence from which ordinarily, in the usual course of events, death or great bodily injury may be a consequence." It is difficult to conceive how there can be a "positive intention" to kill without forming the design to kill, and such "positive intention" necessarily precedes the killing. Whether the "design" or "positive intention" is the offspring of the elements which constitute murder in the first degree, that is, "willful, deliberate, malicious, and premeditated," or of the facts which constitute murder in the second degree, or of sudden passion upon sufficient provocation, or in self-defense, is always a question of fact for the jury under proper instructions of the court. This is the proper meaning and full extent of the law as declared in the leading case of Mitchell v. State, 60 Ala. 26, when correctly construed.

It is undoubtedly a canon of the law that, "if one man intentionally shoot another with a gun or other deadly weapon, and death ensues, the law implies or presumes malice," and, we may add, a "formed design" to take life, and it imposes upon the slayer the burden of rebutting this presumption by other proof, unless the evidence which proves the killing rebuts the presumption. Hadley v. State, 55 Ala. 37; Mitchell v. State, 60 Ala. 28; Gibson v. State, 89 Ala. 121, 8 South. Rep. 98. Whenever there are any facts testified to on a trial for murder, and which are necessary and are relied upon to sustain the charge of murder, and a jury could legally infer from the facts proving the offense that the defendant acted in self-defense, or the homicide was the result of sudden passion, engendered by sufficient provocation, and without malice, it is error to charge the jury as to the presumptions arising from the use of a deadly weapon, without accompanying such charge with the further statement, "unless the evidence which proves the killing rebuts the presumption." When the facts which prove the killing do not tend to rebut the presumption which the law raises from the use of a deadly weapon, then it becomes incumbent on the defendant by other evidence to rebut the presumption, and, failing to meet this burden, the presumptions of law are conclusive against him. Hadley v. State, supra. Although the jury may have discredited the account given by the defendant as to the means by which the deceased came to his death, and although they may have been satisfied that his statements in this respect were unreasonable, this would not deprive the defendant of the benefit of the evidence in the case, whether introduced by the state for the purpose of criminating him, or by himself as exculpatory evidence. It is upon the whole evidence the jury must make up their verdict. Smith v. State, 68 Ala. 430, 431. It would be improper, perhaps, for this court to make special reference to any particular portions of the evi-

dence, but we think when the evidence sustaining the charge is wholly circumstantial, and the character of the wound causing death tends to show that it was done by cutting or stabbing, and the relations of the parties to each other existing as shown in this case, the safer rule is to charge on the law of manslaughter, and to let the jury say whether there are facts which would reduce the crime to a lower degree than murder. Hall v. State, 40 Ala. 706. There was no error in giving the second and third charges requested by the solicitor. Coleman v. State, 59 Ala. 52.

The first and seventh charges requested by the defendant exact too high a degree of conviction in the minds of the jury of the guilt of the defendant. The law does not require that the jury be satisfied beyond all doubt. The definition of manslaughter in the first degree contained in the second charge requested by the defendant is erroneous, and was properly refused. It omits the important qualifying clauses "unlawful" and "without malice." The statute does not attempt to define manslaughter, and we must look to the common law for its definition. Smith v. State, 68 Ala. 430; 3 Brick. Dig. p. 218, § 560. Premeditation is not necessarily a constituent of murder in the second degree. As was said in Ex parte Brown, 65 Ala. 447, 448: "If there be a killing without previous malice provoked by abusive language or other offense less than an immediate preceding assault, and the insulted party, maddened by the insult, immediately and without reflection, without time to reflect, and with no purpose formed or thought of, take life with a deadly weapon, this reduces the crime to murder in the second degree; but it reduces it no lower." The statute itself (Crim. Code, § 3727) declares that killing in a sudden rencounter by the use of a deadly weapon concealed, his adversary having none, under certain circumstances is murder in the second degree. There was no error in refusing this charge. Charge 5, requested by the defendant, is misleading, and asserts an incorrect proposition of law. It is always permissible for the state to prove facts which tend to show a motive for the commission of the offense. Such evidence assists in fixing the crime upon the proper person, and in some cases is strongly instrumental in determining the degree of the offense; but, if the offense be clearly made out by other evidence, it is not incumbent on the state to go further, and also prove a motive. A person who deliberately shoots and kills another with a deadly weapon, without excuse, whom he never heard of or saw before, may be guilty of murder, although there may be an entire absence of proof of motive. Under such a rule, as asserted in the charge requested, the very atrocity of the offense would be made to furnish a presumption of innocence. The fourth and sixth charges are misleading and argumentative in their character. Courts and text-writers often precede their conclusions by just reason and sound argument to sustain them, but, when copied into a charge to a jury, would confuse and mislead. This court never reverses for refusing to give a charge of this character. Tanner v. State, 92 Ala. 8, 9 South. Rep. 613. For the error pointed out in the first charge given at the request of the solicitor the case is reversed, and the cause remanded.

(95 Ala. 467)

DEXTER v. OHLANDER.

(*Supreme Court of Alabama.* Jan. 27, 1892.)

CONTRACTS—REFORMATION—INJUNCTION—REFUNDING BOND.

1. Where the answer in a suit to reform a contract denies every allegation which tends to give the bill equity, the relief prayed for will be denied.

2. An interlocutory decree, dissolving an injunction to stay proceedings on a judgment at law, should order defendant to give a refunding bond, as required by Code 1886, § 3581, as a condition precedent to the enforcement of the judgment in case it should afterwards be perpetually enjoined.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Bill by R. P. Dexter against August Ohlander, praying that a certain receipt given by Dexter to Ohlander, and upon which suit had been brought and judgment rendered, should be reformed so as to speak the intention of the parties, and that an injunction should issue to enjoin the said Ohlander from all further proceedings for the enforcement of the judgment. A temporary injunction having been issued, defendant filed his answer, denying all the facts upon which the equity of the bill vested. He also moved to dissolve the injunction on the ground that the bill contained no equity, and because the answer denied all its material allegations. From a decree dissolving the said injunction, plaintiff appeals. Corrected and affirmed.

W. S. Thorington and *L. C. Smith*, for appellant. *Watts & Son* and *E. P. Morrisette*, for appellee.

STONE, C. J. It requires very great particularity of averment and very clear proof to authorize the reformation of a written contract. 1 Story, Eq. § 152; Campbell v. Hatchett, 55 Ala. 548; Turner v. Kelly, 70 Ala. 85. The answer is a full denial of every averment of the bill which tends to give it equity, and the chancellor did not err in dissolving the injunction. The suit, however, being instituted to enjoin and "stay proceedings on a judgment at law," the decree is imperfect, in that it did not order and "require of the defendant a refunding bond," according to the provisions of section 3531 of the Code of 1886.[1] The decretal order of the chancellor is here corrected and amended, so as to require the defendant, Ohlander, to give a refunding bond with two sufficient sureties in double the amount of the sum enjoined, as a condition precedent to the enforcement of said judgment; the bond to be payable and approved as re-

[1] This section provides that when an interlocutory decree is made dissolving an injunction to stay proceedings on a judgment at law, the chancellor must require of the defendant a refunding bond, conditioned for the repayment of the money collected on the said judgment if the same should afterwards be perpetually enjoined.

quired by the statute. Let the costs of this appeal be paid equally by appellant and appellee. Corrected and affirmed.

(94 Ala. 100)

HURD v. STATE.

(*Supreme Court of Alabama.* Feb. 4, 1892.)

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

On a trial for larceny it is error for the court to refuse to charge, at the request of defendant, that "if the jury, on considering all of the testimony, have a reasonable doubt about defendant's guilt, arising out of any part of the evidence, they should find him not guilty."

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Indictment of Gus Hurd for petit larceny. Verdict and judgment of conviction. Defendant appeals. Reversed.

The defendant in this case was indicted, tried, and convicted for petit larceny, for stealing four silver dollars. The testimony for the state tended to show that the defendant took from one John Hobdy, without his consent, while he held it out in his hand, the money alleged to have been stolen, and that he refused to give up the same, although requested to do so. The testimony for the defendant tended to prove an *alibi*, and that he did not see the said John Hobdy on the night the money was alleged to have been taken. The defendant requested the court to give the following written charges, and duly excepted to the refusal to give each of them: (1) "If the jury believe the evidence for the defendant, they should find him not guilty." (2) "All of the witnesses stand as persons of good character and credible, unless impeached, or have their characters shown to be bad by proof." (3) "If the jury, upon considering all of the testimony, have a reasonable doubt about defendant's guilt, arising out of any part of the evidence, they should find him not guilty." (4) "If the jury believe that the prosecutor has worn falsely in some matters, this should tend to weaken his testimony."

Robert L. Harmon, for appellant. *Wm. J. Martin*, Atty. Gen., for the State.

STONE, C. J. It is certainly the duty of the jury in pronouncing on issues submitted to them, to consider and weigh all the testimony in the case. This does not mean that all or any of it shall be believed. The law exacts no such rule as that. It must be considered, and given such weight as the manner of giving it in, its intrinsic nature, and the other testimony in the cause, entitle it to. This much, and nothing more. This the jury must and will do, as the only way of performing their highest, sworn duty of rendering a true verdict according to the evidence. And the jury would be derelict if a segregated part of the testimony were made the basis of a verdict, without at least considering what influence should be accorded to other testimony in the cause. A finding of the jury based on any other principles would not come up to what the word "verdict" implies,—*veredictum*, a true saying. It would not be the truth. And this rule applies in all issues submitted for decision, without reference to the parties, their pursuits, calling, race, or condition in life; for all have equal rights before the law. It is for these reasons that we have uniformly held that charges should not, as a rule, select a portion of the testimony, or a part only of several material controverted propositions, and seek to make such selected part, without reference to other testimony, and without reference to other qualifying inquiries of fact, decisive of the entire controversy. Charges thus framed have a tendency to mislead, and to give undue prominence to a part of the testimony, or to a selected phase of the inquiry. But we have not held, and could not hold, that when there is an entire failure of proof as to any separable, necessary ingredient of a public offense or private claim, a charge to that effect may not be asked, and should not be given when asked. 3 Brick. Dig. p. 111 et seq., §§ 83–85, 93. So, charges so framed as to be likely to mislead or confuse the ordinary mind should never be given. Carney v. State, 79 Ala. 14; Street v. State, 67 Ala. 87. We think charge 3, as asked, asserts a clear legal proposition, is free from ambiguity and tendency to mislead, and that it ought to have been given. Reversed and remanded.

(94 Ala. 82)

Ex parte RILEY.

(*Supreme Court of Alabama.* Jan. 28, 1892.)

MASTER AND SERVANT—REFUSAL TO PERFORM SERVICES—CRIMINAL LIABILITY.

A father made a written contract for the hire of his minor son to another person for ten months, and for as much longer as might be necessary to work out any advances that might be made the boy during that time. No money was actually paid the father in consideration of the contract, but the understanding was that he should be credited on a past indebtedness. If the boy failed to render the service, the father was to serve in his stead. After the boy had worked six months, and some advances had been made him with the father's approval, he refused to work any longer, and the employer demanded that the father take his place. This the father refused to do because he was cultivating a crop. The father, however, made efforts to compel the boy to return to work, and other efforts to effect the payment of the amount due. *Held*, that as there was nothing to show that the father entered into the contract with intent to injure or defraud the employer, or that his refusal to perform was with like intent, and without just cause, no conviction could be had, under Criminal Code, § 3812, which declares that if any person, with intent to injure or defraud his employer, enters into a written contract for the performance of any act, and thereby obtains money or property from the employer, and with like intent, and without just cause, refuses to perform the said act, or to return the money or property, he must be punished as for theft.

Petition by Enoch Riley for writs of *habeas corpus* and *certiorari*. Granted.

Hargrove & Vandegraaff, for petitioner.

WALKER, J. The petitioner was committed on a preliminary examination before a justice of the peace. When he was brought before the judge of probate upon *habeas corpus*, the prosecutor and all the witnesses who had testified on the preliminary examination were present and were examined. After such examination

the probate judge made an order remanding the petitioner. He was entitled to be discharged from custody if, on such examination, it appeared that no offense had been committed, or that there was no probable cause for charging him therewith. Crim. Code, § 4781; Ex parte Champion, 52 Ala. 311; Ex parte Mahone, 30 Ala. 49. The petitioner is held for an alleged violation of section 3812 of the Criminal Code, which is in the following words: "Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses to perform such act or service, must, on conviction, be punished as if he had stolen it." The effect of this statute is to provide for the punishment criminally of a certain class of frauds which are perpetuated by means of promises not meant to be kept. These frauds closely resemble those perpetrated by means of false pretenses or tokens, but are not punishable under the statute on that subject, as a false pretense is a false representation relating to some existing or past fact, and does not include a promise of something to be done in the future. Colly v. State, 55 Ala. 85. The ingredients of this statutory offense are: (1) A contract in writing by the accused for the performance of any act or service; (2) an intent on the part of the accused when he entered into the contract to injure or defraud his employer; (3) the obtaining by the accused of money or other personal property from such employer by means of such contract, entered into with such intent; and (4) the refusal by the accused with like intent, and without just cause, and without refunding such money or paying for such property, to perform such act or service. This statute by no means provides that a person who has entered into a written contract for the performance of services, under which he has obtained money or other personal property, is punishable as if he had stolen such money or other personal property, upon his refusal to perform the contract, without refunding the money or paying for the property. A mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause. That there was an intent to injure or defraud the employer, both when the contract was entered into and when the accused refused performance, are facts which must be shown by the evidence. As the intent is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof. Carlisle v. State, 76 Ala. 75; Mack v. State, 63 Ala. 138. In the absence, however, of evidence from which inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations, or suspicions as to intentions which were not disclosed by any visible or tangible act, expression, or circumstance. Green v. State, 68 Ala. 539.

In the present case the petitioner entered into a written contract for the hire of his son, Ben Riley, a boy about 16 years of age, to T. J. Countess, for the term of 10 months, to begin on the 16th day of February, 1891, and to continue "until all lost time and all advances made him by said Countess during his term of service is worked out or paid in full by said Enoch Riley." It was provided that, if the boy should from any cause fail to render the service contracted for, the petitioner should serve in his stead. The contract embodied an acknowledgment by the petitioner of his receipt of $60 paid and advanced to him by Countess. There was the further stipulation "that, in case the said Enoch should pay in cash all advances and for all time lost during said term of service, this contract to hold good only until the 16th day of December, 1891, but, if not paid in full, to hold good forever, until paid." No money was actually paid to the petitioner when the contract was made, but the understanding was that he should be credited with the sum of $60 upon an indebtedness due from him to a brother of T. J. Countess. Ben Riley was reluctant to enter the employment of Mr. Countess under the contract made by his father; but, on Countess' refusing to consent that he be hired to another person for wages which were to be paid to Countess, the boy did later enter the service of the latter, pursuant to the contract, and remained in such service from about the 16th day of February, 1891, until the following August. During this time Countess made some advances to the boy with the knowledge and approval of the father. The boy abandoned the service without the consent and against the directions of his father, the petitioner. Countess demanded that the father should himself come and work out the amount due under the contract. When this demand was made, the petitioner did not comply with it, as he had to attend to a crop which he was making on land which he had rented for that year, but he made several efforts to effect satisfactory arrangements for the payment of what was due to Mr. Countess. There is not a single circumstance in the case to indicate that the petitioner entered into the contract with any fraudulent purpose. In the first place, the arrangement was, in fact, primarily for the payment of a past indebtedness. The petitioner realized nothing on it for himself. The only advances thereafter made were to the boy while he was working for Countess. Furthermore, all the evidence indicates that the petitioner did everything in his power to enable Countess to get the benefit of the boy's work. There is not a particle of proof that he advised, encouraged, consented to, or connived at the boy's abandonment of the service. There is absolutely nothing shown against the petitioner beyond his failure to serve in the boy's

stead, when the latter, against the petitioner's commands, abandoned the employment of Countess after working for him six months. This failure, without more, was a mere breach of contract. All the circumstances point to the conclusion that the petitioner entered into the contract with the honest intention of having his son perform the service stipulated for. The making of the contract was not a trick, contrivance, or device for getting money or other personal property. There is nothing in the evidence to suggest that at the time the contract was entered into the petitioner intended thereby to injure or defraud Countess. This essential element of the charge against him is wholly unsupported by proof. The court cannot permit the lack of evidence on a material point to be supplied from the imagination of the jury. It is not the duty of the court to submit to the jury a criminal accusation, in the absence of evidence tending to support it. The evidence in this case did not tend to show that there was any probable cause to charge the petitioner with the commission of any criminal offense, and he should have been discharged. The writs of *certiorari* and *habeas corpus* will be awarded, unless the petitioner, when informed of this ruling, shall elect to renew his application before a court or judge of original jurisdiction. *Certiorari* and *habeas corpus nisi* ordered.

(94 Ala. 434)

STANDARD LIFE & ACC. INS. CO. v. JONES.

(*Supreme Court of Alabama.* Feb. 4, 1892.)

ACCIDENT INSURANCE—ACTION ON POLICY—PLEADING—DUE CARE—INTOXICATION.

1. Where, in a suit on an accident policy providing that the assured, a railroad switchman, should at all times use due care for his personal safety, the insurer pleads that the assured failed to use due care, but contributed directly to his injury by getting off a moving engine with his back towards the direction in which it was going, a replication which does not deny that the assured failed to use due care, but only alleges that he was insured as a switchman, and that the injury occurred while in the discharge of his customary duties, is insufficient in assuming that the policy would cover all such injuries, whether the assured was in the exercise of due care or not.

2. An instruction that it was the duty of the assured to exercise, in such a case, a greater degree of care in getting off a moving engine at night than was necessary in the day-time, was argumentative, and tended to mislead the jury.

3. The fact that a policy insures a person with reference to a particular employment, and provides that the insurer shall be exempt from liability for injuries resulting from a violation of the rules of the employment, does not impose on the insurer the duty of informing the assured as to the existence of such rules, but the assured is bound to inform himself.

4. Such an exemption must be specially pleaded by the insurer before it can be made available as a defense; and, if it be not pleaded, the court may exclude any evidence offered to establish the rule which it is claimed has been violated.

5. Where suit is brought on an accident policy which exempts the insurer from liability if the assured is injured while intoxicated, or in consequence of his having been under the influence of intoxicating liquor, an instruction that if at the time he was injured the assured was "under the influence" of liquor, whether intoxicated or not, the insurer would not be liable, was either misleading, in the absence of a further instruction that the phrase "under the influence" of liquor meant a condition amounting to intoxication, or affirmatively bad, in authorizing a verdict for the insurer notwithstanding the jury may have found that the assured was not intoxicated.

6. A provision in an accident policy exempting the insurer from liability for any injury which might happen to the assured while intoxicated, or in consequence of his having been under the influence of intoxicating liquor, is sufficient to exclude liability for all injuries suffered while the assured was intoxicated, whether the intoxication contributed to the injury or not.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Action by Jane Jones against the Standard Life & Accident Insurance Company upon a policy of insurance. The defendant requested the following charges, which were refused: (1) "If the jury believe from the evidence that, at the time of the injury and death of Albert, or Elbert, Hutchinson, said Hutchinson was under the influence of whisky, whether intoxicated or not, then the plaintiff cannot recover." (2) "It was the duty of said Hutchinson, the person insured by the policy sued on, to exercise a greater degree of care in getting off a moving engine at night-time than is necessary by day." (3) "The policy of insurance, which is the subject of this suit, does not cover any accident or injury to said Albert, or Elbert, Hutchinson, happening while he was under the influence of liquor." (4) "If the jury believe from the evidence that, at the time of the accident and injury to Albert Hutchinson, he was in any way under the influence of liquor, then the plaintiff is not entitled to recover in this action, even if they should find that his being under the influence of liquor had nothing to do with causing the death of said Hutchinson." (5) "If the jury believe the evidence, they must find for the defendant." There was judgment for plaintiff, and defendant appeals. Reversed.

Falkner & Jones, for appellant. *Sayre & Pearson*, for appellee.

MCCLELLAN, J. This action is prosecuted by Jane Jones, appellee here, upon a contract inuring to her benefit, whereby the defendant, appellant here, insured Albert Hutchinson against death by accident. The complaint alleged the contract, in substance, and that the insured came to his death, while the policy was in force, "by external, violent, and accidental means." The policy was issued upon a written application of Hutchinson, in which is made this statement: "My habits of life are correct and temperate, and I understand and agree that the policy to be issued on this application will not cover any accidental injury which may happen to me either while under the influence of narcotics or intoxicating drinks, or in consequence of having been under the influence of either;" and in the policy itself is incorporated the following stipulation: "This insurance does not cover * * * death or disablement happening to the insured while intoxicated, or in consequence of his having been under the influence of any narcotic or any intoxicating drink

whatsoever." It is also an expressed condition of the policy that the insured should at all times use due care and diligence for his personal safety and protection. Upon these stipulations, the defendant interposed several special pleas, to the effect (1) that at the time of the alleged injury the insured was intoxicated; (2) that he was under the influence of whisky; (3) that said injury happened in consequence of the insured having been under the influence of whisky; and (4) that at the time in question the insured "failed to use due care and diligence for his personal safety and protection, but contributed directly and proximately to his own injury and death by getting off an engine in motion in the night-time, with his back towards the direction in which said engine was going, which was an unsafe and dangerous way of alighting from said engine." Plaintiff's demurrers to these pleas having been severally overruled, she joined issue on the first three of the series, and replied to the fourth, as follows: "To the fourth plea plaintiff says that the insured was a railroad switchman, was insured as such, and met the accident which caused his death while in the discharge of his customary duties as such switchman." The action of the trial court in overruling defendant's demurrer to this replication constitutes the subject-matter of the first assignment of error.

1. In our opinion, this action was erroneous. The stipulation set up by this fourth plea was in the nature of an exception in favor of the insurer. It was not necessary that the complaint should have negatived the facts which brought the defendant within the exception. Their existence was a matter of affirmative defense, and the *onus*, both of averment and proof of them, rested on the defendant. Freeman v. Insurance Co., 144 Mass. 572, 12 N. E. Rep. 372; Cronkhite v. Insurance Co., 75 Wis. 116, 43 N. W. Rep. 731. This *onus*, so far as averment is concerned, was discharged by the interposition of the plea in question, which alleges facts involving the absence of that care and caution on the part of the insured which were, by the terms of the policy, a condition to defendant's liability. The replication to this plea does not deny that the insured failed to use due care and caution for his own safety and protection; it affirms merely that he was insured as a switchman, and that the accident which caused his death occurred while he was in the discharge of his customary duties as such. The replication assumes that the policy covers all injuries received while the insured was in the performance of the duties of his occupation, wholly regardless of the manner of such performance, as being within the exercise of due care, or in a careless and negligent manner. It assumes, in effect, that there could be but one possible mode in which the insured's customary duties might be performed, and that the adoption of that mode by him involved, of necessity, the observance of the care required by the policy for his personal safety. It proceeds on the idea that if the act being done by the assured at the time of the injury was within the scope of his employment, and one which it was his duty to perform, it is immaterial whether he used care to avoid the dangers incident to it, or was wholly wanting in respect of the exercise of diligence and prudence in conservation of his personal safety. The theory of the replication is manifestly unsound. The policy has a broad field of operation, without extending its application to injuries received in consequence of negligence on the part of the insured. The duties of a switchman, even when performed with the utmost care, are attended with many perils. The employment in itself, and without reference to additional dangers resulting from the negligence of the employe, is a hazardous one. The policy sued on was intended to cover the inherent danger of the occupation,—dangers which the exercise of due care could not eliminate from it, and not dangers which arise, not from the occupation itself, but from the negligent manner in which its duties are discharged. And while, as alleged in the replication, Hutchinson was insured as a switchman, and was injured while discharging the customary duties of that position, it may be that he was negligent in the manner of his performance of those duties; that that negligence was the cause of, or contributed to, his injury: and, of consequence, that, in admitting the truth of the replication, every fact laid in the plea might also be true, and, if true, afford a full answer to the complaint. This test demonstrates the insufficiency of the replication, and the error of the trial court in overruling the demurrer thereto. Tuttle v. Insurance Co., 134 Mass. 175, and authorities there cited; Bon v. Assurance Co., 56 Iowa, 664, 10 N. W. Rep. 225; Freeman v. Insurance Co., 144 Mass. 572, 12 N. E. Rep. 372; Tooley v. Assurance Co., 3 Biss. 399. The case of Association v. Jackson, 114 Ill. 533, 2 N. E. Rep. 414, is not opposed to the conclusion we have reached. No question was made in that case as to the manner in which the insured discharged the duty in the performance of which he was killed. The contention was that he voluntarily exposed himself to unnecessary danger, or, in other words, that he should not have attempted the act in question at all. The court held, on the facts, that the duty was embraced in his employment with reference to which the policy was issued, and that, therefore, the policy covered any injury received while attempting to discharge it, for aught that appeared in the case, in a careful and prudent manner. It is of no consequence in this connection that the complaint alleged due care and diligence on the part of the insured. Notwithstanding this, the action of the trial court forced the defendant to take issue on the replication, and thus to try the case upon inquiries as to facts which were not really controverted by the defendant, and upon which its rights in the premises did not depend. It is to be observed with respect to this replication that it does not allege that the insured was killed while in the discharge of a duty incident to his employment, in the customary mode of performing that duty, as counsel seem to

insist, but only that he was performing a customary duty of the service; no account being taken and nothing alleged in respect of the manner in which the attempt was being made. Whether, therefore, had the averment been that he was discharging the duty in the mode and manner customary and usual in the service, the replication would have been good, is a question not presented for our consideration; but see Warden v. Railroad Co., (Ala.) 10 South. Rep. 276.

2. It is the well-settled doctrine of this court that, in actions by employes against railroad companies sounding in damages for personal injuries, the plaintiff is not chargeable with negligence upon the mere fact that his conduct at the time of the infliction of the injury, and contributing to it, was violative of a rule of the employer, unless knowledge of the rule is brought home to him. Railway Co. v. Propst, 83 Ala. 527, 3 South. Rep. 764; Railway Co. v. Davis, 92 Ala. 300, 9 South. Rep. 252; Railroad Co. v. Hawkins, 92 Ala. 241, 9 South. Rep. 271. This doctrine is, in part, at least, rested on the consideration that it is the duty of the employer to inform the employe of the rules adopted for his guidance in the service he has undertaken to perform, and, in the nature of things, it would be unjust and wrong to hold the servant responsible for a violation of a rule of which he knew nothing, and his ignorance of which is due to the dereliction of the master. This rule does not obtain between passengers and common carriers, because, in a measure, of the absence of this element of duty, and probably, also, because of the impracticability of instructing each passenger as to the rules made for his observance while the relation exists; and the passenger must therefore acquaint himself with these rules, and comply with them, or fail therein at his own peril. This principle, in our opinion, obtains between the insurer and the insured in a case like this, where the insurance is effected with reference to a particular employment, and the policy contains a stipulation that it shall not cover any injury resulting from the violation of the rules of the employer. The insurer cannot know the rules which the employer has adopted for the government of the employe,—it may be, indeed, that the insurer does not know who the employer is,—and there can be no duty resting on the insurance company to instruct the insured as to the rules of the service in which he is engaged. On the other hand, it is not only entirely practicable for the employe to inform himself in this respect, but it is, certainly, as between him and the insurer, his duty to do so. He undertakes to conform to rules made for his protection, the terms of which the insurer is not and cannot be advised of, but which he can and should acquaint himself with, as a condition to availing himself of the benefits of the policy; and he must be held to have discharged this duty, and to have informed himself of their existence and terms, so that when he is injured, in consequence of conduct violative of an existing rule applicable to him and the service he is rendering, it is wholly immaterial whether, in point of fact, he knew of the rule or not. Tooley v. Assurance Co., 4 Bigelow, Ins. Cas. 34, 3 Biss. 399. But this exception to the insurer's liability was also a matter of affirmative defense, and, under the principle stated and the authorities cited above, should have been specially pleaded before it could be availed of by the defendant. In the absence of such plea, it was not error for the court to exclude the evidence offered to establish the existence of the rule which it was proposed to show had been violated by the insured in such sort as that the violation contributed to his death.

The action of the trial court in refusing certain charges requested by the defendant depends for justification upon a construction of the application for insurance and the policy, in respect of the exception to liability growing out of the use of intoxicants by the insured. It will be noted that there is this difference in the language used in the application and policy, respectively, in this connection. In the former the exception is rested on the fact of the insured being under the influence of intoxicating drinks, while in the latter it is based on the fact of the insured being intoxicated. In common parlance, and hence as addressed to a jury, these two expressions mean different conditions. To be under the influence of whisky is not necessarily to be intoxicated. One may well be said to be under the influence of strong drink when he is to any extent affected by it,—when he feels it,—and this condition may result from potations so small as not to impair any mental or physical faculty, and when the passions are not visibly excited, nor the judgment or any physical function impaired. This is very far short of "intoxication," which is the synonym of "inebriety," "drunkenness,"—implying or evidenced by undue and abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently. If the terms are to be accorded these definitions, as employed in the application and policy, respectively, it is manifest there is a repugnance between the two, and in such case the stipulation in the body of the policy would, we apprehend, control, as against the undertaking set forth in the application, since the policy is the later expression of the minds of the parties, and, indeed, in a sense, the only expression of those matters upon which their minds have finally met, except in so far as the statements of the application are made part of the policy by reference. But the phrase, "under the influence of intoxicating drinks," as used in policies of this character and in this connection, has a legal significance, differing from the popular one, and implying such influence as in reality amounts to intoxication. In a well-considered case it was said by the supreme court of New York that "to be 'under the influence of intoxicating liquors,' within the meaning of this policy, the insured must have drunk enough to disturb the action of the physical or mental faculties, so that they are no longer in their natural or normal condition." When,

therefore, the defendant imposed upon persons insured by it the condition that it would not be liable when death or injury should happen while the insured was under the influence of liquor, the intention manifestly was to require the insured to limit its use in such a degree as that he retained full control over his faculties of mind and body. While he did so, the company was reasonably secure against the insured exposing himself unnecessarily to dangers from his own acts or the acts of others, produced "by his own irritating or offensive conduct or language," or, we may add, as applicable to the present case, produced by his failure or inability to conserve his own safety consequent upon the influence exerted by the liquor to the impairment of his faculties. Shader v. Assurance Co., 5 Bigelow, Ins. Cas. 331, 5 Thomp. & C. 643. It is clear that giving to the words, "under the influence of intoxicating drinks," the meaning accorded them by the case quoted from, and which we think is eminently sound, they import nothing more or less than intoxication, and hence that there is no inconsistency, from the point of view of the law, between the application and the policy itself, in this respect; they each and both rest the exception in question upon the intoxication of the insured at the time of the accident. It follows that charges 1, 3, and 4 asked by the defendant were properly refused. They are either misleading, in that they rest defendant's immunity from liability on the mere fact that the insured was under the influence of liquor, which the jury would probably have understood to mean a condition not amounting to inebriety, or affirmatively bad, in that they would have authorized a verdict for defendant under this exception, notwithstanding the jury might have found that the insured was not intoxicated at the time the injury was sustained.

We entertain no doubt but that it was competent for the parties, by appropriate stipulations, to take out of the field of inquiry and controversy, in the event a claim should be advanced for an injury alleged to be within the policy, the question whether the intoxication of the insured did in fact contribute to the injury, and to provide that the policy should not cover any injury sustained while the insured was in that condition, irrespective of any agency the fact of intoxication may or may not have had in the production of the result complained of. There can be no doubt, either, that this policy contains such a provision. It stipulates, as we have seen, that it shall not cover any accidental injury which may happen to the insured while (not in consequence of being) intoxicated; and, serving to emphasize the purpose to exclude injuries suffered while the insured was under the influence of drink, whether that fact contributed to the result or not, it is provided further, in the same sentence, that the exclusion shall apply also to injuries suffered in consequence of the insured having previously been under the influence of liquor, though not so at the time of the accident,—a causal connection between the condition of the insured and the catastrophe being necessary in the latter case, and not essential in the former, to bring the injury within this exception to the insurer's liability. Shader v. Assurance Co., 5 Bigelow, Ins. Cas. 335. The charges referred to above were not, therefore, open to the objection made to them, on the theory that the intoxication which would bring the case within the exception must have contributed to the injury. Charge 2, requested by the defendant, is argumentative, and tends to confuse or mislead the jury, if, indeed, it is not erroneous. The court properly refused to give it. There was conflicting evidence, or conflicting inferences deducible from the evidence, on every issue of fact presented on the trial, and the court's action in refusing the general affirmative charge requested by the defendant was clearly right. Reversed and remanded.

(94 Ala. 601)

MOSES v. McCLAIN *et al.*

(*Supreme Court of Alabama.* Jan. 27, 1892.)

SPECIFIC PERFORMANCE—INSUFFICIENT EVIDENCE.

In a bill for specific enforcement of a contract to sell land, plaintiff testified positively that he notified defendant of his acceptance within the time specified in the contract, which defendant denied with equal emphasis. One witness confirmed plaintiff partially, while the evidence of three witnesses tended to confirm defendant. *Held*, that the chancellor properly found that plaintiff failed to prove his case.

Appeal from chancery court, Colbert county; THOMAS COBBS, Chancellor.

Action for specific performance by Abram J. Moses against John W. McClain and another. Bill dismissed. Complainant appeals. Affirmed.

Thos. R. Roulhac, for appellant. *J. B. Moore* and *R. C. Brickell*, for appellees.

STONE, C. J. This is a bill by Moses for the specific enforcement of a purchase of a tract of land alleged to have been agreed upon between McClain and himself. McClain signed a writing dated October 21, 1886, by which he proposed to sell the land to Moses for $8,000; $3,000 to be paid in cash, and the remaining $5,000 to be paid in two equal installments, due in one and two years, with interest from the time possession was delivered. The paper writing is what is called an "option." It recites a consideration of one dollar, and gives to Moses the privilege or option, for two hours, in which to determine whether or not he would purchase the land on the terms proposed. The bill alleges that within the two hours Moses elected to accept the offer, and make it a purchase, and that he so informed McClain before the time expired. McClain refused to consummate the trade, and in his answer denies that Moses notified him within the two hours of his acceptance of the offer. The burden of proving acceptance was thus cast on Moses. It is not disputed that Moses did notify McClain that he accepted the offer. The dispute and controversy are whether this notice was given within the two hours. Moses testified positively that it was, while McClain testified with equal emphasis that it was after the two hours had

expired. J. S. Whittemore confirms Moses to some extent, while two witnesses (Parshall and Stegar) tend to confirm McClain. Dill also does to some extent. The chancellor found, as a fact, "that the acceptance of the terms of the instrument was not made within the specified time." It was long the rule in this court that, when a chancellor made a finding of fact, we would not reverse such finding unless clearly convinced that he erred. 3 Brick. Dig. p. 400, § 549; Moon v. Crowder, 72 Ala. 79. That rule was changed by statute. Code 1886, § 675. We do not think that the proof of acceptance of McClain's offer within the two hours allowed is sufficient. Affirmed.

(94 Ala. 156)

CITY OF MOBILE v. CRAFT *et al.*

(*Supreme Court of Alabama.* Feb. 4, 1892.)

CITY ORDINANCES—LICENSE TAX.

1. Acts 1886-87, p. 247, giving the city council of Mobile power to assess a license tax upon all persons carrying on "any business, trade, or profession" within the city, authorizes the assessment of a tax for retailing cigars, although the cigars are sold in connection with a grocery business, and the grocer has taken out a general license for such business.

2. A provision of the said act that no tax therein authorized should exceed 75 per cent. of the tax imposed by the last ordinance upon the subject must be construed as meaning only that the general tax imposed upon any business should not exceed 75 per cent. of the tax previously imposed upon that business, and not as prohibiting the assessment of a tax upon business which had previously been carried on free from taxation.

Appeal from city court of Mobile.

Craft & Co., having been fined for violation of an ordinance of the city of Mobile, appealed to the city court, where they obtained judgment in their favor. The city appeals to this court. Reversed.

Pillans, Torrey & Hanaw, for appellant.
Hannis Taylor, for appellees.

COLEMAN, J. Craft & Co. were fined by the mayor of Mobile for violating a city ordinance which imposed a license tax upon persons engaged in the business of retailing cigars. The case was appealed to the city court, and there the court overruled the demurrers interposed to the pleas of the defendant. The case was then tried without the intervention of a jury, under section 2743 of the Code. The court found the facts to be as set up in the pleas of the defendant, and entered judgment accordingly.

The city ordinance fixing and establishing the rate of license tax for the year commencing March 15, 1890, "imposed and assessed a special license tax of two 50/100 dollars upon all persons trading in or carrying on the business of selling cigars by retail in hotels, bar-rooms, drug-stores, coffee saloons, restaurants, and all places of business other than tobacco stores." Section 40 of an act to incorporate the port of Mobile, approved December 10, 1886, (Acts 1886-87, p. 247,) provides "that the said general council shall, besides the tax heretofore authorized, have the authority to assess and collect from all persons or corporations trading or carrying on any business, trade, or profession, by an agent or otherwise, within the limits of said corporation, a license tax, which shall be fixed and declared each year by an ordinance of said corporation; and the license so laid shall be issued, and the amount imposed shall be collected, as may be provided by ordinance of said corporation. * * * Said general council may also, by ordinance, impose such fines and penalties, within the limitations named in this act, as they may deem advisable, for the doing of any business, or the carrying on of any trade, or the practicing of any profession, by any party who shall fail to take out such license, as may be imposed by said general council, under the authority conferred by said general act: provided, also, that the license tax hereby authorized shall not exceed seventy-five per centum of the amounts fixed for licenses by the last ordinance on the subject enacted by the mayor, aldermen, and common council of the city of Mobile."

The facts set up in the pleas of the defendant, the demurrers to which were overruled, and which were found to be true by the court, are that after the passage of the ordinance fixing the license tax for the retail of cigars at $2.50 an ordinance was passed which "imposed and assessed a general license upon every pursuit, business, profession, or trade not specially provided for in a foregoing enumeration, and defendants paid to said city the sum of fifty-six 25/100 dollars for a general license tax as wholesale and retail grocers, and that the sale of cigars by them was an element of their general trade as wholesale and retail grocers, and not as a separate pursuit or business, and that the sum of fifty-six 25/100 dollars paid for their general license was a sum equal to seventy-five per centum of the amount fixed for license by the last ordinance on this subject, and that under said last ordinance no special tax was imposed upon the selling of cigars, whether such business was carried on as a separate business or as an element in the business of wholesale and retail grocers, and that the said special license tax for retailing cigars is a new subject of special license tax, not embraced in the last ordinance upon the subject of licenses."

As we construe the pleas of the defendant, they are intended to raise the following questions: Whether or not section 40, supra, authorizes the city to impose a special tax for retailing cigars when they are sold as an element of the business of wholesale and retail grocers, for the doing of which grocers' business a general license has been paid for and taken out. There can be no reasonable question of the authority of the common council to pass such an ordinance. 1 Dill. Mun. Corp. § 91; Van Hook v. City of Selma, 70 Ala. 363. The business of a grocer does not necessarily include a dealer in tobacco. Section 40 of the act of incorporation, supra, authorizes the general council to assess and collect a license tax "from all persons or corporations trading or carrying on any business, trade, or profession." When the city ordinance imposed

a special tax of $2.50 as a license tax to retail cigars, and by a succeeding ordinance a general license tax of a much larger sum upon wholesale and retail grocers, the license to engage in the latter business did not relieve the party from the special tax for retailing cigars, while the business of the two may be combined, as also a dry goods merchant, the keeper of a restaurant, or a liquor dealer may combine with his business that of retailing cigars; but the fact that no license tax was required of the dry goods merchant, or a different license tax was required of the liquor dealer or restaurant keeper, would not relieve the party of the special license tax upon retailing cigars. The provision that the license tax shall not exceed 75 per centum of the amounts fixed for licenses by the last ordinance on the subject, when applied to the present case, is that the general license tax imposed upon grocers shall not exceed 75 per centum of the license tax imposed upon that business by the last ordinance; but the construction insisted upon, that this provision prohibits the common council from imposing a license tax upon business which had not by a former ordinance been taxed, would be too narrow. Section 40, supra, confers authority to impose a license tax upon any business. Whether the business had been carried on previously without being subjected to a license tax, or whether the business was entirely new, and for the first time engaged in and carried on, could make no difference in the application of the ordinance. The purpose and scope of this provision was simply to provide that the license tax thereafter, as to all business which had been subjected to a license tax by a previous ordinance, should not exceed 75 per centum of the amount fixed by the last ordinance, but as to any business which had not been taxed the general council has authority to assess and collect a license tax. To hold otherwise would restrict the power of the general council to assess and collect a license tax only upon such business as was being carried on when the act was passed, while all new enterprises would be relieved of this burden. We hold the city court erred in overruling the demurrers to defendant's pleas, and in the final judgment rendered, upon the facts. Reversed and remanded.

(94 Ala. 576)

HODGES *et al.* v. WINSTON *et al.*, (two cases.)

(*Supreme Court of Alabama.* Jan. 5, 1892.)

VENDOR AND VENDEE—BONA FIDE PURCHASERS—NOTICE.

1. Where the only evidence offered to prove notice on the part of a mortgagee that the separate funds of a wife had been used in the purchase of the mortgaged premises, and that she was therefore entitled to reimbursement, was certain remarks alleged to have been made by the mortgagee importing a knowledge merely of the marital rights of the wife, and the mortgagee testified positively that she had no such notice, and the wife herself testified that she had no recollection of anything being said to the mortgagee with reference to the use of her money in that way, the mortgagee must be deemed a *bona fide* purchaser.

2. Where a person, after purchasing land, resells a part to the vendor upon an independent consideration, the transaction having no relation whatever to the purchaser's rights as vendor in the original sale, the possession of the vendor of the part resold is not notice to a mortgagee of any lien upon the balance.

Appeal from chancery court, Marshall county; S. K. MCSPADDEN, Chancellor.

On the 30th day of January, 1886, John G. Winston, Sr., filed his bill against Edward Winston, his son, seeking the foreclosure of an alleged vendor's lien on certain lands therein described. Decree *pro confesso* was taken against said Edward Winston on May 10, 1886, and on the 18th of May appellants Hodges and Matheney were, by leave of the court, permitted to come in as parties, and they filed their answers at once, averring that they were judgment creditors with a lien against the land of Edward Winston, and denying on information and belief the existence of complainant's lien. On the 25th of November, 1889, complainant was allowed to amend his bill by making the appellant Martha Sloan a party defendant. She thereupon filed her answer, alleging that she held a mortgage on said lands executed by Edward Winston and wife to secure a loan made to them contemporaneously with the execution of the mortgage, claiming to be a *bona fide* purchaser without notice, and denying on information and belief the existence of complainant's lien. On the 24th day of March, 1886, Nancy A. Winston, wife of the said Edward Winston, filed her bill in the same court by her next friend, A. R. Hooper, against her husband, John G. Winston, Sr., Martha Sloan, Jesse Sloan, Jasper M. Matheney, James W. Hodges, A. G. Henry, and F. M. Kirby, alleging that moneys belonging to her statutory estate to the amount of $1,980.34 had been used by her husband in the purchase of said lands from John G. Winston, Sr. and praying that they be declared subject to a trust in her favor, and sold for the payment of said $1,980.34. The bill was subsequently dismissed as to Henry and Kirby. Decrees *pro confesso* were taken against Jesse Sloan, Edward Winston, and John G. Winston, Sr. On the 25th of April, 1886, defendants Hodges and Matheney filed a joint and several answer, averring that they were judgment creditors of said Edward Winston, and had acquired a lien without notice of said Nancy's alleged claim upon said lands, and denying on information and belief that any such claim existed. They prayed that their answers might be taken and held for cross-bills, and the land sold to satisfy their liens. They also embodied in their answers several grounds of demurrer. On the 28th of April, 1886, defendant Martha Sloan filed her answer, averring that she was a mortgage creditor, claiming to be a *bona fide* purchaser without notice, and denying on information and belief that complainant Nancy A. Winston had any claim whatever in said lands. She prayed that her answer might be taken and held for a cross-bill, and her mortgage foreclosed. She embodied in her answer several grounds of demurrer. No notice of the demurrers of the defendants is made,

either in the decree of reference or the final decree; and the failure of the court to pass upon the demurrers, among other things, is assigned as error. To these several cross-bills, John G. Winston, Sr., Edward Winston, and Nancy A. Winston filed answers, denying that Hodges, Matheney, and Mrs. Sloan were creditors and purchasers without notice, and averring that at the time their several liens attached they had notice of the existence of said Nancy's interest in said lands.

Brown & Street, for appellants. *Watts & Son*, for appellees.

MCCLELLAN, J. These cases were tried as one in the court below, and are so submitted, and will be considered here. "The rule as to proof of *bona fide* purchase is that the party pleading it must first make satisfactory proof of purchase and payment. This is affirmative, defensive matter in the nature of confession and avoidance, and the burden of proving it rests on him who asserts it. *Ei incumbit probatio qui dicit.* This done, he need not go further, and prove he made such purchase and payment without notice. The burden here shifts, and, if it be desired to avoid the effect of such purchase and payment, it must be met by counter-proof that before the payment the purchaser had actual or constructive notice of the equity or lien asserted, or of some fact or circumstance sufficient to put him on inquiry, which, if followed up, would discover the equity or incumbrance. Craft v. Russell, 67 Ala. 9, which collects the authorities; Taylor v. Association, 68 Ala. 229; Creswell v. Jones, Id. 420." Barton v. Barton, 75 Ala. 400, 402. In the case at bar, Mrs. Sloan sets up that she became a mortgagee of the land in controversy for value, and without notice of the claim now advanced by John G. Winston, Sr., for purchase money alleged to be due from Edward Winston, the mortgagor, who held the legal title, and also without notice of the claim now advanced of Nancy Winston, the wife of said Edward, which proceeds on the theory that the land was in part paid for with funds belonging to her statutory separate estate, and is sought to be worked out through a declaration of trust in her favor for reimbursement. That Mrs. Sloan did lend Edward Winston the money for which a mortgage was taken, and that the mortgage was duly executed by said Edward and his wife upon this land to secure its repayment, are facts not controverted in the case. The protection she invokes as a *bona fide* purchaser is sought to be defeated by John G. Winston, Sr., in respect of his claim for unpaid purchase money, by proof of possession by him of a part of the land—a certain 40-acre parcel—embraced in the mortgage at the time of its execution, which possession, he insists, was constructive notice to her of his lien upon the whole tract for the balance of the price at which he sold to Edward, the mortgagor. This proposition will be examined further on. By Mrs. Nancy Winston, Mrs. Sloan's alleged rights as a *bona fide* purchaser are attempted to be defeated by evidence going to show that, at the time of advancing the money and taking the mortgage, the mortgagee had actual notice that funds belonging to Mrs. Winston's separate estate were used in the purchase of the land by Edward from his father, John G., Sr., and hence of her claim to reimbursement out of the land. On this issue the burden, as we have seen, was with Mrs. Winston. It was upon her to prove to the satisfaction of the chancellor, by such preponderance of evidence as should also suffice on appeal to satisfy this court, that at or before the time of the transaction Mrs. Sloan either knew of the existence of her claim, or had notice of such facts as would have put her on inquiry, which, if properly prosecuted, would have led to a knowledge of the claim now made by Mrs. Winston. In our opinion, this has not been done. The evidence fails to satisfy us that Mrs. Sloan, when she made the loan, and took the mortgage to secure its repayment, had any knowledge or notice of the rights brought forward in Mrs. Winston's bill, seeking to have a resulting trust declared in her favor to the amount of her money used in the purchase. The evidence offered to prove such notice goes only to show alleged remarks made by Mrs. Sloan at the time of the transaction with reference to the execution of the mortgage by Mrs. Winston, as well as her husband; which remarks, making allowance for the improbability of their being accurately reproduced by the witnesses, may well be held to import no more than a knowledge of Mrs. Winston's marital rights in the lands of her husband. On the other hand, Mrs. Sloan testifies positively and explicitly, and without evasion or equivocation, that she had no notice or knowledge whatever of any individual right, claim, or interest of Mrs. Winston; and Mrs. Winston herself swears that she has no recollection whatever of anything being said, at any time, by or in the presence of Mrs. Sloan, with reference to the fact that her money had been used by her husband in part payment for the land. On this state of the testimony we do not think Mrs. Winston has discharged the burden which rested upon her to affirmatively show that Mrs. Sloan had notice of her claim upon the land for reimbursement; and we accordingly hold that, as to that claim, Mrs. Sloan is a *bona fide* purchaser without notice.

Was Mrs. Sloan chargeable with notice of John G. Winston's lien for purchase money by reason of his possession at the time the mortgage was executed of a 40-acre subdivision of the land? We think not. The uncontroverted facts in that connection are that Edward Winston, some time after he had purchased the lands from his father, and received an absolute conveyance of them in fee, sold back to John G. Winston, Sr., the 40 acres in question, and put him in possession. This transaction was entirely separate and distinct from, and without any reference whatever to, the original sale of the whole tract by John G. to Edward Winston. No fact or circumstance involved in it would have been other than it was had no lien for purchase money existed in favor of

John G. Winston, Sr., under the sale to his son. The consideration agreed to be paid, and actually paid, by John G., Sr., for these 40 acres, did not consist in the satisfaction *pro tanto* of his claim for unpaid purchase money on the original transaction, but of the satisfaction *pro tanto* of a mercantile account which had been contracted by Edward with his father after the sale by the latter to the former. The claim or title of John G., Sr., to the 40-acre parcel was not in any degree rested on his claim for unpaid purchase money, or referable to it, but grew out of an entirely independent transaction, no circumstance of which pointed to or indicated the previously existing claim for unpaid purchase money. Nay, more; the fullest inquiry into and completest discovery of all the facts involved in this latter transaction, so far from affording notice of the first one, and Winston's lien under it, would have tended to assure the purchaser from Edward that his father had no lien for purchase money on any of the land, since it would have been reasonable to suppose that, had such been the fact, the parcel sold back to him would have been paid for by satisfaction in part of the debt secured by the lien, and not upon another and distinct consideration. Be this as it may, however, it is certainly the law that possession is notice to a subsequent purchaser only of the right or title in or by which the possession is held; and the possession of the 40-acre tract by John G. Winston, Sr., in this case, being under a repurchase on independent consideration from Edward, the transaction bearing no relation whatever to the purchaser's rights as vendor in the original sale, was notice to Mrs. Sloan that the father had bought the land from the son, paid him for it, and held it as such purchaser. There is, manifestly, nothing in the fullest knowledge of these facts which would tend to excite inquiry as to this purchaser's rights respecting other lands, both the absolute legal title and possession of which were in Edward Winston, the mortgagor. Fassett v. Smith, 23 N. Y. 252, 258, 259; Suiter v. Turner, 10 Iowa, 517, 524, 525; Leach v. Ansbacher, 55 Pa. St. 85. The fact of John G. Winston, Sr.'s, possession of this parcel was notice to Mrs. Sloan that he had bought and paid for it, and she took the mortgage subject to any rights which these facts vested in him, as to that particular tract; but it was no notice to her of his lien for purchase money on the other land covered by the mortgage, since these facts, so far from putting her on inquiry which would have discovered the lien, were, inferentially at least, inconsistent with its existence.

The rulings and decree of the chancellor in all other respects have been carefully considered. We concur with his conclusions on exceptions to the register's report, and in holding that Hodges and Matthews had notice of the claims of John G. Winston, Sr., and Mrs. Nancy Winston, before their rights accrued, and hence that their claims are secondary to those of the respective complainants. That Mrs. Winston is entitled to reimbursement out of the land, and that John G. Winston, Sr., has a valid vendor's lien upon it, except as against Mrs. Sloan, we do not doubt. Mrs. Sloan, however, must be first paid, and in failing to so decree the chancellor erred. The decree is reversed and the cause remanded.

(94 Ala. 597)

FEAGIN *et al.* v. JONES.

(*Supreme Court of Alabama.* Jan. 12, 1892.)

EJECTMENT—TITLE TO SUPPORT—TAX-TITLE.

1. In an action of ejectment by one claiming under a tax-title against another in possession under a similar title, the fact that defendant failed to duly acquire title will not aid or strengthen the position of the plaintiff, who is similarly situated.

2. Under Code 1886, §§ 566–568, empowering the probate court to order the sale of lands to pay taxes only when the collector makes and subscribes an oath, at the end of entries in his docket in reference to unpaid taxes, that he has been unable to find sufficient personal property out of which to collect the same, a decree by a probate judge for such sale, and a sale thereunder, based upon a tax collector's docket in which the required affidavit is wanting, are nullities.

Appeal from circuit court, Covington county; JOHN P. HUBBARD, Judge.

Action of ejectment by S. A. Jones against Feagin, Kendall & Co. Judgment for plaintiff. Defendants appeal. Reversed.

The plaintiff founded his right to the possession of the property in controversy upon his being the assignee of the certificate of purchase, made by the tax collector at the tax-sale of said property in said county. To show the foundation of his claim the plaintiff offered in evidence the tax collector's docket showing the delinquent-tax causes of said county, and also the order of the probate judge for the sale of the lands contained therein for the payment of taxes. The defendants objected to the introduction of said tax-book in evidence on the ground that it did not have the oath of the tax collector as required by law, showing that the parties against whom the taxes were assessed had no personal property out of which the taxes could be made. The court overruled this objection, and allowed the book in evidence, and the defendants duly excepted. The lands were assessed against the Mobile & Girard Railroad Company. According to the order of the probate judge, the lands were regularly sold at a tax-sale on May 25, 1886, and one N. H. Hare became the purchaser of the lands in controversy, and he received the tax collector's certificate of purchase, which he afterwards assigned to the plaintiff in this suit. The plaintiff then offered in evidence the tax-deed made to him by the probate judge for said lands upon presentation of the certificate of purchase, which had been transferred to him by said Hare. The defendants objected to the introduction of said deed in evidence, on the ground that the plaintiff had not shown that said lands were liable to taxation, and that no valid tax-sale of said lands had been shown to have been made. The court overruled this objection, and the defendants duly excepted. The defendants claim title to the lands in controversy under the purchase from one J. A. Prestwood, who, it was alleged,

purchased said lands at the tax-sale. The defendants offered in evidence the tax-book, and the decree of the probate court showing the sale of said lands to said Prestwood, and also offered in evidence the tax-deed to said Prestwood to said lands. It was shown by said deed that the same lands were purchased by Prestwood at a continuation of the tax-sale from May 25, 1886, to June 8, 1886. Upon the introduction of all the evidence the court, at the request of the plaintiff in writing, instructed the jury that, "if they believed the evidence, they must find for the plaintiff." To this charge the defendants duly excepted. There were verdict and judgment for the plaintiff, and the defendants bring this appeal, and assign the rulings of the lower court upon the evidence, and the giving of the general charge for the plaintiff, as error.

Stallworth & Burnett and *W. D. Brown*, for appellants. *John Gamble*, for appellee.

WALKER, J. The defendants reserved exceptions to the action of the trial court in overruling their objections to the introduction in evidence of the book containing the tax collector's entry of the land sued for as assessed for taxation, and the decree of the probate court for the sale of the same, and to the introduction of the deed to said land made by the probate judge to the plaintiff. The defendants did not estop themselves from making or insisting upon these objections by setting up title in themselves to the land in dispute under another alleged tax-sale, based upon the same proceedings. The plaintiff and the defendants respectively claimed under separate and distinct sales and deeds made at different dates. The two claims were adverse and inconsistent. There was nothing in the respective positions of the parties to preclude a denial by either of the validity of the other's title. The effort of each party was to show that it had acquired the title of the Mobile & Girard Railroad Company to the land in dispute, and perhaps neither could have required the other to go beyond that common source of title, (Lang v. Wilkinson, 57 Ala. 259; Pollard v. Cocke, 19 Ala. 188;) but, as the parties sought to connect themselves with that title by different means, and there was no relation between them to raise an estoppel in favor of the one as against the other, the burden was on the plaintiff as the actor in the suit to sustain his contention by proving title in himself. His right to recovery depends upon the strength of his own title; and if he is not able to show that he has duly acquired whatever title to the land there was in the railroad company, his position is not strengthened by the fact that the defendants also fail in a similar attempt to show that they have acquired that title. 3 Brick. Dig. p. 325, §§ 38, 39. The positions of the parties are similar to that of two persons claiming the same land under different and conflicting deeds from the same grantor. If both of the deeds are invalid as conveyances, the holder of one of them would not be aided thereby in an attempt to recover possession of the land from the person claiming under the other defective muniment. If the decree of the probate court relied on in this case was void, it does not help the plaintiff that the defendants also claim title through another deed based upon a sale under that same void proceeding.

The defendants objected to the proof introduced to show the alleged tax-sale because of the absence of the required showing that there was no personal property out of which the taxes could have been collected. The probate court is empowered to order the sale of lands for the payment of taxes assessed thereon or against the owner thereof only when the tax collector shall report to the court that he was unable to find sufficient personal property therefor; and, at the end of the entries in reference to unpaid taxes on real estate required to be made in the docket, which it is the duty of the tax collector to deliver to the judge of probate, he must make and subscribe an oath showing that he has made diligent search for personal property of the parties against whom the taxes are respectively assessed, and that, after diligent search, he has been unable to find sufficient personal property out of which to collect the taxes, or any part thereof. Code 1886, §§ 566–568. It is plain from the language of the statute that the inability to find personal property from which to collect the taxes, and the affidavit of the tax collector on his docket to this effect, are jurisdictional facts, which are essential to the validity of any decree for the sale of land for the non-payment of taxes; and, under the established construction of the statute, the docket required to be returned by the tax collector must affirmatively show these jurisdictional facts. If it does not, the decree and sale thereunder are nullities. Wartensleben v. Haithcock, 80 Ala. 565, 1 South. Rep. 38; Fleming v. McGee, 81 Ala. 409, 1 South. Rep. 106; Carlisle v. Watts, 78 Ala. 486. In the tax collector's docket, introduced in this case as the foundation of the plaintiff's title, there was not the required affidavit; nor, indeed, any showing at all that a search had been made for personal property, or that a sufficiency thereof could not be found. The court erred in overruling the defendants' objections to the admission of the docket and of the tax-deed. They were mere nullities, the jurisdiction of the probate court not being shown, and they furnished no evidence of title in the plaintiff. The affirmative charge to find for the plaintiff cannot be supported on the proof of his prior possession of the land sued for, as the proof on that subject was conflicting; a witness for the defendant stating that the plaintiff had never been in possession of the land. The charge should have been refused. There was no ruling of the court involving the question as to whether, on the aspect of the evidence most favorable to the plaintiff, such prior possession of the land by him was shown as is requisite to the maintenance of ejectment. It is not plain that the proof on this subject was sufficient to support a finding for the plaintiff against these de-

fendants on prior possession alone. Alexander v. Savage, 90 Ala. 383, 8 South. Rep. 93; Rivers v. Thompson, 46 Ala. 335; Childress v. Calloway, 76 Ala. 128.

Reversed and remanded.

(95 Ala. 382)

SAINT *et al.* v. WHEELER & WILSON MANUF'G CO.

(*Supreme Court of Alabama.* Jan. 26, 1892.)

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—BOND FOR PERFORMANCE OF DUTIES OF EMPLOYMENT.

1. A bond by a principal and sureties, conditioned on the faithful performance by the principal of his duties under a contract of employment, is a contract of suretyship, and not of guaranty; and a request by one surety to withdraw his name, made after delivery of the bond and after notice by the employer to the employe to enter upon the discharge of his duties, which request is not assented to by the employer, will not operate as a release of the surety making the request, or of the others, who became sureties on condition that he should join with them.

2. Sureties for the faithful performance of a written contract of employment of their principal as collector are not relieved from liability by a subsequent parol agreement between the employe and the employer's agent, imposing additional duties, not hindering the employe's performance of the duties originally undertaken, nor by a reduction of his compensation,—there being no new consideration therefor, nor evidence of the employer's approval; nor by allowing him to retain his compensation out of collections,—the contract being silent as to the manner of payment.

3. Such sureties are not discharged by mere indulgence by the employer, or by his forbearance in enforcing the liability of the employe for an embezzlement, or by an agreement, made without their knowledge, without consideration, whereby the employer agrees to wait for payment. But where, after knowledge of such dishonesty, the employer's agent, having supervision of the employe and of all matters embraced in the contract, which contains a provision for its determination at pleasure, continues the employment, without notice to the sureties, and commits other funds to the employe, which are likewise converted, such sureties are not liable for the employe's default during the subsequent service.

Appeal from circuit court, Colbert county; H. C. SPEAKE, Judge.

Action by the Wheeler & Wilson Manufacturing Company against R. F. Saint, as principal, and C. M. Wright, A. J. Crosthwait, and J. R. Spragins, sureties, upon a bond for the performance of a contract of employment by defendant Saint with plaintiff. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

The contract between these parties, of which the other defendants guarantied the faithful performance, is divided into seven sections, which are as follows: "Section 1. The party of the first part [Wheeler & Wilson Manufacturing Company] agree to employ the party of the second part as a collector. Sec. 2. The party of the second part is to engage in no other business, but to devote his time exclusively to collecting claims given him from time to time by the party of the first part. Sec. 3. The party of the second part agrees to remit to the party of the first part, on Saturday of each week, the full amount of all collections made by him. Sec. 4. All notes, leases, and cash received by the party of the second part on account of the party of the first part shall be held and rendered strictly as the property of the said party of the first part, subject to their order and under their control. Sec. 5. In any matters where the duties of the party of the second part are not herein clearly defined, he shall obey any and all directions or instructions in relation thereto which shall from time to time be given him by the party of the first part. Sec. 6. The party of the second part is to receive as full compensation for his services under this agreement a salary of $50.00 per month, and necessary traveling expenses; said salary and expenses to commence when the party of the second part reaches his territory and work commences,—said party of the second part to furnish his own horse, and to go wherever ordered. All loss of time to be deducted. Sec. 7. This agreement may be terminated at the option of either party, in which case the party of the second part agrees to deliver to the party of the first part, at their office in Nashville, all of their property remaining in his possession or under his control, unless otherwise ordered by them in writing." The bond on which this suit was instituted was written on the back of this contract. All the defendants filed the plea of general issue, in short, by consent, on the 11th day of March, 1889. The other sureties on the bond filed separate pleas, 22 in number, including those to which demurrers were sustained. A. J. Crosthwait separately pleaded that, before Saint had entered on the discharge of his duties as collector, he notified plaintiff to take his name off of the bond,—that he would not become a surety on the bond; that the plaintiff made no objection, and he was thereby released from any obligation on the bond. The other sureties on the bond filed a separate plea, that they signed the bond with the understanding that Crosthwait was also jointly liable with them on the bond, and that a release of Crosthwait from the bond, without their consent, released them. The sureties filed a number of other pleas, on which they based a valid defense to this suit: (1) They pleaded that the contract under which Saint worked for the plaintiff was changed after the bond was executed by them, without their knowledge or consent; (2) that plaintiff and Saint so changed the original contract, after the bond was executed, as to constitute Saint a salesman, and required him to sell sewing-machines; (3) that plaintiff required Saint to sell and discount the notes which were put in his hands for collection under the contract; (4) that different duties were imposed on Saint by plaintiff than was stipulated for in the contract, and which increased defendants' risk; (5) that plaintiff knowingly suffered Saint to retain in his possession money which it knew he had collected; (6) that plaintiff and Saint changed that clause of the contract requiring him to remit to the plaintiff at the end of each week the full amount of all collections, and permitted Saint to retain from his weekly collections his salary and traveling expenses; (7) that plaintiff, knowing Saint had defaulted for a large

amount of its money, gave him other notes and accounts for collection, and suffered him to collect other money, without notifying the sureties; (8) that the contract was changed, and Saint required to work at $9 per week instead of $50 per month; (9) that, after the plaintiff discovered that Saint had used money collected under the contract that ought to have been paid at the time, it agreed to extend the time of payment; (10) that the plaintiff was a foreign corporation, and had not complied with the laws of this state by filing its declarations with the secretary of state. The plaintiff filed demurrers to some of the pleas; but it is not deemed necessary to set out the grounds of the several demurrers, nor to specify the pleas to which they were interposed, since the pleas on which issue was joined, as stated above, sufficiently present the questions discussed in the opinion.

The evidence introduced on the trial of the case established the following facts. That the above contract was executed by the plaintiff and R. F. Saint; and the bond was executed by the defendants, Wright, Crosthwait, Hall, and Spragins, as sureties on the bond. That Saint received from the plaintiff a large list of notes and accounts for collection. That he collected a considerable amount of money for it, paid over a portion of it, and retained or embezzled the balance of it. After the bond was executed, Saint carried it or sent it to Nashville, to the plaintiff. That when he (Saint) went to Nashville to begin work under the contract, and before he had reached that place or had received any notes or accounts from the plaintiff, Crosthwait notified plaintiff to take his name off the bond, which was a revocation of his guaranty, and, plaintiff not having refused, he regarded himself released. Plaintiff did not decline to release him, but simply asked his reasons; and after that plaintiff gave Saint the notes and accounts to collect. That when Saint went to Nashville to take charge of the work assigned to him under the contract, the original contract was changed, and Saint was permitted to retain from his weekly collections all his expenses and a salary of $50 per month, instead of remitting to plaintiff the full amount of all collections. That in February, 1888, the plaintiff, through W. W. Walls, made another change in the contract, whereby Saint was to get only $9 per week instead of $50 per month for his services as collector, and that Saint worked under this last contract until he quit, but, on a settlement he made with the company through Walls, he was allowed $50 per month. That Saint was required to sell and discount notes and accounts which had been put in his hands for collection under the contract. That he was required to take up the sewing-machines, and sell them again for such prices as he could get for them, and that he did take up some machines for the plaintiff, but did not know how many, and sold some of them under instructions from the plaintiff. That Wright, Hall, and Spragins knew nothing about Crosthwait revoking his guaranty on the bond. That they signed it with the understanding and agreement that Crosthwait was jointly liable with them. It was also proved that in February, 1888, the plaintiff, through its agent, had notice of Saint's defalcation, and that after such notice said company continued Saint in its employment. The defendants knew nothing about the changes made in the contract between Saint and the plaintiff after the bond was signed. They never consented to any of the changes. The plaintiff never notified either of them of Saint's dishonest act in appropriating the plaintiff's money. Defendants then offered to prove by each of the defendants that they had not consented to a change in the contract, and had no knowledge of such change. To this ruling of the court, defendants reserved an exception. Defendants then offered to prove that neither the plaintiff nor Saint had obtained license to sell sewing-machines. The court, on objection made by the plaintiff, refused to permit the defendants to introduce that evidence. Defendants introduced as evidence a number of letters written by plaintiff to the defendant R. F. Saint, in which they authorize him to discount notes and to use his discretion. All the letters show that Saint was required to do other work than that required under the written contract, all of which increased the risk which the sureties had incurred.

In addition to the other charges requested by the defendant in writing were the following: (5) "If the jury believe from the evidence that in February, 1888, Saint had only used fifty or sixty dollars of the plaintiff's money, and that Saint notified the plaintiff that he was short that amount, then it was the duty of the plaintiff to notify the sureties, Wright, Crosthwait, Hall, and Spragins, and, if the plaintiff failed to notify them of such fact, they cannot recover against these sureties for any defalcation of Saint after that time." (7) "If the jury believe from the evidence that A. J. Crosthwait was released from the bond as guaranty after the other sureties, Wright, Crosthwait, Hall, and Spragins, had signed it, then I charge you that such release was a material change in the contract. And if you further believe from the evidence that such change was made without the knowledge and consent of Wright, Hall, and Spragin, and Crosthwait, then the plaintiff cannot recover against them." (9) "If the jury believe from the evidence that in February, 1888, the plaintiff had notice that defendant Saint had collected money for it which he had converted to his own use, then it was the duty of the plaintiff to notify Wright, Hall, Crosthwait, and Spragins, his securities, and if it failed to notify them the plaintiff cannot recover against said sureties for the money collected and appropriated to his own use after the time." The defendants separately excepted to the court's refusal to give the several charges requested by them, and also excepted to the court's giving the several charges requested by the plaintiff, but it is deemed unnecessary to copy these charges in full. There were verdict and judgment for the plaintiff, and the defendants appeal.

Kirk & Almon, for appellants. *Roulhac & Natham*, for appellee.

McCLELLAN, J. The contract sued is not a guaranty, but one of suretyship. Crosthwait and the other defendants, who undertake that Saint shall faithfully perform his contract with the company, are sureties of Saint, and not guarantors. The distinction between the two classes of undertakings is often shadowy, and often not observed by judges and text-writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not, in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but when this responsibility is secondary, and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they undertake to pay money or do any other act in the event their principal fails therein, they are sureties; but, if they assume the performance only in the event the principal is unable to perform, they are guarantors. Or, yet another and more concise statement, a surety is one who undertakes to pay if the debtor do not; a guarantor, if the debtor cannot. The first is sponsor absolutely and directly for the principal's acts; the latter, only for the principal's ability to do the act. "The one is the insurer of the debt; the other, an insurer of the solvency of the debtor." This is the essential distinction. There is another, going as well to its form. The contract of suretyship is the joint and several contract of the principal and surety. "The contract of the guarantor is his own separate undertaking, in which the principal does not join." Indeed, it has been held, pretermitting all other considerations, that no contract joined in by the debtor and another can be one of guaranty on the part of the latter, (McMillan v. Bank, 32 Ind. 11, 10 Amer. Law Reg., N. S., 435, and notes,) though we apprehend that a case might be put, involving only secondary liability on the sponsors, though the undertaking be signed also by the principal. However that may be, it is certain that in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to suretyship. See Brandt, Sur. §§ 1, 2; 9 Amer. & Eng. Enc. Law, p. 68; Marberger v. Pott, 16 Pa. St. 9; Allen v. Hubert, 49 Pa. St. 259; Reigart v. White, 52 Pa. St. 438; Kramph's Ex'r v. Hatz's Ex'r, Id. 525; Birdsall v. Heacock, 18 Amer. Law Reg. (N. S.) 751, and notes; Hartman v. Bank, 103 Pa. St. 581; Courtis v. Dennis, 7 Metc. (Mass.) 510; Kearnes v. Montgomery, 4 W. Va. 29; Walker v. Forbes, 25 Ala. 139.

Applying these principles to the bond sued on, the conclusion must be that it is not a guaranty, but a contract of suretyship, on the part of Crosthwaite, Wright, Hall, and Spragins. It is not their separate undertaking, but the principal also executes it. While they employ the word "guaranty," they directly obligate themselves, along with Saint to pay—absolutely and wholly, irrespective of Saint's solvency or insolvency—all damages which may result to the obligee from his default. Not only so, but they expressly stipulate that the company need not exhaust its remedies against Saint before proceeding against them. It is, in other words, and in short, a primary undertaking on their part—not secondary and collateral—to pay to the company in the event of Saint's failure, and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors; and their rights depend upon the law applicable to the former relation, and not upon the law controlling the latter. One of the important differences in the operation, effect, and discharge of the two contracts finds illustration in this case. The undertaking of guaranty, in a case like this, is primarily an offer, and does not become a binding obligation until it is accepted and notice of acceptance has been given to the guarantor. Till this has been done, it cannot be said that there has been that meeting of the minds of the parties which is essential to all contracts. Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. Rep. 178; Walker v. Forbes, 25 Ala. 139. Being thus a mere offer, it may be recalled, as of course, at any time before notice of acceptance. Indeed, there are authorities which hold that even after acceptance, and notice thereof, the guarantor may revoke it by notice that he will be no longer bound, unless he has received a continuing or independent consideration which he does not renounce, or unless the guarantee has acted upon it in such way as that revocation would be inequitable and to his detriment; and, in cases of continuing guaranty, the effect of such revocation is to confine the guarantor's liability to past transactions. 2 Pars. Cont. 30; Allan v. Kenning, 9 Bing. 618; Offord v. Davies, 12 C. B. (N. S.) 748; Tischler v. Hofheimer, (Va.) 4 S. E. Rep. 370. All this is otherwise with respect to the contract of a surety. He is bound originally, in all respects, upon the same footing as the principal. His is not an offer depending for efficacy upon acceptance, but an absolute contract, depending for efficacy upon complete execution; and its execution is completed by delivery. From that moment his liability continues until discharged in accordance with stipulations of the instrument, or by some unauthorized act or omission of the obligee violative of his rights under the instrument, or by a valid release. Nothing that he can do outside of the letter of the bond can free him from the duties and liabilities it imposes. He cannot assert the right to revoke unless the right is therein nominated. As was said by the English court, if he desired to have the right to terminate his suretyship on notice, he should have so specified in his contract. Calvert v. Gordon, 8 Man. & R. 124; Brandt, Sur. §§ 113, 114.

The evidence here as to the release of Crosthwaite tends to show no more than

this: That after the bond had been delivered to plaintiff, and after its officers had advised Saint that they were ready for him to enter on the discharge of his duties under the contract secured by the bond, he (Crosthwait) requested plaintiff to take his name off the paper. No assent to this request is shown, but only an inquiry on the part of plaintiff as to Crosthwaite's reasons for desiring to be released. It would seem that the court itself should have decided that these facts did not release Crosthwaite, but the question appears to have been submitted to the jury. If this submission, or any of the instructions accompanying it, was erroneous, no injury resulted to defendants, since the jury determined the point against the alleged release, as the court should have done, assuming it to have been a question of law. On the other hand, if it were a question for the jury, it is to be presumed they were properly instructed as to the rules of law which should guide them to its solution, as no exceptions were reserved in that regard. The exceptions which were reserved on this part of the case are to charges given, and to the refusal to give charges asked by defendants declaratory of the effect which the discharge of Crosthwaite, if the jury found he had been discharged, would have upon the liability of his co-sureties. As the jury found expressly that he had not been discharged, these exceptions present mere abstractions not necessary to be decided. We have no doubt, however, but that the law in this respect was correctly declared by the court to be that the release of Crosthwaite operated to release the other sureties only to the extent of his aliquot share of the liability. Brandt, Sur. § 383; Burge, Sur. 386; Klingensmith v. Klingensmith, 31 Pa. St. 460; Ex parte Gifford, 6 Ves. 805; Shock v. Miller, 10 Pa. St. 401; Currier v. Baker, 51 N. H. 613; Governor v. Jemison, 47 Ala. 390.

The sureties of Saint insisted on the trial below that they were discharged from all liability on the bond by reason of certain alleged changes made in the original contract between their principal and the company, by the parties thereto, after they became sureties for its faithful performance, and without their knowledge, consent, or ratification. It is not pretended that the paper writing evidencing this contract was ever altered in any respect, but that its terms were changed by subsequent parol agreements, in the following respects, among others to be presently considered: *First*, that under this contract, which constituted Saint a collector only for the company, he was instructed and required to take up and resell sewing-machines when he found the notes for the purchase money of the same, and which were in his hands for collection, could not be collected; and, *second*, that he was authorized to discount or sell the notes placed in his hands for collection, when the same could not be otherwise realized upon. Nothing is claimed in this action on account of Saint's misconduct in respect of any property thus taken up or resold, or of any note discounted by him, or with respect to the proceeds of any such sale or discount. If these duties were such as usually devolved upon a collector for a sewing-machine company,—as to which there is no evidence in this record, and no necessity for any, under the present complaint,—it may be that Saint's sureties would be responsible for their faithful performance on his part to the same extent as for money collected on notes in his hands. Bank v. Ziegler, 49 Mich. 157.[1] However that may be, the fact that they were imposed upon him, assuming they were not covered by his contract, and hence were in addition to those assured by the other defendants, cannot relieve his sureties from liability with respect to those which were imposed by the contract, unless the imposition of these new duties and their performance by Saint rendered impossible, or materially hindered or impeded, the proper and faithful performance of the service originally undertaken. There is no evidence here that these new and additional duties interfered with the collection of notes placed in his hands for that purpose, nor is any claim made against his sureties on account of any failure to collect such notes. But the *gravamen* of the action is that he (1) did collect these notes, and converted the proceeds to his own use; or (2) that he failed to deliver such notes to the company on the termination of his employment. We are unable to conceive how the fact that he had other property and funds—machines and the proceeds of discounted notes—in his possession, could have hindered or impeded him in the accounting for funds collected or notes remaining in his hands, or could in any degree have conduced to his conversion of such funds or notes. To the contrary, it would seem, in all reason, that the possession of this other property and these other funds, out of which he might have met the necessities which presumably induced his malversations, would have lessened the chances of misappropriation of the funds and property for which his sureties were responsible, and thus have lessened, instead of increased, their exposure to liability. We are very clear to the conclusion that the imposition of these new duties, not covered by the contract, did not discharge the sureties with respect to those embraced in the contract, and as to which no change in the particulars we are considering was attempted. City of New York v. Kelly, 98 N. Y. 467; State v. Vilas, 36 N. Y. 459; Insurance Co. v. Potter, 4 Mo. App. 594; Com. v. Holmes, 25 Grat. 771; Bank v. Traube, 75 Mo. 199; Gaussen v. U. S., 97 U. S. 584; Jones v. U. S., 18 Wall. 662; Ryan v. Morton, 65 Tex. 258; Bank v. Gerke, (Md.) 13 Atl. Rep. 359, 6 Amer. St. Rep. 453, and note, 458; Bank v. Ziegler, 49 Mich. 157, 13 N. W. Rep. 496.

The sureties further defended on the ground that the contract between Saint and the company was changed without their knowledge or assent by a subsequent parol agreement entered into by their principal and Walls, representing the company, whereby Saint's compensation was to be reduced from $50 per month to $9 per week. There was evidence of such agree-

[1] 13 N. W. Rep. 496.

ment, but none that it was supported by a consideration or that it was approved by plaintiff; and it appears from other evidence that all of Wall's contracts were subject to approval or rejection by other officers of the corporation, and that plaintiff settled with Saint on a basis as to compensation of $50 per month. We think, on these facts, this defense is without merit. Steele v. Mills, 68 Iowa, 460, 27 N. W. Rep. 294. Equally untenable, in our opinion, is the defense which proceeds on the ground that the instruction of plaintiff to Saint to retain his salary and expenses out of collections made by him was a material change of that provision of the contract which required him to remit to the company on the last day of each week the amount collected up to that day. The contract provided for Saint's compensation and expenses, but was silent as to the manner of payment. Method of payment thus adopted tended to decrease the risks of the sureties, as affording less occasion for conversion by Saint than had payments to him been made only at the end of each month.

It is well settled that mere indulgence of the creditor to the principal, the mere forbearance to take steps to enforce a liability upon default, or even an understanding between them looking to payment of the deficit presently due at some time in the future, which does not, for the want of a consideration to support it, or other infirmity, prevent the creditor from immediately demanding payment, will not discharge the surety. Hence what took place between Walls and Saint in February, 1888, in regard to allowing the latter further time to make good the sum he had theretofore converted, afforded no defense to the sureties with respect to the sum then due. 3 Brick. Dig. p. 715, §§ 36-43; 9 Amer. & Eng. Enc. Law, p. 83, note 4; Canal, etc., Co. v. Van Vorst, 21 N. J. Law, 100.

The sureties, however, on another aspect of the transaction last above referred to between Saint and Walls, predicate a defense going to the amount of their liability. They insist that Saint was at that time a defaulter by embezzlement; that Walls knew this fact, and, without giving any notice of it to them, he, acting for the company, continued Saint in its employment, and committed other funds to him, which were also converted; and that this action of Walls discharged them from all liability for funds thus converted after he knew of Saint's dishonesty. The general principle here relied on finds abundant support in the authorities. In the leading case of Phillips v. Foxall, L. R. 7 Q. B. 666, the proposition is thus stated by QUAIN, J.: "We think that in a case of continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." And this proposition is rested upon considerations which, to our minds, are eminently satisfactory. Premising that had a default involving dishonesty, and occurring before the surety became bound, been known to the creditor, and concealed by him from the surety, the effect would have been to discharge the surety,—a doctrine which appears to be well established,—the court proceeds to declare the same result from a concealment of dishonesty pending a continuing guaranty, as follows: "One of the reasons usually given for the holding that such a concealment [at the time the surety enters into the obligation] would discharge the surety is that it is only reasonable to suppose that such a fact, if known to him, would necessarily have influenced his judgment as to whether he would enter into the contract or not; and, in the same manner, it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that after the servant's dishonesty in the service had been discovered the guaranty * * * should continue to apply to his future conduct, when the master chose, for his own purposes, to continue the servant in his employ, without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination." The citations directly supporting this conclusion are *quasi dicta* of Lord REDESDALE in Smith v. Bank, 1 Dow. 287, and of MALINS, V. C., in Burgess v. Eve, L. R. 13 Eq. 450; but the case was subsequently followed in England and the United States, and nowhere abstractly doubted. We follow these authorities, and adopt their conclusions as sound in principle. Sanderson v. Aston, L. R. 8 Exch. 73; Brandt, Sur. § 368; Roberts v. Donovan, 70 Cal. 108, 11 Pac. Rep. 599; Railroad Co. v. Gow, 59 Ga. 685; Telegraph Co. v. Barnes, 64 N. Y. 385; Newark v. Stout, 52 N. J. Law, 35, 18 Atl. Rep. 943.

Indeed, the foregoing doctrine is not controverted in this case, but it is contended that it has no application as between a corporation, being the creditor, and the surety of one of its officers or employes; and there are not a few adjudged cases which support this view. The argument upon which this conclusion is reached is that "corporations can act only by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his [the principal's] infidelity, ought not in reason, and does not in law or equity, relieve the sureties from their responsibility for him. They undertake that he shall be honest, though all around him be rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution all their sureties might

be discharged. It is impossible that a doctrine leading to such consequences can be sound." Railway Co. v. Shaeffer, 59 Pa. St. 356; Taylor v. Bank, 2 J. J. Marsh. 565; McShane v. Bank, (Md.) 20 Atl. Rep. 776; Brandt, Sur. § 369. It is to be noted that these cases—and there may be others which follow them—hold, not only that, where there is a conspiracy between officers of a corporation to embezzle its funds, the dereliction of neither officer will discharge the sureties of the other, but also where there is a negligent failure on the part of one such officer to give notice to the sureties of another of his dishonesty, and a continuance of the dishonest servant in the corporate service without the assent of his sureties, given with a knowledge of the default, the sureties are not discharged from liability for subsequent deficits, though confessedly they would be were the creditor an individual or copartnership. It may be that the first position stated is sound. It would seem to be immaterial whether an original default results from the dishonesty of the principal alone, or conjointly from his and the dereliction of another corporate employe. The sureties are bound to answer for the results of any form of original dishonesty That is what they insure against. It may be, too,—doubtless would be,—that no concealment by a conspirator of the fact of the principal's original default, no continuance in the service by an officer of the corporation *in pari delicto* with the principal, would suffice to discharge the surety, since all of this is malversation participated in by the principal, and violative of the contract which the sureties have undertaken to see faithfully performed. Moreover, the acts and omissions of one agent of a corporation, in conspiracy with another to filch their common master, in furtherance of their nefarious purposes, are, in the nature of things, without authorization, by implication or otherwise, and can in no just sense be said to be acts or omissions of the corporation. Upon this idea, it may be that where one officer, though not originally participating in the default of another, conceals that default from the sureties of his fellow-officer and from the company for sinister purposes of his own, and not as representing his employer or in its interest, and continues the defaulting officer in the service, the sureties would not be discharged as to subsequent deficits. This far we may go with the learned courts in which the cases we have cited were decided. But even our conservatism in following adjudications of courts of acknowledged ability and learning can in no degree constrain us to adopt the second proposition stated above. We cannot subscribe to the doctrine that there is the radical difference insisted on, or any material difference in fact, between the efficacy of acts and omissions of an agent of a creditor corporation, having authority in the premises, on the one hand, and the acts and omissions of the agent of an individual creditor, or of the individual himself, on the other, in respect of condoning the defalcation of an employe, omitting notice to the employe's sureties, and continuing him in the service, to operate a release of the sureties as to subsequent deficits of the dishonest employe. No doctrine of the law is more familiar than that notice to an agent, within the scope of his agency, is notice to the principal; and the doctrine has in no connection been applied more frequently and uniformly than to corporations and their agents. Indeed, there is an absolute necessity in all cases for its application to corporations, since they act and can be dealt with only through agents. Notice to one agent of a corporation with respect to a matter covered by his agency must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing. In the case at bar, Walls had authority to make the contract with Saint, subject to the approval of another agent of the corporation. He did in fact make it. This contract contained a provision for its termination by either party at pleasure. The evidence was that Walls had full supervision over Saint, and over all matters embraced in the contract made by Saint. It was at least a fair inference to be drawn by the jury that he could terminate the employment, either under the stipulation in the instrument, or for a violation of it by Saint, subject to the approval of the other officer or agent referred to. There is no ground to doubt but that to have given the sureties notice of Saint's default would have been in the line of his duty and authority. Equally clear it must be that their assent to him to a continuance of Saint's employment would have bound them for the subsequent defalcation; and, on the other hand, it must be that their dissent from such continuance, communicated to him, would have had the same effect as had it been given to any other officer of the creditor company. He had notice of the default. He received it as representing the company. In that capacity, he condoned it, made arrangements with Saint to make it good, continued the employment, and thereby continued Saint's opportunities to embezzle the company's funds, on the supposed security for its reimbursement afforded by the obligation of the sureties, who had contracted on the assumption of Saint's honesty, and were entitled to know of his dishonesty, when it should develop, as a condition to their subsequent liability. There is no intimation of connivance or conspiracy on the part of Walls with Saint to defraud either the creditor or the sureties. What he did was doubtless done in good faith, and for the interest, as he supposed, of his employer. It was in the line of his employment. If his further duty was to report his action to another officer of the company, the presumption is that he made such report. There is nothing in the record to rebut such presumption. We cannot hesitate to affirm, on this state of the case, that what he did which ought not to have been done, and what he failed to do which ought to have been done, were the acts and omissions of the corporation, involving the same consequences, in all re-

spects, as if the corporate entity had been capable of direct personal action, so to speak, and had acted as he did, or as if he himself, and not the Wheeeler & Wilson Manufacturing Company, had been the creditor. We suppose it would not be contended in any quarter that if these sureties had in terms stipulated that, in case of Saint's default, notice to them, and assent on their part, should be a condition precedent to their liability for further defaults, they could be held, without such notice and assent; and yet, under the doctrine announced in the cases cited, such a stipulation would be entirely nugatory, and the failure of every agent and officer, all with knowledge of the stipulation and of the default, to notify the sureties thereof, would avail them nothing. Yet it would manifestly be no more the duty of the corporation to give a notice so stipulated for than to give a notice made a part of the contract by the law of the land. And such doctrine, carried to its legitimate results, would defeat all corporate liability growing out of the contracts, acts, and omissions of agents clothed with power and authority in the premises. That it is unsound is demonstrated, not only in logic, but upon analogous authority. As we have seen, the English court, in the leading case of Phillips v. Foxall, supra,—which has never been called in question there or in this country, either as to the result or the reasoning upon which it was reached,—supported the principle declared upon the same considerations which underlie the doctrine that if an employer have knowledge of the previous dishonesty of a servant, and accept a guaranty for his future honesty without disclosing such knowledge to the surety, this is a fraud upon the latter, and he is not bound. Now, suppose an officer of a corporation, charged with the duty of finding surety for another officer, knowing of such previous dishonesty on the part of such other officer, takes bond for his faithful and honest performance of the services contracted for, without giving the surety notice of the prior dereliction. Would not that omission of duty on his part stand upon the same plane before the law, and involve precisely the same consequences, as if the default had occurred after the surety has bound himself, and the officer had then failed to give him notice of it? If the corporation is not prejudiced by the omission in one instance, can it be in the other. If the corporation is responsible for the dereliction of its agent with respect to notice of a previous default, would it not also be responsible for its agent's failure to give notice of the subsequent default? There can, in our opinion, be but one answer to these questions. There can be no possible difference in the duty of the agent and the corporation's liability for its non-performance in the two cases; and the law is well settled that the failure of the agent of a corporation to give notice of such previous dishonesty avoids the obligation of the sureties for future misconduct. Singularly enough, too, some of the cases holding this doctrine distinctly and broadly were decided by courts—those of Pennsylvania and Kentucky—which hold the contrary view as to notice of after-occurring embezzlement. Brandt, Sur. §§ 365–368; Wayne v. Bank, 52 Pa. St. 344; Graves v. Bank, 10 Bush, 23; Bank v. Cooper, 36 Me. 179, 39 Me. 542.

Our conclusion on this point is further supported by the cases of Railroad Co. v. Gow, and Telegraph Co. v. Barnes, supra, which, without discussing this point, in effect hold that the omission of an officer of a corporation to notify a surety of the default of his principal in a case like this, and the continuance by such officer of the employment of the principal, will discharge the surety as to all defaults arising during the subsequent service. And in Newark v. Stout, 52 N. J. Law, 35, 18 Atl. Rep. 943, the New Jersey court, while adhering generally to the doctrine we have been criticising, yet held that if the default and dishonesty of a municipal officer be brought to the attention of the city council, which is clothed with the power to remove him, and he is allowed to continue in the service without notice to and assent on the part of the surety, the latter will be discharged from liability as to all subsequent defaults. It does not appear to have been so considered by that court; but it is manifest that this is a radical departure from the doctrine held by the Pennsylvania, Kentucky, Maryland, and other courts, and relied on by appellee here, and goes strongly in support of the contrary rule, which we believe to be the sound one. It is also to be noticed that much reliance is had by the courts holding that a surety of one officer of a corporation is not discharged by the acts or omissions of another, in the particulars under consideration, on cases decided by the supreme court of the United States in respect of sureties of public officers. Indeed, it would seem that this whole doctrine had its inception in this class of cases. This can but be considered an infirmative circumstance, going to the soundness as authority of those cases which involve sureties of corporation officers. There is a palpable and manifest distinction between the two classes of cases bearing directly upon this question, which, while requiring the application of this rule to public officers on the grounds of public policy, and that laches should not be imputed to the government, does not require its application to officers of corporations.

We hold that if Walls, while acting for the corporation and in the capacity of its agent, with respect to the matters and things involved in Saint's contract, received notice of such a conversion of its funds by Saint as amounted to embezzlement or involved dishonesty, and, without imparting this knowledge to the sureties and receiving their assent thereto, continued him in the service, the sureties are not liable for Saint's subsequent defaults. Charges 5, 9, and 7, requested for defendants, when referred to the evidence, were correct expositions of the law, as we understand, in this connection. The refusal of the court to give them involved error which must work a reversal of the case. Most of the other assignments of error are covered by the points considered in the first part of this opinion. Such of

the assignments as are not discussed have been considered, and found to be without merit. The judgment is reversed, and the cause remanded.

(94 Ala. 466)

SAYRE *et al.* v. WEIL.

(*Supreme Court of Alabama.* Jan. 27, 1892.)

TRUST—POWER TO REVOKE—DEPOSIT IN NAME OF WIFE—CHECKS BY HUSBAND—ASSIGNMENT BY BANK—RIGHTS OF ASSIGNEE.

1. Defendant deposited money in a bank to the credit of himself as "trustee for G. children." He testified that he deposited the money from time to time for the last 10 or 15 years as a gift to those children. *Held*, that the trust was irrevocable, nothing remaining in defendant but the naked legal title.

2. Defendant owed the bankers on his note, and directed them to apply such trust fund towards the payment of the note. They agreed to do that, and to deliver the note as soon as their cashier could make the proper entries. Before the note was delivered, they assigned for the benefit of creditors. Defendant knew nothing of their financial embarrassment, or that they intended to assign. *Held*, in an action on such note by the assignees, that the agreement to apply such trust fund bound the bankers.

3. Defendant had made another deposit in the name of his wife, and it was understood by the bank that he could check against this deposit. He subsequently checked against the deposit, but his wife had not drawn on it. At the time defendant directed the application of the trust fund towards the payment of his note, he directed, also, that enough be taken from the deposit in the name of his wife to pay the balance due on the note. The bankers agreed to this, and the wife ratified the act of defendant. *Held*, that this agreement bound the bankers.

4. The assignees were invested with no higher or more extensive authority than the bankers, but were bound by those agreements equally with the bankers.

5. Code, § 1580, which provides that deposits by married women of their earnings shall be paid only to such married women, does not apply to a deposit made by defendant in the name of his wife.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Action by H. A. Sayre and others, assignees of Moses Bros., against David Weil, to recover on a note. Judgment for defendant. Plaintiffs appeal. Affirmed.

The evidence introduced showed, among other things, that prior to July 3, 1891, the defendant deposited in the banking-house of Moses Bros., of which firm the plaintiffs are the assignees, to the credit of "D. Weil, trustee for Goldman children," the sum of $1,038.42, which money was still on deposit on said 3d day of July, 1891; that there was also on deposit with the said firm on July 3, 1891, to the credit of Rosina Weil, who was the wife of the defendant, the sum of $1,668.78, which had been placed in the said bank by the defendant; that no one drew checks on the account of Rosina Weil except the defendant, and he had frequently drawn on this account in the name of Rosina Weil, or in his name for her, with her knowledge and consent, and with the consent of Moses Bros. It was further shown that on February 7, 1891, the defendant was indebted to Moses Bros. in the sum of $2,000; that on that day he paid the said indebtedness by executing the note here sued on, and transferring from the account of Rosina Weil enough money to pay the balance of the said debt; that on the 3d day of July, 1891, the defendant and Moses Bros., through H. C. Moses, a member of said firm, agreed that the note here sued on, which was payable four months after date, should be paid by applying to its payment the $1,038.42 deposited to the credit of "D. Weil, trustee for Goldman children," and that the balance on said note, after deducting said amount, should be charged to the account of Rosina Weil, and the whole note thus be paid. It was also further proved that Rosina Weil afterwards ratified this agreement. All the other necessary facts are sufficiently stated in the opinion. The cause was tried, by agreement, by the judge of the city court without the intervention of a jury, and, upon the introduction of all the evidence, he held that the said agreement between defendant and Moses Bros. was valid and binding, and rendered judgment for defendant.

Tompkins & Troy and *Horace Stringfellow*, for appellants. *Watts & Son*, for appellee.

COLEMAN, J. By written agreement of the parties, filed as provided in section 2743 of the Code, the case was tried and determined by the court without the intervention of a jury. Under the following section, (2744,) the finding of the court may be general or special, unless the parties, or either of them, in writing, request a special finding of the facts; and, if a special finding is requested, the court must state, in writing, the facts as it finds them; and such statement, with the judgment of the court, must be entered on the minutes. Construing sections 2744 and 2745 together, we hold that whenever there is a special finding by the court, whether performed in the exercise of its discretion, or upon written request of the parties, or either of them, on appeal it is the duty of this court to examine and determine whether the facts are sufficient to support the judgment. Quilliman v. Gurley, 85 Ala. 594, 5 South. Rep. 345; Betancourt v. Eberlin, 71 Ala. 464. The first legal proposition for consideration is the one which arises in regard to the deposit for the Goldman children. The defendant Weil testifies as follows: "I had another account with Moses Bros.: 'D. Weil, trustee for the Goldman children.' There was $1,038.42 to the credit of that account on the 3d day of July, 1891. I had deposited the money there, from time to time, for my grandchildren, the Goldman children, ever since they were born,—for the last ten or fifteen years. I put it there as a gift to them every week, so when they grew up they would have something to fall back upon." The same principles of law as to gifts *inter vivos* apply in cases of gifts of money deposited in bank as to other personal property. The donor must part with all dominion over the thing given. There must be a delivery, or something equivalent thereto. If anything remains to be done to perfect the gift, if there be a reservation of the use or enjoyment of the thing, it is not a valid, executed gift. Walker v. Crews, 73 Ala. 417. A donor may constitute himself a

trustee for the donee upon a mere voluntary consideration, and, in case of personal property, this may be done by parol. If by language clear and unmistakable, whatever may be the form of expression, a trust is created, as distinguished from a mere intention to create; if nothing remains to be done to perfect the trust, although there is no valuable consideration,—courts of equity will uphold and enforce the trust in the interest of the beneficiary. 1 Perry, Trusts, §§ 96–98; 8 Amer. & Eng. Enc. Law, p. 1323; Gerrish v. Institution, 128 Mass. 160. These general principles are almost universally conceded. The difficulty arises in their application to the varying facts of particular cases, in determining whether, in the case of a gift, it has been perfected, and, in the case of a trust, whether it has been perfectly created. We have examined many authorities upon the question at issue, and it would seem, in some of the authorities, that the same rule has been differently applied to a similar state of facts; but in each case the general rule as we have stated it has been recognized as the correct rule. In Nutt v. Morse, 142 Mass. 1, 6 N. E. Rep. 763, Calvin Morse made deposits as follows: "Book 3,006, $1,000, Calvin Morse, in trust for Rus Morse. Book 3,007, $1,000. Calvin Morse, in trust for Edgar S. Hays;" and similar deposits were made for other persons, brothers and sisters of the depositor. The court held that upon the facts it was clear that there was no perfected gift to either of the claimants. The court uses the following language: "Calvin Morse retained the entire dominion and control of the funds, both principal and interest, during his life, and the facts show conclusively that he intended no title to or interest in the funds should pass to the several claimants until after his death. The transaction was intended to be in the nature of a testamentary disposition, and was an attempted evasion of the statute of wills,"—citing Sherman v. Bank, 138 Mass. 581. The statement of the evidence in the case cited shows that the depositor informed the claimants that he controlled the fund while he lived, but it was theirs after he died; that, in fact, he did draw and use the accumulations of interest, and, the night before he died, said to them, "When I am gone, you take these books, and transfer the money to your names, and say nothing to nobody about it." It further appears that Calvin Morse, the depositor, knew, at the time he made the deposits, that he could not draw interest on any sum deposited in his own name over $1,000; and we infer the court found in this case, as is declared in other cases of the same state, that to avoid the effect of the statute, which forbade the payment of interest on sums exceeding $1,000, the depositor deposited money in the name of other persons.

It will be further seen, by an examination of the facts in the case in 138 Mass. 581, supra, that by a by-law of the bank money deposited "should be drawn out only by the depositor, or some person by him legally authorized, and that no payment should be made to any person without the production of the pass-book." In the case cited from 142 Mass., 6 N. E. Rep., supra, the depositor retained control of the pass-book; and this fact is referred to in the opinion. There are quite a number of authorities in the Massachusetts Reports, where deposits were made in the name of other persons, the depositor retaining the pass-book, and the deposits were claimed by the persons in whose names they were made, as gifts, in which it was held that the gifts were not absolute, and the money did not pass to the claimants. The fact that the depositor retained control of the pass-book, and that by virtue of the by-law no payment should be made without the production of the pass-book, was considered as evidence to show the depositor did not intend to part with dominion over the money. The question of the intention of the depositor is a question of fact open to inquiry; and his acts and declarations at the time of the deposit, or to the person in whose name it was made, could be considered. Sherman v. Bank, 138 Mass. 581; Brabrook v. Bank, 104 Mass. 228; Scott v. Bank, 140 Mass. 165, 2 N. E. Rep. 925; Broderick v. Bank, 109 Mass. 150. In the case of Gerrish v. Institution, 128 Mass. 159, A. made a deposit in trust for his son by name, and also a deposit for his grandchildren by name. The court recognized the rule that it was not enough that the testator manifested an intention to create the trust and make the gift at some future time, but that the act of transfer must be fully and completely executed. The court further held that it was a question of fact whether the trust has been perfectly created; that, when the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery. The son and grandchildren offered to prove the declarations of the depositor "that he had put the money in the bank for them, that he wanted to draw the interest during his life-time, and that after he was gone they were to have the money." This evidence was excluded. On appeal it was held that this evidence should have been admitted; a majority of the court holding that, upon the evidence admitted, a jury would be justified in finding that the testator had fully constituted himself a trustee for these claimants. The rule has been much more liberally applied in favor of a donee in the state of New York. In the case of Macy v. Williams, 8 N. Y. Supp. 658, a deposit was made in a savings bank; the depositor receiving a pass-book containing an account opened with him as trustee for Eleanor Hildich. The pass-book for a considerable time was left with the mother of Eleanor Hildich, but subsequently obtained by the depositor. He drew out all the money, and died. It was held that the trust and the trust relations were fully established, and that when he drew the money out he held it as her trustee, and was liable to account to her for it. The case of Orr v. McGregor, 43 Hun, 529, was one in which the deposit was made in the name of another than the depositor. The question was one of gift *vel non*. The court held that a deposit of one's own money in a savings

bank to the credit of another, without any qualification expressed at the time, is of itself *prima facie* evidence of a gift; yet an intent to the contrary may be shown; that the retention of the pass-book by the depositor was a fact to be considered, with other attending circumtances, in ascertaining the intent. The court states the proposition broadly that if the depositor intended, by the act of deposit, to give him the money, his right to it became complete, although she retained the pass-book; that she would be deemed to have held it in trust for him; but if her intention was not to consummate the gift, and that with that view she retained the pass-book, the act of donation was not accomplished, but rested in intention to complete the gift at some future time. In the case of Martin v. Funk, 75 N. Y. 136, in a well-considered opinion delivered by CHURCH, C. J., it was held that "the rule does not require that the gift shall be made in any particular way. It only requires that enough shall be done to transfer the title to the property; and one of the modes of doing this is by an unequivocal declaration of trust. * * * As notice to the *cestui que trust* was not necessary, and as the retention of the pass-book was not inconsistent with the completeness of the act, the case is peculiarly one to be determined by this test: Did the intestate constitute herself a trustee? I think [says the chief justice] the question must be answered in the affirmative. It was not done in express terms, but such is the fair legal import of the transaction." The entry in the pass-book in this case was as follows: "The Citizens' Savings Bank, in account with Susan Boone, in trust for Lillie Willard. 1866, March 23, $500.00." In Minor v. Rogers, 40 Conn. 512, the deposit was as follows: "Mary Daniels, as trustee of William A. Minor." It was held that the deposit was a complete gift; that the depositor could not revoke it. This case is cited by our own court in the case of Walker v. Crews, 73 Ala. 418, in support of the proposition that "a donor may, by an apt declaration to that effect, convert himself into a trustee for the donee, and thereby make a valid, irrevocable gift of the property." To the same effect may be cited Boone v. Bank, 84 N. Y. 86; Gadsden v. Whaley, 14 S. C. 216. In the case under consideration the deposit, as shown by the testimony, was: "D. Weil, trustee for the Goldman children." Says the depositor: "I put it there as a gift to them every week, so when they grew up they would have something to fall back on." He had continued making these deposits for 10 or 15 years, and had never drawn against this deposit. Under all the authorities, we hold that the trust was completed and irrevocable, and that nothing remained in the trustee but a mere naked legal title.

We hold the law to be that a deposit is a matter of contract between the depositor and bank, and the depositor may stipulate at the time as to the manner, or by whom, (there being no statute or by-law to the contrary,) the money may be drawn out; and when payment is thus made the bank is discharged from further liability. We further hold that if D. Weil, as trustee, had drawn against this fund in his trust character, Moses Bros. were under no legal duty to inquire into the purposes intended, or the use to be made by the trustee of the money, and, if his drafts were paid in ignorance of any improper use intended by the trustee, they would not be responsible; that payment of such drafts would be in due course of banking business, and discharge them from liability. When, however, D. Weil proposed to apply this trust money in satisfaction of his own individual indebtedness, Moses Bros. knew that the funds were trust funds, and that the proposition involved a violation of his trust. Such an agreement cannot be upheld against the *cestui que trust*. The *cestui que trust* may afterwards ratify such unauthorized application of the trust fund, and hold Weil responsible; or he may repudiate the payment *in toto*, and hold Moses Bros. as his debtors. These principles are fully sustained by reason and authority. National Bank v. Insurance Co., 104 U. S. 61; Wolfe v. State, 79 Ala. 206; Duncan v. Jaudon, 15 Wall. 165. As between the trustee, Weil, and Moses Bros., however, a different rule applies. The trustee, Weil, cannot sue Moses Bros. for this deposit. He held the legal title to the money, and by his own act has applied the money in payment of his own indebtedness. Neither can Moses Bros. sue Weil upon his debt, for they have accepted the funds, and applied them in payment of their claim against Weil. Such an agreement is binding upon the parties to it. It may be avoided at the election of the *cestui que trust*. It rests upon the principle which applies where an administrator or executor makes an unauthorized disposition of personal property. Woods v. Legg, 91 Ala. 513, 8 South. Rep. 342; Swink's Adm'r v. Snodgrass, 17 Ala. 657. We do not doubt that the agreement between D. Weil and Moses Bros. operated to destroy the relation of debtor and creditor as between them. Weil directed the application of the trust money to his individual debt. This was agreed to by Moses Bros. The cashier was at that time absent. Moses Bros. agreed to have the proper entries made as soon as the cashier returned, and deliver Weil his note. The entry of the credits by the cashier would only have furnished written evidence of the fact of payment. The payment, however, was completed by the agreement of the parties. We do not think there is any difficulty in regard to the deposit by Weil in the name of his wife, Rosina Weil. The uncontradicted evidence shows that D. Weil had the right to draw on this fund. We have stated that any person making a deposit of his own money could prescribe the term and manner upon which it could be drawn out. The testimony shows that "it was understood between the depositor and Moses Bros. that he could check on that fund;" referring to the fund to the credit of Rosina Weil. It seems that D. Weil had been accustomed to check on that fund, but that the

wife had never checked against it. She knew her husband controlled it, and never dissented from the exercise of such authority. In fact, when informed by her husband of his disposition of the fund, she assented to and ratified it. She is the only person who can complain, and until she dissents no other person has the right to interpose an objection. It appears from the testimony in the record that when Weil made the arrangement with Moses Bros. he did not know, and had no reasonable grounds for believing, that Moses Bros. were financially embarrassed, or contemplated an assignment for the benefit of their creditors.

The deposits in this case to the credit of the wife are not governed by section 1530 of the Code, in which special provision is made that deposits by a married woman or minor of her or his earnings shall be paid only to such married woman or minor; nor does the rule of law arise which was declared in Stout v. Kinsey, 90 Ala. 546, 8 South. Rep. 685, when the wife sued in detinue to recover a mule which the husband had sold in payment of his individual debt.

The authorities in this state uniformly hold that an assignee is invested with no higher or more extensive authority and powers than the assignor. In all cases of assignment for the benefit of creditors, whenever it is shown that the assignor could not maintain a suit his assignee is equally concluded. We are very clear that Moses Bros. could not maintain the present suit against D. Weil upon his note; and his assignees are equally concluded. Walker v. Miller, 11 Ala. 1067; Insurance Co. v. Kamper, 73 Ala. 346. We have considered all the issues presented in argument and brief of counsel. Our conclusion leads to an affirmance of the case.

Affirmed.

(94 Ala. 431)

In re NEWTON.

(*Supreme Court of Alabama.* Jan. 28, 1892.)

CRIMINAL LAW — SENTENCE — FINE OR IMPRISONMENT — APPEAL-BOND.

1. Where a judgment of conviction and for fine and costs was rendered against defendant on trial for crime, and an appeal taken to the supreme court, where the judgment was affirmed, the trial judge cannot sentence defendant to hard labor at its next succeeding term; such alternative sentence being available only during the term at which conviction was had, under sections 4503, 4504, providing that, if the fine and costs are not paid, an alternative sentence of imprisonment at hard labor may be imposed.

2. The appeal, and the giving of a bond by defendant to abide the judgment thereof, did not prevent the trial court from imposing the alternative punishment before the case was removed, an appeal not lying until after a final judgment.

Application by the state, on the relation of the solicitor of Montgomery county, for a *certiorari*, *mandamus*, or other remedial writ. Denied.

Wm. L. Martin, Atty. Gen., and *Tennent Lomax*, for relator. *Sayre & Pearson*, *contra*.

CLOPTON, J. This proceeding is an application by the state, on the relation of the solicitor of Montgomery county, for a *certiorari*, *mandamus*, or other remedial writ, requiring the judge of the city court of Birmingham to certify and return for revision, by this court, the proceedings under a writ of *habeas corpus*, applied for and obtained by Nancy E. H. Newton, on the hearing of which she was released, and discharged from the performance of hard labor, to which she had been sentenced by the city court of Montgomery. The judge having returned the proceedings in his answer to the rule *nisi*, the case comes before the court for decision on the merits. At the February term, 1891, of the city court of Montgomery, Mrs. Newton was indicted for assault with intent to murder; and on March 27, 1891, was convicted of assault and battery, and a fine for $500 assessed by the jury. Immediately after the rendition of judgment for the fine, she took an appeal therefrom, and entered into bond, with sureties, for her appearance to abide the judgment of this court. The judgment of conviction having been affirmed, Mrs. Newton appeared in the city court of Montgomery, July 27, 1891, when a judgment, reciting the conviction, assessment of the fine, the appeal, and affirmance, was rendered as follows: "And the said fine and costs of this prosecution not being presently paid or otherwise secured, and the said defendant, being asked by the court if she had anything to say why sentence of the law should not now be pronounced against her, says nothing, it is therefore considered by the court, and it is the judgment and sentence of the court, that the said defendant perform one hundred and forty days' hard labor for the county of Montgomery in payment of said fine, and, the costs of the prosecution being now ascertained and amounting to seventy-three dollars and seventy cents, it is further considered by the court that the said defendant perform an additional term of eight months' hard labor for Montgomery county in payment of said costs, at the rate of thirty cents *per diem*." The sentence to hard labor was imposed under sections 4503 and 4504 of the Code. The first provides that, if the fine and costs are not paid or a judgment confessed according to the provisions of section 4502, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county for a specified number of days, proportioned to the amount of the fine; and the second authorizes the imposition of an additional term of hard labor as may be sufficient to pay the costs, at a rate of not less than 30 cents for each day, but not to exceed 8 months in cases of misdemeanor. The question is whether the sentence to hard labor for payment of the fine and costs, having been imposed at a term of the court subsequent to the term at which the conviction was had and judgment for the fine rendered, and after the judgment of conviction had been affirmed by this court, is authorized and legal. The general power of the court to set aside or modify its unexecuted judgments during the term at which they were made in criminal cases is not and cannot be denied. When a fine is assessed, and the

fine and costs are not paid, nor judgment confessed therefor, as provided by section 4502, it is made the duty of the court to imprison the defendant, or sentence to hard labor, as required by the statute. Under the statute, the court may impose the alternative punishment as a part, and in continuation of the entry of the judgment of conviction; or, if deemed proper, the court may have the judgment of conviction entered, and allow defendant a reasonable time to pay the fine and costs or confess judgment therefor, and, on failure, may impose the alternative punishment at any time during the term. Either course is in pursuance of the statute. It may be that when the court adjourns, without rendering judgment on a verdict of guilty, the suspension being at the instance of the defendant, it may pronounce, at the next term, the judgment which should have been pronounced at the previous term, as was held in Charles v. State, 4 Port. (Ala.) 107. The power of the court to modify its judgments, except for the correction of clerical misprisions, or to amend *nunc pro tunc*, for the purpose of making the record speak the truth, ceases at the expiration of the term. A judgment imposing punishment cannot be pronounced by piece-meal at different terms, and, after the expiration of the term, the court is without power to substitute another kind of punishment for that first imposed. People v. Felker, 61 Mich. 110. The judgment or sentence pronounced during the term must embrace the entire punishment imposed.

Furthermore, when the judgment of the city court was affirmed in this court, it became so merged in the judgment of this court as to place it beyond the power of the city court to alter or modify it, so as to impose the alternative punishment. Werborn v. Pinney, 76 Ala. 291. It is insisted that by the interposition of the appeal, and giving the bond to abide the judgment of the appellate court, Mrs. Newton, by her own act, compelled the postponement of ascertaining whether she would pay the fine and costs or confess judgment therefor, and that these facts could not be ascertained until the decision of the case by this court. It may be conceded that the operation of the appeal was to remove the case to this court, and that the city court could not thereafter make any order in the case until decided by this court; but the appeal did not prevent the city court from imposing the alternative punishment, under section 4503, before the case was thereby removed. An appeal does not lie until there is a final judgment. When questions of law are reserved in such cases, the court may proceed to impose the alternative sentence to hard labor before making an order suspending the execution of the sentence until the appeal is decided. This operates no hardship on the defendant. The imposition of the sentence to hard labor may be avoided by a confession of judgment for the fine and costs, and, if the judgment of conviction is reversed, the judgment confessed falls with it. Burke v. State, 71 Ala. 377. Our conclusion is that the judgment of conviction and for the fine and costs having been rendered at the February term, 1891, and an appeal taken therefrom, the city court had no power to impose the alternative sentence to hard labor at the next term of the court, and after the affirmance of the judgment by this court. The application must be denied.

(95 Ala. 105)

ALABAMA MINERAL LAND CO. v. COMMISSIONERS' COURT OF PERRY COUNTY.

(*Supreme Court of Alabama.* Feb. 2, 1892.)

TAXATION—ASSESSMENT—VALUATION.

The provision of Acts 1886-87, pp. 11, 12, that in hearing objections to assessments of taxes on land the commissioners' court "shall take into consideration its character, whether improved or not, its surroundings," etc., does not render evidence of the valuation of other land, of a similar character, within the county, by the owner thereof, or the county assessor, admissible, on trial in the circuit court of an appeal from the valuation of the commissioners' court.

Appeal from circuit court, Perry county; JOHN MOORE, Judge.

Proceedings upon objections to the return made by the Alabama Mineral Land Company of its land for taxation. The company appeals from a judgment of the circuit court confirming, on a trial *de novo*, the valuation made by the commissioners' court. Affirmed.

John M. McKleroy, for appellant. *J. H. Stewart*, for appellee.

WALKER, J. The appellant was notified that objection was made to its return of its property in Perry county for taxation on the ground of the under-valuation of its lands. It appeared at the August, 1890, term of the commissioners' court of that county, and contested the objections. The commissioners' court raised the valuation from $1.25 per acre to $3 per acre, and the lands were assessed accordingly. The cause was tried anew in the circuit court, an appeal having been taken pursuant to the provision of section 13 of the act approved February 28, 1887, (Acts Ala. 1886-87, p. 11.) The valuation, as made by the commissioners' court, was confirmed by the judgment of the circuit court. This appeal is from that judgment, and the errors assigned are upon rulings of the circuit court in rejecting evidence offered by the appellant. The appellant offered to prove (1) by the agent of the Selma Land & Improvement Company that that company owned a considerable quantity of land in said county, of a similar character to the lands owned by the appellant, and that said lands were in the same part of the county as are appellant's lands, and that said lands were listed for assessment for state and county taxes for the year 1890 at $1.25 per acre; and (2) by the tax assessor of said county that, after the return of said Selma Land & Improvement Company had been made, the commissioners' court duly reviewed said assessment, and on such review placed the valuation of the lands of said company at $2 per acre. The record does not show that any exception was reserved to the action of the court in refusing to admit other evidence which was offered by the appellant.

In hearing objections to assessments, the commissioners' court "shall receive only evidence touching the fair market or real value of the property, and shall take into consideration its character, whether improved or not, its surroundings, and, if it is productive, the amount of its average annual yield;" it being the true intent and purpose of the statutory provisions on the subject as therein expressed "to have all property and subjects of taxation fairly assessed, at the value which would be realized therefrom by a cash sale, but not a forced sale thereof, in such manner as such property and subjects are usually sold; and for this purpose the power and authority hereby conferred upon such court of county commissioners shall be liberally construed, but said court is expressly prohibited from reducing the valuation of any property below the fair cash market value of the property, or what the property would sell for." Acts Ala. 1886-87, pp. 11, 12; State v. Water Supply Co., 89 Ala. 325, 8 South. Rep. 54. In fixing the taxable value of lands, it would perhaps be proper to receive evidence of the value of similar property, under similar conditions, as a feature of the "surroundings," within the meaning of that expression as used in the statute, and as affording a criterion from which the value of the property in question could be deduced. Johnson v. West, 43 Ala. 689; 7 Amer. & Eng. Enc. Law, p. 60. The assumption that such proof would be admissible brings us to the question raised by the assignments of error in this case as to whether the valuations at which such other lands have been returned or assessed for taxation would be competent, as evidence of their real value. The valuation of property, as found upon the tax-books, represents either the *ex parte* statement of the owner thereof in his return, or the conclusion of the assessor or of the commissioners' court from information, inspection, or otherwise. The declaration of the owner would not be admissible against any person other than himself or some one in privity with him. The decision of the assessor or of the commissioners' court would not be admissible against a stranger to the proceeding in which the decision was rendered. Such stranger, in offering proof of such valuation of the property of others, claims the benefit of evidence which would not be available against him. A valuation of his own property, in which he does not participate, is inadmissible, if objected to by him. Railroad Co. v. Smith, 89 Ala. 305, 7 South. Rep. 634. It is not permissible to prove a fact pertinent to the issue in a case by showing that some one not a party to the suit has made an oral or written statement in reference to such fact, or by producing evidence of the conclusion reached in another proceeding, which involved the same question, but was between parties who are strangers to the pending suit. The returns of the owners, and the valuations as made on a review of the assessments, are equally incompetent as evidence of the value of lands belonging to other persons. The inquiry as to what was the fair cash market value of the lands of the appellant should be determined upon evidence pertinent to that question. It would but tend to draw away the minds of the jury from the matter in issue to admit evidence to show the results of similar inquiries as to other property of like character. The question as to what conclusions were reached in other cases could have no legitimate bearing upon the result in this case. In determining the valuation at which the appellant's property should be assessed for taxation, it is immaterial to inquire whether or not other property has been fairly valued, for the fact that under-valuations have been permitted in many instances would afford no excuse for the assessment of the appellant's property at less than its "fair market or real value." A neglect of the requirements of the law in this case could not be excused by showing a similar breach of duty in other cases. There may be a remedy to prevent unjust discriminations in the valuation of property for taxation, but the fact that the property of others has been undervalued could not justify a corresponding undervaluation of the property of the appellant. The foregoing considerations suffice to show that there was no error in excluding the evidence above referred to.

Affirmed.

(95 Ala. 394)

MARX v. NELMS.

(*Supreme Court of Alabama.* Feb. 2, 1892.)

EXECUTORS AND ADMINISTRATORS—ASSETS—GROWING CROPS.

An administrator is entitled to a crop of cotton, the cultivation of which was practically completed at the intestate's death, but which was harvested and sold by the heirs. Blair v. Murphree, 2 South. Rep. 18, 81 Ala. 459, distinguished.

Appeal from circuit court, Perry county; JOHN MOORE, Judge.

Action by Samuel A. Nelms, administrator of M. F. C. Weaver, against F. M. Marx, for conversion. Judgment for plaintiff. Defendant appeals. Affirmed.

Pitts & Harwood, G. B. Johnston, and *E. W. Pettus,* for appellant. *John F. Vary* and *J. H. Stewart,* for appellee.

STONE, C. J. M. F. C. Weaver lived on a plantation, and cultivated a crop of cotton thereon, in 1889. He died intestate August 17, 1889. At that time the cultivation of the crop was practically completed, but its growth had not ceased. It was in the fields, and ungathered. Most of these facts are shown in the testimony. The others are common knowledge. Two sons of deceased—one of them residing on the plantation, but on another part of it—then gathered the cotton, and sold it to the appellant, Marx. This sale was in August, 1889. The bales of cotton were branded in the name of the deceased, and at the time of the purchase appellant knew M. F. C. Weaver was dead, and that no administration had been granted on his estate. Appellant resold the cotton in September, 1889. This is the alleged conversion for which this action was brought. No proof was made of the expense or value of the labor incurred or

employed in gathering the cotton and preparing it for market, and no ruling was invoked bearing on this question. If there be anything in it, (upon which we decide nothing,) the record fails to bring it before us for consideration. On November 4, 1889, Nelms was appointed administrator of the estate of M. F. C. Weaver, deceased, and brought this action against appellant for the conversion of the cotton. The court, on written request, gave the general charge that, "if the jury believe the evidence, they must find the issue in favor of plaintiff." This ruling furnishes the subject of the chief assignment of error. The case of Blair v. Murphree, 81 Ala. 454, 2 South. Rep. 18, is relied on by appellant in support of the chief assignment of error stated above. The facts of that case were materially different from those found in the record before us, and that case was decided mainly on the exceptional facts it presented. Even with this explanation, the contention is plausible that some of the expressions found in that opinion tend to mislead, if they do not invade the domain of a well-recognized principle, which is essential to the maintenance of creditors' rights in estates of decedents. We there decided that the word "may," in section 2098 of the Code of 1886, does not impose on the personal representative the imperative duty of completing every crop the decedent may leave growing at the time of his death, irrespective of any prospect of profit to be derived from its completion. We held that the statute left him a discretion, to be exercised in the interest of the estate. We adhere to that conclusion, but hold it has no proper application to the case in hand. When Mr. Weaver died—August 17th—the cultivation of the crop was practically completed. There remained to be bestowed only the labor of gathering and preparing it for market. If an administrator previously appointed had neglected this duty, and had permitted a crop thus circumstanced to perish in the field, he would have been guilty of a *devastavit*, and would have been chargeable therefor. The presumption is that he would have done his duty, and would have harvested the crop for the benefit of the estate. Coming later into the trust, and his right of property dating from the death of his intestate, we must accord to him all the legal rights a performance of these plain duties would have secured to him. Possibly, in claiming the crop after it was harvested, the duty would be assumed by him to compensate any labor and expense that had been incurred in gathering it. This question, as we have said, is not before us, and we do not decide it. The case in hand is not distinguishable in principle or material facts from many heretofore decided in this court, in which we held the plaintiff was entitled to recover. The circuit court did not err in the charge given. Upchurch v. Norsworthy, 15 Ala. 705; Carpenter v. Going, 20 Ala. 587; Abernathy v. Bankhead, 71 Ala. 190; Mitcham v. Moore, 73 Ala. 542; Loeb v. Richardson, 74 Ala. 311; Tayloe v. Bush, 75 Ala. 432. There is nothing in the other exceptions reserved. Affirmed.

(94 Ala. 574)

SWEETZER *et al.* v. BUCHANAN.

(*Supreme Court of Alabama.* Feb. 2, 1892.)

DISCOVERY—STATUTORY PROCEEDINGS—PROPERTY SUBJECT TO PAYMENT OF DEBT.

1. Under Code, §§ 3544–3547, as amended by Laws 1888–89, p. 96, allowing a simple contract creditor to maintain a bill for discovery of property within or without the state, etc., a bill averring that defendant has property subject to the payment of his debt, but that its kind, description, and manner of holding is concealed from and unknown to complainants, and praying a discovery, is sufficient upon demurrer.

2. Such a bill should be sworn to. Lawson v. Warren, 8 South. Rep. 141, 89 Ala. 584, followed.

Appeal from chancery court, Madison county; THOMAS COBBS, Chancellor.

Bill of discovery by Sweetzer, Pembrook & Co. against Thomas G. Buchanan. Complainants appeal from a decree of the chancellor sustaining a demurrer to the bill. Reversed.

The bill in this case was filed by the appellants against the appellee, and prayed the discovery of assets in the hands of the defendant, which should be subjected to the claim of the complainants, and that said assets be subjected to the payment of the indebtedness of said defendant to the complainants. The defendant demurred to the bill on the grounds that the complainants by said bill seek to place a legal cause under equitable cognizance, and because the bill does not contain equity. On the submission of the cause upon the demurrer to the bill the chancellor sustained the demurrer. Complainants bring this appeal, and the chancellor's decree upon the demurrer is assigned as error.

Watts & Son and *Bush & Brown*, for appellants. *D. D. Shelby*, for appellee.

COLEMAN, J. Complainants' bill was filed under sections 3544–3547 of the Code, inclusive, as amended by act of the legislature of 1888–89, p. 96. These sections enlarge the remedy of a simple contract creditor, and under their provisions he may maintain a bill for discovery and relief in certain cases, for which the general principles of courts of equity, without the statutory aid, would be wholly inefficient. The scope and effect of these remedial statutes, to some extent, have been ascertained and declared by former decisions of this court, and we are satisfied with the correctness of the conclusions reached in those adjudications upon the questions involved. Railroad Co. v. McKenzie, 85 Ala. 548, 5 South. Rep. 322; Lawson v. Warren, 89 Ala. 585, 8 South. Rep. 141; McCullough v. Jones, (Ala.) 8 South. Rep. 696. The present bill avers and describes the indebtedness of the defendant, Thomas G. Buchanan, to complainants, and further avers that he has no visible property or other means accessible to legal process from a court of law to satisfy plaintiffs' demand. The bill further avers substantially that he "has property, or an interest in property, real or personal, or money, or effects, or choses in action, subject to the payment of his debt;" but that the kind and description of property, and how held, is kept concealed and hidden from, and is un-

known to complainants, and that a discovery by the defendant is necessary to enable complainants to reach and subject it to the satisfaction of their demand. The bill further avers that this property or interest was conveyed away and is kept concealed by the defendant debtor for the purpose of hindering, delaying, and defrauding his creditors. The bill is not liable to the objection that it is a mere fishing process to discover as by chance whether the defendant has such property. The averments are that he has property liable to the debt, but that defendant has so manipulated and concealed it that it cannot be reached by the ordinary process from courts of law; that its kind and character and whereabouts is unknown, and cannot be discovered without the aid of a court of chancery. An accurate or any description of the property, further than to show that it is liable to the payment of defendant's debt, is not required in such cases. Neither is the objection available that the property is beyond the limits of the state. The defendant debtor is in court in person, subject to its jurisdiction, and the statute itself makes express provision for such cases, whether the property be "within or without" the state. Code, § 3547. The court may require the debtor to make all conveyances to a receiver which may be necessary to enable him to receive, sue for, and recover such property. The chancery court erred in sustaining defendant's demurrer to the bill. In the case of Lawson v. Warren, 89 Ala. 584, 8 South. Rep. 141, it was declared that bills like the present one should be sworn to. Reversed and remanded.

(94 Ala. 93)

FRENCH v. STATE.

(*Supreme Court of Alabama.* Feb. 3, 1892.)

CRIMINAL LAW—EVIDENCE—SEARCHING PERSON UNDER ARREST.

In a criminal prosecution for carrying a concealed pistol, evidence that defendant, having been lawfully arrested while in the act of violating a municipal ordinance, was searched, and the weapon found upon him, is admissible. Chastang v. State, 8 South. Rep. 304, 88 Ala. 29, followed.

Appeal from criminal court, Pike county; WILLIAM H. PARKS, Judge.

Indictment against W. E. French for carrying a concealed weapon. Defendant appeals from a judgment of conviction. Affirmed.

The appellant in this case was indicted, tried, and convicted for carrying a pistol concealed about his person. The evidence introduced by the state showed that upon the defendant's being arrested, and his person searched, as is stated in the opinion, a pistol was found concealed in his coat-pocket. The defendant duly excepted to the court's allowing the state to introduce evidence concerning the search of the defendant, and the discovery of said pistol concealed about his person. Upon the introduction of all the evidence the court gave the jury the following charge: "If you believe the evidence in the case, you must find the defendant guilty;" to which charge the defendant duly excepted.

M. N. Carlisle, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

MCCLELLAN, J. It was admitted on the trial below that the arrest of French by the police officers of the city of Troy was a lawful arrest, the said French being in the act of violating an ordinance of the municipality, and, of consequence, that his imprisonment was legal. Under these circumstances, it was not only the right, but the duty, of the officers to search the prisoner for weapons which might be used by him to effect an escape, and this wholly regardless of his resistance or peaceable submission to the arrest and confinement in the first instance. The fact that one lawfully arrested makes no attempt to use weapons he has about his person, or to otherwise resist the officers of the law, is no reason whatever for allowing him to retain such weapons, which he may afterwards, and under more favorable conditions, it may be, resort to to make good his escape. Ex parte Hurn, 92 Ala. 102, 9 South. Rep. 515. The right to arrest and confine French being thus admitted, and the additional right arising from such arrest and confinement to search him and take away any arms found upon his person being, in our opinion, unquestionable, this case, in respect of the matter reserved for our consideration, is upon all fours in principle with that of Chastang v. State, 83 Ala. 29, 3 South. Rep. 304, where it is held that the fact disclosed by such a search that the person arrested had a pistol concealed about his person may be given in evidence against him on a subsequent prosecution for carrying concealed weapons. Adhering to the principle declared in that case, and applying it to the case at bar, we hold that the criminal court did not err in admitting the testimony excepted to, or in giving the general affirmative charge for the state. The question whether, had the arrest, confinement, and search of the defendant been unauthorized and illegal, testimony of the facts disclosed thereby would have been admissible against him on this trial, is not presented by this record, and its decision is therefore, as in the case of Terry v. State, 90 Ala. 635, 8 South. Rep. 664, pretermitted.

Affirmed.

(95 Ala. 518)

BOLLING *et al.* v. ROMAN.

(*Supreme Court of Alabama.* Feb. 3, 1892.)

CONSTRUCTION OF CONTRACT—WAIVER OF LIEN BY MORTGAGEE—MOTION TO DISSOLVE INJUNCTION—GROUNDS.

1. A senior mortgagee promised a junior mortgagee, if the latter would advance $2,500 to the mortgagors, "so as to make their indebtedness to you, including the above $2,500, in all $10,500," to waive his mortgage lien to the extent of "said indebtedness." *Held*, that "said indebtedness" referred to the proposed debt of $10,500.

2. Where, in an action by a junior mortgagee to foreclose the mortgage, and restrain the senior mortgagee from foreclosing, on the ground that the latter waived his lien, an injunction is granted, an averment of the answer that there was a mistake in the written agreement of waiver, though a ground of defense, is not available on motion to dissolve the injunction on the denials in the answer.

3. An issue, raised by the answer, as to whether the original debt remains unsatisfied, can be determined only by evidence, and is not available on motion to dissolve the injunction on the denials in the answer.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Bill to foreclose a mortgage, and enjoin the foreclosure of another mortgage, by S. Roman against R. E. Bolling and others. Defendants' motion to dissolve the injunction denied. Defendants appeal. Affirmed.

The bill in this case sought to enjoin defendants from foreclosing a mortgage which had been executed to them by Giddens & Co., and also prayed the foreclosure of a mortgage which had been executed by Giddens & Co. to complainant. The ground upon which the complainant based his relief was that the said R. E. Bolling & Co. had waived all priority of lien which they held over Roman under the mortgage executed to them by said Giddens & Co. This was alleged to have been waived by the following agreement, which was addressed to Messrs. Lehman, Durr & Co., and signed by R. E. Bolling: "If you will advance Giddens & Co. an additional amount of twenty-five hundred dollars, for the purpose of making his arrangements to carry on their mercantile business and to make their crops, so as to make their indebtedness to you, including the above $2,500.00, in all, ten thousand five hundred dollars, I will and do hereby waive my mortgage lien on the land and personal property of said Giddens & Co., to the extent of said indebtedness and interest, for and on account of Lehman, Durr & Co., only." The mortgage and notes which were held by Lehman, Durr & Co. were alleged in the bill to have been duly and properly transferred to the complainant. The defendants filed their answer and demurrer to the bill, and also moved to dissolve the injunction for the want of equity in the bill, and upon the sworn denials of the answer.

E. P. Morrisett, for appellants. *Tompkins & Troy*, for appellee.

STONE, C. J. We cannot agree with appellants in the construction of the written agreement of R. E. Bolling, bearing date February 5, 1887. The first employment of the word "indebtedness," in the agreement, refers unmistakably to the aggregated sum,—the past indebtedness of $8,000, supplemented with the additional $2,500 to be advanced. The language of the writing is, "so as to make their indebtedness to you, including the above twenty-five hundred dollars, in all, ten thousand five hundred dollars." We think and hold that the proper interpretation of the instrument is that Bolling's offer was to permit the entire $10,500 to take precedence over his (Bolling's) mortgage on the lands in Crenshaw county.

The answer sets up, in avoidance of the injunction and of the suit—*First*. That there is a mistake in the writing, and that it does not truly express the agreement of the parties. This is affirmative matter set up, and, if proved, may be a defense to the claim, in whole or in part. It furnishes no ground for dissolving the injunction. *Second*. While the answer does not, and probably could not, deny the complainants' claim, as matter of knowledge, it nevertheless fails to admit its justness, as claimed, and so questions it as to render it necessary to take the account, and to ascertain to what extent, if any, the original debt remains unpaid. The waiver was as to that debt, and none other. Only to the extent that debt, with its accruing interest, remains unsatisfied, is Bolling's mortgage to be postponed. This is a question for proof, and does not arise on the motion to dissolve the injunction on the denials in the answer.

Affirmed.

(69 Miss. 73)

CAMERON *et al.* v. LOUISVILLE, N. O. & T. RY. CO.

(*Supreme Court of Mississippi.* Oct. 26, 1891.)

QUIETING TITLE — LIMITATIONS — PLEADING — CONSTITUTIONAL LAW.

1. Under Acts 1888, c. 23, § 4, providing that 12 months' occupation of levee lands under a deed from the auditor of public accounts or the levee commissioners shall bar any action for the same, the averment in a bill that defendants have been in actual possession, claiming title, under such deed, for 12 months prior to the date of the filing of the bill, is fatal to it.

2. While what is reasonable time within which to bring actions for existing rights is not a question for final determination by the legislature beyond the reach of the courts, yet it was within its power to limit the time to 12 months, and such limitation was not unreasonably short.

Appeal from chancery court, Bolivar county; W. R. TRIGG, Chancellor.

Action by W. D. Cameron and others against the Louisville, New Orleans & Texas Railway Company. Judgment for defendant. Affirmed.

Moore & Jones, for appellants. *J. B. Harris*, for appellee.

CAMPBELL, C. J. The averment of the bill "that said defendants have been in actual possession of said land, claiming title to the same, under said deed from Gwin & Hemingway, and said deed from the auditor, twelve months prior to the date of the filing of this bill," is fatal to it; for the case made brings it within the fourth section of the act entitled "An act to quiet and settle the title to certain lands in the Yazoo delta," etc., approved March 2, 1888.[1] It was within the power of the leg-

[1] Acts 1888, c. 23, provides (section 1) that the deeds executed by Gibbs and Hemingway and by Given and Hemingway, commissioners of the chancery court in the cause of Joshua Green and others against Gibbs and Hemingway, treasurer and auditor and *ex officio* liquidating levee commissioners, shall be *prima facie* evidence of the regularity of the proceedings; (sections 2 and 3) that the auditor of public accounts shall, upon application to him of any purchaser of said levee lands from said commissioners, execute a deed conveying the state's title, which shall be *prima facie* evidence of paramount title; (section 4) "that twelve months' occupation, at any time after the passage of this act, of any tract of land, under any such conveyance from said commissioners of the Hinds county chancery court, or under said auditor's deeds, or of any part thereof, by any such occupant claiming the whole, shall forever bar any action, either at law or in equity, for such tract."

islature to require all actions to recover any of the land described in the act to be brought within 12 months after the passage of the act. While what is a reasonable time in which to bring actions asserting existing rights is not a purely legislative question for final determination beyond the reach of the courts, we are unwilling to declare that the time prescribed was an unreasonably short period for the assertion of claims to land in the situation in which the lands mentioned by the act referred to were. Affirmed.

(29 Fla. 332)

ATLANTIC & G. C. C. & O. LAND CO. v. KINSMAN.

(*Supreme Court of Florida.* Jan. Term, 1892.)

DISMISSAL OF APPEAL—SETTLEMENT OF ACTION.

The attorney for appellant filed papers evidencing a settlement of the litigation, and then the attorneys who had argued the cause in this court in behalf of appellee moved for an affirmance of the judgment to the extent of the amount of fees claimed by them for their services; and thereupon the appellant moved to dismiss the appeal on the ground that the suit had been settled. Motion to dismiss granted, without adjudicating whether or not the suit had been settled, and without prejudice to any rights of attorneys for appellee.

(*Syllabus by the Court.*)

Appeal from circuit court, Osceola county.

Action by A. S. Kinsman against the Atlantic & Gulf Coast Canal & Okeechobee Land Company. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

E. K. Foster, for motion. *Cooper & Cooper*, opposed.

RANEY, C. J. When this cause was reached upon the docket for reargument, under special rule No. 1, there had been placed among its files by the attorney for the appellant the following papers: (1) A certified copy of a deed bearing the date of March 12, 1890, made by the appellee, and purporting to sell and assign to the First National Bank of Orlando the judgment appealed from, the same being in favor of appellee, and against appellant, and for the sum of $9,456.62; the consideration for such assignment, as expressed in the deed, being "the sum of three thousand dollars, and other valuable considerations, lawful money of the United States of America," and the appellee covenanting that the full amount of the judgment and the interest thereon was still due and unpaid, and the appellant agreeing to save the appellee harmless from any costs of proceedings for the recovery of the amount. (2) A certified copy of an instrument dated April 8, 1891, signed and sealed by the appellee, in and by which instrument he authorizes John M. Lee, clerk of the circuit court of Osceola county, in which court such judgment was rendered, to cancel such judgment upon the Judgment of Record Books in such clerk's office; such authorization being, according to the instrument, for and in consideration of the sum of $1,250 to appellee in hand paid by the defendant, the appellant company, the receipt of such sum being acknowledged in full satisfaction of the judgment. (3) A certified copy of an instrument under seal, executed by the above-named bank, and bearing date July 6, 1891, and reciting the making, filing, and recording of such deed in the office of the clerk of the circuit court of Osceola county, then reading, in substance, as follows: Now, in consideration of $1,250 paid to said bank by said appellant company, the receipt whereof is hereby acknowledged, in full satisfaction of said judgment, costs, and interest, and the same is hereby canceled of record in as complete a manner as if the whole sum of $9,456.62 had been paid, with costs and interest since the rendition of the judgment, "this cancellation being made in connection with another cancellation which has been made, executed, and delivered to said" appellant company "by A. S. Kinsman, in his own proper person, subsequent to the assignment of said judgment hereinafter mentioned to the First National Bank of Orlando, Florida."

These papers are certified by the clerk of the circuit court of Osceola county to be copies of the records of his office.

There had also been entered by Messrs. Cooper & Cooper, and was presented to the court on the calling of the cause, a motion by which they represent that they were and are the attorneys of record in this court of the appellee, and argued the case orally here, and prepared and filed the briefs in his behalf, and that the alleged deed of assignment to the Bank of Orlando, represented by the above-stated certified copy thereof, and the attempted cancellation of such judgment by Kinsman, were made without notice to them, and that such assignment and attempted cancellations were made without any payment or settlement of the fees due the movants for their services for appellee in this court, which fees amount to $500. That Kinsman had actual notice, and constructive notice from the records of this court, of their services, and the bank had the same constructive notice, and that before the attempted cancellation by the bank they gave notice to it, and to appellant, and to the latter's attorney, of their rights in the cause as attorneys, all of which they represent was known to each of said parties from the record in this cause; and they ask the court to affirm the judgment appealed from, to the extent of directing that it be enforced for the collection of the amount of $500 due them as attorneys for appellee.

The movants have filed certain papers in support of their motion, which, in view of the conclusion we have reached, it is unnecessary to notice.

Upon the argument of the above motion by counsel for appellant, he entered in behalf of the appellant a motion "to dismiss the appeal on the ground that the suit has been settled."

Our conclusion is to dismiss the appeal on motion of the appellant, but without adjudicating that the suit has been settled, and without prejudice to any right which the movants, Messrs. Cooper & Cooper, may have. Appellant has the right to dismiss on payment of costs,

whether the suit has been settled or not. The dismissal of the appeal, however, will not, of itself, affect the judgment. If the judgment has been lawfully settled or canceled of record, the dismissal will not prejudice the movants, nor add anything to the effect of the alleged settlement or cancellation, if any they have, upon the rights of the movants. Moreover, it now seems to us, in view of the limited character of our original jurisdiction, which extends only to certain special writs, that the circuit court, and not this tribunal, is the proper forum for the assertion of whatever rights the movants may have.

Orders disposing of the appeal and of the motions in accordance with the above views will be made.

(29 Fla. 500)

HODGE v. STATE.

(*Supreme Court of Florida.* Jan. 28, 1892.)

CRIMINAL LAW—COMMISSION TO TAKE DEPOSITION OF WITNESS—REQUISITES OF AFFIDAVIT—PLEA IN ABATEMENT—WAIVER OF RIGHT—RECEIPT OF VERDICT ON SUNDAY.

1. The oath or affidavits required by the act of March 11, 1879, (section 41, p. 466, McClell. Dig.,) to satisfy the court that the testimony of a witness, whose deposition it is desired to take under a commission, is material and necessary to the defense of the accused, must present facts naturally and reasonably calculated to satisfy the judgment of the court that such testimony is material and necessary to the defense. An affidavit of counsel stating that he is acquainted with the case of the defendant, and what is necessary for his defense, and verily believes that the testimony of a named witness, to whom interrogatories calling for his opinion as an expert, and accompanying the motion for a commission, are addressed, "is necessary, material, and important to the defendant," is not sufficient.

2. A plea of not guilty is a waiver of the right to plead in abatement in a criminal cause.

3. If there can ever be a review by an appellate court of a ruling of a trial court refusing to permit the withdrawal of the general issue for the purpose of pleading in abatement of the indictment, it will not be done where the accused has waited 21 months after the finding of the indictment, and there has already been a trial on the merits, and the period barring a new indictment has elapsed.

4. A charge to a jury cannot be made a part of the record except by a bill of exceptions, or by being signed, sealed, and filed by the circuit judge in accordance with the act of March 2, 1877, (section 36, p. 388, McClell. Dig.,) and will not be reviewed by the appellate court when not made a part of the record.

5. A verdict may be received and entered on Sunday, but it seems that judgment or sentence cannot be lawfully rendered on that day. The former proceeding is not ground for a new trial.

6. The failure of the record to show that the judge asked a prisoner, before pronouncing sentence upon him, if he had anything to say why the sentence of the law should not be passed upon him, is not ground for setting aside the judgment, where the conviction is not of a capital offense.

(*Syllabus by the Court.*)

Error to circuit court, Marion county; JESSE J. FINLEY, Judge.

Green W. Hodge was indicted December 20, 1888, for murder in the first degree, for the killing of one Jesse J. Marlow; and, after a conviction of the crime charged, and reversal by the supreme court, (26 Fla. 11, 7 South. Rep. 593,) was tried and convicted on the 2d day of November, 1890, of manslaughter in the third degree, and sentenced to imprisonment in the state penitentiary, at hard labor, for two years and six months. He brings error. Affirmed.

Miller & Spencer, for plaintiff in error. *W. B. Lamar*, Atty. Gen., for the State.

RANEY, C. J. The first allegation of error in the assignment of errors furnished under the requirement of the statute (section 4, p. 455, McClell. Dig.) is the refusal of the circuit judge of a motion, made in open court October 21, 1890, for the issuance of a commission to take the testimony of one E. C. Spitzka, residing at 712 Lexington avenue, New York, on interrogatories filed five days previously at the same term.

The statute of March 11, 1879, (sections 41 et seq., p. 466, McClell. Dig.,) enacts that when any person is arraigned before a circuit court upon indictment or information, charged with crime which is by law a felony, and he shall satisfy the court by his oath in writing, or by affidavits of other credible persons, that the testimony of absent persons is material and necessary to his defense, and such witnesses reside beyond the jurisdiction of the court, or are so sick or infirm that with diligence they cannot be procured to be in attendance at the same or next succeeding regular or special term at which the case may be tried, it shall be lawful, and is made the duty of the judge, upon the proper application of the accused or his attorney, and the filing of the interrogatories, to order that a commission be issued to some competent person or persons to take the deposition of the witness, to be used on the trial.

If we are permitted to consider the interrogatories in the absence of a bill of exceptions duly incorporating them, we see that their purpose is to prove by the proposed witness, as an expert, that there is such a thing as transitory or impulsive insanity, and also its nature and effect, and that certain assumed or supposed conditions and acts of a person were symptoms of his being the victim of such insanity, and that, in the opinion of the witness, a person acting in a described supposed manner, under described supposed conditions, was insane and irresponsible.

The affidavit presented in support of the application for the commission was made by Mr. Hugh E. Miller, one of the prisoner's counsel. The substance of Mr. Miller's affidavit is that he "is acquainted with the case of the defendant, and what is necessary and material to his defense; that he verily believes that the testimony of" Dr. Spitzka, residing at 712 Lexington avenue, in the city of New York, "is necessary, material, and important to the defendant," and that witness resides beyond the jurisdiction of the court. It might be said of this affidavit that it is evidence that Mr. Miller had satisfied himself that the testimony of Dr. Spitzka was "material and necessary" to his client's defense; but, certainly and obviously, the statute, when it says the prisoner shall satisfy the court that the testimony of the absent person is material and necessary to his defense, means that there

shall be presented at least some facts which will reasonably and naturally satisfy the judgment of the court. It is palpable that there is nothing here to indicate to the court that the prisoner intended and would be able, or even expected, to prove on the trial the supposed facts which would make the opinions proposed to be elicited from Dr. Spitzka of any use to him in the trial of the cause. There is nothing for the judge to do but refuse the motion. Besides what has been said, it is apparent from the record that nearly two years had passed since the indictment was found, and that there had been a former trial, and it does not appear why the application was not made before this time, when the cause was about to be tried the second time; and again, in the absence of a bill of exceptions, how can it be assumed that there was any evidence on the trial of a character to make Dr. Spitzka's opinion of any value to the prisoner or his defense? There is nothing whatever to support the alleged assignment of error. This conclusion is not inconsistent with the ruling in Newton v. State, 21 Fla. 53.

Another error assigned is the refusal of the trial court to permit the prisoner to withdraw his plea of not guilty, and interpose a plea in abatement. This motion was made immediately after the denial of the preceding motion for the commission to take the deposition of Dr. Spitzka. The prisoner had already been tried upon the plea of not guilty. By this plea he waived his right to plead in abatement. By a plea in bar, voluntarily pleaded, it seems all matter of abatement is waived; and, though it may be in the discretion of the trial court to permit the withdrawal of such a plea for the purpose of pleading in abatement, that discretion will not be reviewed or interfered with on appeal. Savage v. State, 18 Fla. 909; Adams v. State, 28 Fla. —, 10 South. Rep. 106. Pleas in abatement should be pleaded before pleading in bar. 1 Whart. Crim. Pl. § 426; Savage v. State, 18 Fla. 909, 949. After the general issue pleaded, the defendant cannot plead in abatement; and according to the old authorities the proper time for the plea is upon his arraignment. 1 Bish. Crim. Proc. § 175; 2 Hale, P. C. 175; 1 Chit. Crim. Law, 447; Kinloch's Case, Fost. Crown Law, 16; Whart. Crim. Pl. § 426; Martin v. Com., 1 Mass. 347; State v. Farr, 12 Rich. Law, 24. Chitty says it was always necessary to plead it before any plea in bar, as the defendant will be estopped by an issue. 1 Chit. Crim. Law, marg. p. 447. If there can ever be a review by an appellate court of a ruling refusing to permit the withdrawal of the general issue for the purpose of pleading in abatement, we find no such authority; but, if there can, it will not be done in a case in which the party has waited over a year and nine months after indictment found, and after there has already been a trial on the plea of not guilty; and when more than two years have passed since the alleged killing, by which lapse of time any new indictment in this case has become barred. Johnson v. State, 27 Fla. —, 9 South. Rep. 208. To permit such a practice would encourage all kinds of delay, and overturn the established rule, which requires that all matters in abatement should be pleaded primarily. The fact that the proposed plea here tends to affect the legality of the grand jury does not change the rule, or create any exception to its application. There is, moreover, if an excuse for the delay would have any effect in favor of the assignment of error, not even a pretense of an excuse or reason for the delay in presenting the proposed plea.

It is also assigned as error that the court altered instructions asked for by the prisoner, and in charges given in lieu of those asked, and in refusing to give charges as requested. We have already stated that there is no bill of exceptions; and not only is this so, but it is also a fact that there is not in the transcript before us anything which can be recognized or treated as a charge requested or given or refused. There is upon no paper incorporated in the transcript before us, and purporting to be a charge offered, given, refused, or "altered," any evidence that the same, or the original thereof, was ever signed, sealed, and filed by the circuit judge, or either signed, sealed, and filed by him. Richardson v. State, 28 Fla. —, 9 South. Rep. 704; Parrish v. Railroad Co., 28 Fla. —, 9 South. Rep. 696. There is, it is true, quite a mass of papers, whose originals may have played an important part in the trial of the cause; but they have not been made a part of the record either by a bill of exceptions, or in the manner provided by the act of March 2, 1877, (section 86, p. 338, McClell. Dig.,) and indicated above; the only two legal modes of doing it, and of authorizing us to consider them as charges offered and given or refused.

In the absence of a bill of exceptions and of the entire testimony, no review can be made of the refusal of the motion for a new trial, the grounds of which, other than the matters considered above, were that the verdict was contrary to the charge of the court, and against the weight of and without evidence to support it, and alleged error of the court both in admitting and in rejecting evidence.

It is also objected that the verdict was rendered on Sunday. The jury returned into court on Sunday, November 2, 1890, the case having been submitted to them the previous day, and rendered their verdict, and were discharged; and thereupon the court adjourned until the next day at 9 o'clock, on which latter day the prisoner moved for a new trial, and, the same having been overruled, he was sentenced by the court to imprisonment in the state penitentiary at hard labor for two years and a half. No valid judgment can, at the common law, be rendered on Sunday, and any judgment actually pronounced or rendered on that day is void. Black, Judgm. § 182; Freem. Judgm. § 138; Chapman v. State, 5 Blackf. 111; Swann v. Broome, 3 Burrow, 1595. The sentence or judgment in the case before us was not rendered on Sunday, and the law applicable to such a state of facts is consequently not in point. We find, however, that a verdict may be received and entered of record on Sunday. Nearly all the cases touching the question sustain the practice as being both lawful and proper. Ball v. U. S., 140 U. S. 118, 131, 11 Sup. Ct. Rep. 761; Baxter v. People,

3 Gilman, 368; Van Riper v. Van Riper, 4 N. J. Law, 176; State v. Ricketts, 74 N. C. 187; State v. Penley, 107 N. C. 808, 12 S. E. Rep. 455. See, also, Allen v. Godfrey, 44 N. Y. 433; Huidekoper v. Cotton, 3 Watts, 56; Hoghtaling v. Osborn, 15 Johns. 119. The general rule is that judicial acts cannot be done on Sunday, but acts which are not judicial are not within the maxim, *dies dominicus non est juridicus*, and may be lawfully performed. Story v. Elliot, 8 Cow. 27. In Mackalley's Case, 9 Coke, 65, it was resolved that though Sunday was not *dies juridicus*, and no judicial act could be done on it, yet that ministerial acts might be lawfully executed; and the objection that an arrest could not be made was overruled. In Shaw v. McCombs, as reported in 2 Bay, 232, (A. D. 1799,) a new trial was granted by the court of appeals because the verdict was received on Sunday morning. In Hiller v. English, 4 Strob. 486, (A. D. 1849), where Shaw v. McCombs (a case in which no opinion was written) is examined, and the report of it by Bay corrected, and the term of the court shown to have expired, the decision of the court of errors, in the same state, was that the receipt and publication of a verdict on Sunday is a judicial act, but that where a court is directed to sit two weeks, and a jury retire before midnight of the first Saturday and return into court before day-light of Sunday, their verdict may be received and published, and that it seemed, both under the common law, applicable to courts not bound by the terms at Westminster, and under the statutes of South Carolina, that it might be received at mid-day of any Sunday included within the term, and that it also seemed that although Sunday, when mentioned in a statute, begins and ends as another civil day, yet to it, as a common-law festival, and as a holy day established by the usage of various sects and Christians, common-law prohibitions extend only from sunrise to sunset. In Davis v. Fish, 1 G. Greene, 406, where the jury was charged, verdict returned, and judgment rendered on Sunday, it was said that it is improper to even receive the verdict on Sunday. But the settled doctrine is against this view, in so far as to the mere receipt of the verdict and the entry thereof on that day, (Davis v. Fish, 48 Amer. Dec. 387, 392, 393, note;) and the statutes of this state are not repugnant to this conclusion, (section 17, p. 813, McClell. Dig.) The result of the authorities is that the receipt and record of a verdict on Sunday is not within the prohibition of the maxim mentioned above; and, whatever the true reason for this may be, we feel satisfied that neither good morals, the welfare of society, nor religion are offended by doing so, and relieving jurors from the restraints placed upon the usual and proper observance of the day by being detained in a jury-room for no practical or beneficial purpose.

In reaching the conclusion announced in the above paragraph, we have not invoked the aid of the written agreement appearing in the record, bearing date Saturday, November 1, 1890, signed by the state attorney and counsel for the prisoner, in which it is recited that the cause had been submitted to the jury under the charge of the court at a late hour of that day, and by which it is agreed that, in the event the jury may be ready to render their verdict at any time on the following day, it may be received as if rendered on any other day of the week, and that no advantage or exception "can be taken by defendant by reason of such verdict having been rendered on the Sabbath day under this agreement."

The only other error assigned is that it does not appear that the prisoner was asked by the circuit judge, upon being sentenced, if he had anything to say why sentence should not be passed upon him. In Keech v. State, 15 Fla. 591, 609, where it was urged that there was error in not asking the defendant why sentence of death should not be pronounced against her, RANDALL, C. J., speaking for the court, said: "It is laid down by Bishop that it is indispensably necessary that this ceremony should be observed in capital cases, and that it should appear of record that it was observed,"—and the authorities cited sustain the conclusion; but he further says the utmost that may be asked on account of the omission of this ceremony is "that the judgment be set aside, and the prisoner remanded to the proper court, to be dealt with according to law, the verdict standing unimpaired;" or, in other words, for a resentence, with an observance of the ceremony. It seems to be the view of the text-books that, only in cases where the sentence is death, is it indispensable that the record should show affirmatively the observance of this formula. Whart. Crim. Pl. § 906; 1 Chit. Crim. Law, 699, 700; 1 Bish. Crim. Proc. § 1118. See, also, Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. Rep. 761. And though there are American decisions which refuse to set aside the judgment, even in capital cases, on account of the failure of the record to show that the question was asked, (see notes to Wharton and Bishop, supra,) we find but two authorities (Safford v. People, 1 Parker, Crim. R. 474, and Crim v. State, 43 Ala. 55) holding that it is necessary that the record should show it in convictions of other or inferior offenses. In the following cases, not capital, it is at least held that the judgment or sentence will not be set aside on account of the omission: Grady v. State, 11 Ga. 253; West v. State, 22 N. J. Law, 212, 229; State v. Ball, 27 Mo. 324; State v. Taylor, 27 La. Ann. 393; Jones v. State, 51 Miss. 718; Spigner v. State, 58 Ala. 421. Where the record shows, as it does here, that the prisoner was in court, and represented by counsel who were present, and that a motion for a new trial was made and refused, and there is, moreover, no error apparent on the record for which the judgment can be arrested, it does look like child's play to send the case back for the purpose of asking a question to which there can be no answer that will change the prisoner's fate, and of having a new sentence pronounced. State v. Johnson, 67 N. C. 55, 60; Spigner v. State, supra. The authorities do not call upon us to extend the rule applicable in capital cases; and we, in the absence of a meritorious reason, are not disposed to do so. Jones v. State, 51 Miss. 721, 728. Doubtless, if

the question had been material to defendant, his counsel would have called the matter to the judge's attention, if it was in fact omitted, and due exception would have been taken, had there been a refusal to ask the question.

The judgment is affirmed.

(29 Fla. 318)

ADAMS *et al.* v. FRY.

(*Supreme Court of Florida.* Jan. 12, 1892.)

FORECLOSURE OF MORTGAGE—DEFENSES—PLEADING AND PROOF—PERSONAL JUDGMENT—MASTER'S REPORT.

1. To a bill filed to foreclose a mortgage for purchase money due on real estate, the mortgagor in undisturbed possession, under a warranty deed from the mortgagee with covenant that said real estate is not incumbered by any mortgage, judgment, or any lien whatever, cannot set up as a defense an outstanding incumbrance or title, in the absence of any allegation of an eviction, actual or constructive, from the premises, or fraud or insolvency on the part of the mortgagee.

2. It is error to decree a personal judgment against a married woman, or direct an execution to issue generally against her property for such deficiency of a decree as may exist after the sale of mortgaged property in foreclosure proceedings.

3. When a reference is made to a master to ascertain a fact depending upon testimony, his report should show the basis of his finding, so that the court may see the correctness of his conclusions; and a decree for solicitor's fees, predicated upon the report of a master, in the absence of any testimony to show what was a proper fee under the circumstances of the case, introduced either before the master, or otherwise appearing in the record, will be set aside.

4. In foreclosure proceedings, though not under default, there is no rule of practice making it compulsory on a chancellor to refer a cause to a master to ascertain the amount of principal and interest due on a note, or what is the reasonable attorney fee to be allowed in a case. These are matters of mere computation, or of ready ascertainment, that can usually be made and established under the supervision of the chancellor without interfering with his public duties; but if, in a case not under default, a chancellor, after adjudicating the equities between the parties, refer it to a master for his report, the proceedings before him are regulated and controlled by the rules of practice prescribed in such cases.

(*Syllabus by the Court.*)

Appeal from circuit court, Clay county; JAMES M. BAKER, Judge.

Bill by Reginald Fry against J. Irene Adams and Thomas J. Adams to foreclose a mortgage on real estate. Decree for complainant. Defendants appeal. Reversed.

Thomas E. Wilson, for appellants. *C. P. & J. C. Cooper*, for appellee.

MABRY, J. The appellee, Reginald Fry, instituted proceedings in equity by bill in the circuit court of Clay county, Fla., in March, A. D. 1887, against the appellants, J. Irene Adams and Thomas J. Adams, to foreclose a mortgage. The mortgage was executed by appellants to appellee on the 9th day of February, A. D. 1885, on real estate situated in said county, to secure the sum of $5,000, payable in equal installments one and two years from the 31st day of January, A. D. 1885, with interest from that date at the rate of 10 per cent. per annum. This suit is instituted to foreclose said mortgage for the last installment maturing January 31, A. D. 1887. The bill here is the usual one in foreclosure proceedings, with no distinguishing features from the ordinary bills filed in such cases.

Within the time prescribed by the rules of practice applicable to such cases, the appellant filed an answer, to which appellee filed exceptions. The record does not reveal any disposition of said exceptions by the court, but, at a subsequent date, appellants, as respondents in the circuit court, filed an amended answer alleging substantially the same matters contained in the original answer, together with others.

The complainant below, appellee here, set the cause down for hearing upon bill and amended answer, and upon these a hearing was had, and a final decree rendered in favor of appellee.

In view of this hearing, the allegations of the amended answer became important in disposing of this case, as they are conceded to be true. It is herein alleged by appellants that they agreed, about the 1st day of February, 1885, to purchase from appellee, through his agent, the land described in the mortgage sought to be foreclosed, and that upon their demand, as a prerequisite to said purchase, said agent agreed to furnish them a clear abstract of title to said land; that on the 18th day of February, A. D. 1885, appellee executed and delivered to the appellant J. Irene Adams a warranty deed to said land, and therein covenanted that the same, at the date of said deed, was unincumbered by any "mortgage, judgment, dower, limitation, or by any incumbrance whatever;" that appellants agreed to pay $7,000 for said land, in three installments, as follows: $2,000 cash; $2,500 in one year, with 10 per cent. interest; and $2,500 in two years, with 10 per cent. interest; that they paid the cash installment of $2,000, and executed notes to appellee for the others, securing the same by mortgage on said land; and that they paid the first note falling due; and aver that appellee is proceeding in this suit to foreclose the said mortgage on the second note for the purchase money of said land.

Appellants further answer that before said second note became due they discovered an unsatisfied mortgage for the sum of $7,000, covering, with other lands, the said land conveyed by appellee to said J. Irene Adams, and that said mortgage was executed by a prior grantor and predecessor, through whom appellee derived his title to said land, and to the best of appellants' knowledge, information, and belief said mortgage was at the time of said conveyance to J. Irene Adams, and still remains, an incumbrance and lien thereon, as shown by the records in the clerk's office of Duval county, in which, appellants are informed, said land was situated at the time of the recording of said mortgage.

The answer then proceeds to specify that the said mortgage claimed to be an incumbrance was executed by one John H. McIntosh on the 16th day of December, A. D. 1844, to one Kingsley B. Gibbs, and was recorded in the clerk's office for Duval county, Fla., on the 30th day of said

month; that said mortgage is for the sum of $7,000, with interest from the 16th day of December, A. D. 1844, and has never been satisfied of record, and is now a valid and existing lien against the property so purchased by appellant J. Irene Adams, as shown by the record in said clerk's office.

It is further alleged that the administrators of said John H. McIntosh, in the year 1853, sold the land in question to one Stephen Bryan; and the chain of title from said McIntosh through Stephen Bryan to the appellee is set out in full, with the dates of the record of the various deeds constituting the same. Some of said deeds are alleged to be recorded in Duval county, and some in Clay county; and at the time of the mortgage from McIntosh to Gibbs the latter county is alleged to have been a part of the former.

Appellants further answer that they are not informed, and do not know, whether or not the mortgagee, Gibbs, is deceased, and, if dead, whether or not he left minor heirs, and that they have no further knowledge on the subject of said mortgage than that learned from an investigation of the records in the counties of Duval and Clay.

They further say that, on discovering the condition of the title of the land conveyed to appellant J. Irene Adams, they applied to the agent of appellee to have said incumbrance removed as a cloud upon their title, but appellee has neglected and refused, and still neglects and refuses, to take any steps to remove the same, and that appellants refused to pay him the said second note and interest until he did remove said incumbrance and cloud upon their title, believing that a court of equity would compel appellee to do so before allowing him to foreclose his said mortgage.

On the hearing, which was on the 18th day of January, 1888, the court decreed the equities of the bill in favor of appellee, and referred the case to a special master to compute and report the sum due on the note attached to the bill, and also a reasonable amount for solicitor's fee, as provided in the mortgage, under the rules and practice of the court. The special master reported to the judge at chambers, on the 20th of said month, a sum as due for principal and interest on said note, and also an amount as solicitor's fee for foreclosing the mortgage.

On the 6th day of February, 1888, a final decree, based upon the bill, amended answer, and report of the special master, was filed in the office of the clerk of the circuit court of Clay county, Fla. The report of said master was also filed in said office that day. The final decree confirms the report of the master, and adjudges that the respondents, within 10 days from date, pay the said sum ascertained by the master to be due, with interest, the amount reported for solicitor's fees, and costs of court, to be taxed by the clerk, and, in default, that said mortgaged premises be sold at public auction by a master named and appointed for that purpose. After directing the disbursement of the funds arising from said sale, and in the event of a surplus that it be reported to the court, the decree further adjudges "that the defendants be not dismissed until the said debt, principal and interest, and said solicitor's fees, and all costs and expenses of foreclosure, be paid, and execution to issue against said defendants' goods and chattels, lands and tenements, generally, for any balance of mortgage debt, fees, and costs, as aforesaid, not paid and satisfied by the proceeds of sale of said mortgaged property."

Defendants below, J. Irene Adams and Thomas J. Adams, appeal from the decree of the court, and in their petition of appeal assign the following: *First*, the decree of the court is erroneous; *second*, the decree of the court should have found the equities of the case with the defendants, and not with complainant; *third*, the master's report should have been allowed to lie for 30 days, as required by the rules of the court; *fourth*, there was no opportunity given to take exceptions to the master's report; *fifth*, there was no notice given of any hearing before the master.

The first and second assignments of error may be considered together. Appellants here contend that the chancellor should have decreed the equities of the bill with them, and not with the appellee. The defense upon which they rely under these assignments is that the wife, J. Irene Adams, obtained the land which is the subject of this foreclosure proceeding from the appellee by a warranty deed with covenant that said land was not "incumbered by any mortgage, judgment, dower, limitation, or by any incumbrances whatsoever," and that there is upon the records of Duval county, Fla., an uncanceled mortgage covering the land in question, together with other property, to secure the sum of $7,000. They contend that, as this proceeding is to foreclose a mortgage on said land for the last installment of purchase money, a court of chancery should not lend its aid to the appellee until he has removed said incumbrances as a cloud upon their title; that although said mortgage is recorded in Duval county, yet at the time of its record Clay county, in which said land is now situated, was a part of Duval county; and, although appellants have no other information in reference to said mortgage than that derived from an examination of said records, as a matter of fact it may have been kept in existence by payments, or disability of parties in interest.

For appellee it is contended that said mortgage was never recorded in Clay county, and, furthermore, that it has long since become barred by the statute of limitation; the bond which it secured having matured some 40 years before the execution of the present mortgage. It is further contended that appellants cannot avail themselves of the matters set up in their said answer as a defense in the proceeding. Leaving out of consideration the contention that said mortgage is barred by limitation, or not recorded in Clay county, we think there is in the last objection urged a sure foundation upon which to base our decision. The bill alleges that, at the time of the execution of

the mortgage to appellee, the appellant J. Irene Adams was seised in fee of the land described in the mortgage; and there is no contradiction of this anywhere, but, on the contrary, it is alleged in the answer that appellee executed and delivered a warranty deed to said J. Irene Adams, conveying to her said land. Their possession of the land has not been disturbed, nor have any proceedings been instituted to foreclose the said outstanding mortgage, or any demand of payment of the same made by anybody of them. No eviction, actual or constructive, from the premises, is alleged, and no fraud or misrepresentation on the part of appellee in selling the land is averred, nor is there any intimation that he is insolvent. The answer distinctly alleges that the land was conveyed to J. Irene Adams by warranty deed with covenant that the same was free from all incumbrances whatever. In such a case "it is no defense to a foreclosure suit on a purchase-money mortgage that there is an outstanding title or incumbrance. The mortgagor is left to his remedy on the covenant." 2 Jones, Mortg. § 1500. In Peters v. Bowman, 98 U. S. 56, it is said: "It is the settled law of this court that upon a bill of foreclosure, or, as in this case, a bill to enforce a lien for the purchase money, and where there has been no fraud and no eviction, actual or constructive, the vendee, or a party in possession under him, cannot controvert the title of the vendor; and that no one claiming an adverse title can be permitted to bring it forward, and have it settled in that suit. Such a bill would be multifarious, and there would be a misjoinder of parties." It is further said: "The rule is founded in reason and justice. A different result would subvert the contract of the parties, and substitute for it one which they did not make. In such cases, the vendor, by his covenants, if there are such, agrees upon them, and not otherwise, to be responsible for defects in the title. If there are no covenants, he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property. Here it is neither expressed nor implied that he may refuse to pay, and remain in possession of the premises, nor that the vendor shall be liable otherwise than according to his contract." This case is referred to in the decision of our own court in the case of Randall v. Bourgardez, 23 Fla. 264, 2 South. Rep. 310, where it was held that where a mortgagor in possession, holds under deed with full covenant warranting the title and there has been no eviction, actual constructive, and no fraud or insolvency or on the part of the vendee is alleged, the defense of an outstanding title or breach of covenants cannot be set up to a bill of foreclosure brought by the vendor for unpaid purchase money. There was no error on the part of the chancellor in decreeing the equities of the cause in favor of appellee.

It is apparent, however, that there is error in the decree rendered. After confirming the report of the master, the decree adjudges that the said defendants, within 10 days from its date, pay complainant the amount reported by the master for debt, solicitor's fees, and costs; and, further, "execution to issue against defendants' goods and chattels, lands and tenements generally, for any balance of mortgage debt, fees, and costs, as aforesaid, not paid and satisfied by the proceeds of sale of said mortgaged property." One of the defendants, J. Irene Adams, is shown by the record to be a married woman, and it is not competent to decree a personal judgment against her, or direct execution to issue generally against her property, even when a deficiency is shown after the exhaustion, by sale, of the mortgaged property. This point was decided in Randall v. Bourgardez, supra.

It is further contended that the report of the master should have been filed in the clerk's office, and there remain for 30 days, as required by the rules of the court; and that a failure to observe the rule in this instance deprived appellants of an opportunity to take exceptions to the master's report. The interlocutory decree referring the cause to the master to report the sum due on the note and mortgage, and a reasonable amount for solicitor's fee, was made on the 18th day of January, A. D. 1888. The final decree recites that the master's report was submitted on the 20th day of January, A. D. 1888, but said report and the final decree were filed in the clerk's office on the 6th day of February, A. D. 1888. It is clear that the report was not filed in the clerk's office before the final decree was rendered, nor is there anything to show that appellants had any knowledge of the making of said report before the decree was rendered. Looking into the report, we find no error in the master's computation of the amount due on the note secured by the mortgage. This amount was ascertained by a simple calculation of interest on the note which was before him. In reference to the solicitor's fee, the master reported as follows, viz.: "I find that the solicitor's fees for foreclosing said mortgage should be fixed at three hundred dollars, should the entire amount of the mortgage debt be collected; or ten per cent. of the amount collected, if a less amount than the entire sum be realized of the mortgage debt, principal and interest." He does not report any testimony as taken to establish what was a reasonable fee, nor does his finding on this point purport to be based upon any testimony before him. The rule requires that the evidence upon all examinations before a master shall be taken down by him, or some other person by his authority, in his presence, and filed with his report. The decree of the chancellor for solicitor's fees could not be sustained in the absence of any testimony to support it. Long v. Herrick, 26 Fla. 356, 8 South. Rep. 50. When a reference is made to a master to ascertain a fact depending upon testimony, his report should show the basis of his finding, so that the court may see the correctness of his conclusions. The report in this case did not furnish a basis for a final decree as to the solicitor's fees, as it did not appear that the amount reported

was ascertained from evidence. The reference to the master was not to obtain his estimate of what was a reasonable fee, but for him to ascertain from competent testimony what was a reasonable fee under the circumstances of the case. If an exception had been taken to the report on this item, it would have been the duty of the court to have recommitted the report to the master, with instructions to report the testimony upon which he based his finding. In June v. Myers, 12 Fla. 310, it was held that when the appellate court cannot determine from the report of a master, or from the evidence in the case, the basis upon which the decree was made, it will be reversed. See, also, Strang v. Allen, 44 Ill. 428. In Nims v. Nims, 20 Fla. 204, it was said, where it appears that the report of the master is not correct or intelligible, the order of confirmation should be vacated, and exceptions allowed to be filed. There is nothing in the report of the master, nor is there any testimony in the case, from which the court can determine the correctness of the report in reference to the solicitor's fees. If the decree did not award judgment and execution against Mrs. Adams for any balance that may remain after sale of the mortgaged property, it might be reversed, with directions that the amount of a reasonable solicitor's fee be ascertained by competent evidence, as in Long v. Herrick, supra; but in view of that error a general reversal will be ordered.

In proceeding in cases like this, not under default, as is the case here, there is no rule of practice making it compulsory on a chancellor to refer a cause to a master to ascertain the amount of principal and interest due on a note, or what is a reasonable attorney's fee to be allowed in the case. These are matters of mere computation, or of ready ascertainment, that can usually be made and established under the supervision of the chancellor without interfering with his public duties, and in many cases would save to parties the fees incident to a reference. In a bill for an account, where the items are few and not complicated, a reference to a master to state an account, or the statement of the account by the chancellor before or at the rendering of the decree, is not essential, there being no confusion or uncertainty in arriving at the basis of the decree or the rules regulating his decision. May v. May, 19 Fla. 373. If, however, in a cause not under a default, a chancellor, after adjudicating the equities between the parties, refers it to a master for his report on matters specified in the reference, the proceedings before him are regulated and controlled by the rules of practice prescribed in such matters.

In view of the general reversal of the decree, it is not deemed necessary to say anything further in reference to the proceedings before the master.

The decree is reversed, with directions that the chancellor ascertain, according to the rules of practice in such matters, the amount due on the note secured by the mortgage which is the subject of foreclosure in this suit, and also by proper proof a reasonable solicitor's fee for foreclosing said mortgage, and that such further proceedings be had in this cause as may be agreeable to equity.

(29 Fla. 179)

SUMMER v. MITCHELL.

(*Supreme Court of Florida.* Jan. 20, 1892.)

FOREIGN DEEDS AS EVIDENCE—LEGISLATIVE POWERS—RETROACTIVE LAWS—ACKNOWLEDGMENT OF DEED—TECHNICAL ERRORS—JUDICIAL NOTICE OF FOREIGN STATUTES.

1. In 1865 the laws of this state did not authorize the admission to record of a deed acknowledged out of this state, but in another state of the United States, before a clerk or deputy-clerk of any court, or before a judge of any court not a court of record, and having a seal and clerk or prothonotary.

2. A legislature has power, in the absence of any inhibiting constitutional limitation, and except as against prior vested rights, to cure by retroactive legislation defective acknowledgments of deeds in all cases where the purpose of the acknowledgment is the admission of the instrument acknowledged to record, or its use in evidence.

3. An effect of the "Act providing for the acknowledgment of deeds and other conveyances," approved February 24, 1873, (sections 16–19, pp. 218, 219, McClell. Dig.,) is to authorize the acknowledgment of the execution of a deed for the record here, to be taken out of this state and according to the laws of the state where it may be taken, at least if the execution of the deed, as distinguished from its acknowledgment is, as in the case at bar, in compliance with the laws both of Florida and of the state of its execution and acknowledgment.

4. The fourth section of the act of February 25, 1872, (section 19, p. 219, McClell. Dig.,) which provides that any deed of conveyance heretofore executed and acknowledged in compliance with the previous provisions of the act should have the same force and effect and be as valid as if the same had been executed after its passage, was to validate, at least from the approval of such act, any prior acknowledgment made out of this state of a deed conveying lands located here, if the acknowledgment conformed to its provisions, and certainly where, as in the case at bar, the execution of the deed, as distinguished from its acknowledgment, conformed both to the law of this state and that of the state of its execution and acknowledgment.

5. It is the established policy of the law to uphold certificates of acknowledgment of deeds, and, wherever substance is found, obvious clerical errors and all technical omissions will be disregarded. Inartificialness in their execution will not be permitted to defeat them, if looking at them as a whole, either alone or in connection with the deed, we find that they reasonably and fairly indicate a compliance with the law. Clerical errors will not be permitted to defeat acknowledgments when they, considered either alone or in connection with the instrument acknowledged, and viewed in the light of the statute controlling them, fairly show a substantial compliance with the statute.

6. The instrument acknowledged may be resorted to for support to the acknowledgment; and where the same name appears as a witness to the execution of the deed, and to the certificate of acknowledgment as the officer taking it, it may be presumed, in support of the certificate, that these names represent the same person.

7. Where the title of an officer taking an acknowledgment of a deed is written out in full in the body of the certificate, its omission from the signature is immaterial, and affixing it to the signature is itself sufficient. Initials may, however, be used, and are sufficient to designate such title.

8. The certificate of acknowledgment, either of itself or aided by the instrument, must show

that the officer taking the acknowledgment is one authorized by law to do so; but initials are sufficient to show this, and if they, viewed in connection with the statute, reasonably indicate an officer designated by it as competent to take the acknowledgment, the certificate should be sustained.

9. Where the title of office stated in the body of the certificate of acknowledgment is one which the law did not authorize to take the acknowledgment, and the suffix to the signature, read in connection with the deed, if not alone, indicates an office having such authority, the suffix will control.

10. A deputy may take an acknowledgment of a deed in his own name.

11. Where an instrument has been acknowledged in another state before a deputy-clerk of a court, signing himself as such, and affixing the seal of office, it will be presumed, in support of the certificate, that the clerk had authority to appoint a deputy.

12. The ordinary provisions of recording statutes do not contemplate that recording officers shall record official seals of public officers; and hence, where the acknowledgment of a deed, as recorded, indicates by its language that the official seal of the officer taking it was affixed to such acknowledgment, the absence of the seal, or of anything representing it, from the record, or from a transcript thereof, is not sufficient to overcome the presumption created by such language, that the officer's official seal was affixed to the original.

13. The act of February 24, 1873, (pages 218, 219, McClell. Dig.,) in relation to the acknowledgment of deeds, does not require other evidence of the official character of an officer taking an acknowledgment when he affixes his official seal to such acknowledgment.

14. If it does not appear that the introduction of a certified copy of the record of a deed was objected to in the trial court on the ground that it was not shown that the original was not within the custody or control of the party offering the copy, the appellate court will conclude that this requirement of the constitution (section 23, art. 16) was complied with or waived.

15. The effect of the act of February 24, 1873, in relation to the acknowledgment of deeds, is to validate, at least from the approval of such act, a record made prior thereto of any deed cured thereby.

16. In 1863 the laws of Georgia authorized the conveyance there of land located there by a writing signed by the maker and attested by two witnesses, and the record of the deed there upon an acknowledgment made there before a clerk of the superior court, or a justice of peace, but, unlike our statute as to the acknowledgment of deeds out of the state, did not require the certificate of acknowledgment to state that the officer taking it knew, or had satisfactory proof, that the person making it was the individual described in, and who executed, the deed. A deed purported to have been signed, sealed, and delivered in Thomas county, Ga., by H. L. H. and M. E. H., his wife, in the presence of two witnesses, one of whom signed his name, "T. C. Bracewell, J. P.," and the certificate of acknowledgment represented that it was acknowledged in the same county by H. L. H. and M. E. H. before (according to the body of the certificate) "the undersigned, deputy-clerk of circuit court" of the county; the conclusion of the certificate being: "In witness whereof, I herewith set my hand and seal of office the day and year above mentioned. T. C. BRACEWELL, Deputy-Clerk S. & J. C." *Held*, that the acknowledgment, whether deemed, as might be, to have been made before a deputy-clerk of the superior court, or a justice of the peace, was in accordance with the law of Georgia, and validated by the Florida act of February 24, 1873, as was the record made of the deed here in 1863 on such acknowledgment, and that a transcript of the record is admissible in evidence under section 24, art. 16, Const. 1885, though no representation of the seal of the officer taking the acknowledgment appeared on such record or transcript.

17. The statutes of another state of the Union must be proved by being introduced as evidence. Our courts do not take judicial notice of them.

(*Syllabus by the Court.*)

Appeal from circuit court, Marion county; JESSE J. FINLEY, Judge.

Ejectment by Mary M. Summer, through her next friend, against Reuben S. Mitchell, to recover an undivided half of certain land and the mesne profits thereof. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

The other facts fully appear in the following statement by RANEY, C. J.:

The action is ejectment for the recovery of an undivided half of lot 2, block 35, old survey of Ocala, and mesne profits, and was commenced in June, 1887, by the plaintiff, then a minor, through her next friend, she being the only surviving child of Adam G. Summer, who died in the spring or summer of 1866. To further sustain her action, she put in evidence a certified copy of the record of a deed in the office of the clerk of the circuit court of Marion county; such deed bearing date September 1, 1858, and purporting to have been made by Martha Baker, Robert Bullock, and Amanda Bullock, his wife, and to convey to H. L. Hart, in fee, the lot in question. She also offered in evidence a certified copy of the record in Marion county clerk's office of a deed bearing date July 9, 1863, and purporting to have been executed in Thomas county, state of Georgia, to be a conveyance in fee of the same property by Hart and wife to Adam G. Summer and Henry Smith; but, its admission in evidence having been objected to by defendant on the ground that the deed "had not been duly proven and acknowledged and recorded as required by law," the objection was sustained, the plaintiff excepting to the ruling, and having, in support of the admissibility of the deed, read in evidence sections 2690, 2705–2707, of the Code of the state of Georgia, (second edition, of date 1873, revised, corrected, and annotated by David Irwin, George N. Lester, and W. B. Hill.)

Plaintiff then offered as a witness Robert Bullock, who testified that he was in possession of the lot in 1854, claiming title, had the lot under fence, built a livery stable, and operated and ran it, dug a well on the south-west corner of the lot, and so remained in possession until some time in 1858, when he sold it to H. L. Hart, and placed him in possession thereof; that Hart continued in the same business on said lot, running a livery stable, for a number of years thereafter. The following questions were asked the witness by plaintiff, and each of them was objected to, and the objection sustained; the plaintiff excepting to the rulings:

"(1) How long did H. L. Hart remain in actual possession of said lot after you put him in possession thereof? And state whether or not he was in possession, claiming title exclusive of any other right. (2) Were you in possession of said lot at that time, claiming title thereto exclusive of any other right? (3) State the character of the possession of H. L. Hart." This

question being preceded by an offer to prove by the witness the character of Hart's possession, and being asked for such purpose. "(4) Who was in possession of said lot immediately after H. L. Hart?" This question being preceded by an offer to prove that Hart placed Summer in possession when he sold to him, and being asked for that purpose.

The plaintiff also introduced as a witness W. P. Trantham, who testified that he was acquainted with the premises in controversy, and knew Adam G. Summer; and then plaintiff asked him the following questions, each of which was ruled out on objection of defendant, and the ruling excepted to by plaintiff:

"(1) State how long Adam G. Summer was in possession of said lot, and what was the character of the possession. (2) Was Adam G. Summer, prior to his death, in 1866, in actual possession of said lot?"

The plaintiff here offered to prove by the witness Robert Bullock that the possession of Bullock, Hart, and Summer followed in immediate succession, and was turned over from one to the other, and was continuous and adverse from 1854 to Summer's death, in 1866, each claiming title from the other in the order of succession, and for this purpose asked him the following question: "State whether or not the possession of said lot by Robert Bullock, H. L. Hart, and Adam G. Summer, from 1854 to 1866, immediately succeeded each other, and each claiming title from the other." The question was excluded on objection by defendant, and plaintiff excepted.

The plaintiff having rested, the defendant put in evidence a deed of conveyance in fee of the above property, dated May 1, 1886, from William E. Schoeflin and wife to H. E. Miller and Edwin Spencer.

Schoeflin, a witness for defendant, testified that he took possession of the lot in 1878; that he built a new fence around it, and built a house on it, and lived in it with his family until he sold it to Miller and Spencer; that it is the same house Mr. Hicks now lives in. On cross-examination he said that he built a new fence, and did not repair an old one; took away some old pieces of boards, and built a new fence. The house he built is the same one Hicks now lives in,—the same house that Wallace Dawkins put there; and witness put a new story on, and fixed it up the same as building a new one. The house that Mr. Hicks lives in is on lot 26, west of this one, but "I had all fenced up,—both lots." The house was partly in the street that runs between the two lots. At this time that street was not opened. "I told you that the house I built and lived in is the same one in which Mr. Hicks now lives, and had the whole thing under fence."

Defendant then introduced a deed from Miller and Spencer to the defendant, bearing date December 7, 1886, and purporting to convey to Mitchell and his heirs the lot in question.

The defendant having rested, the plaintiff introduced one Wallace Dawkins, who testified that he lives in Ocala, and has seen the lot every day for the last 12 years. That he took possession of the lot in 1877, and put a fence around it. That he took possession by mistake, intending to locate on another lot, and got on this one by mistake. (Witness locates the lot on a map of Ocala handed to him.) That, when he found out his mistake, he moved off. That he built a house on the lot across the street from this one on the west. That he built it. That Schoeflin moved in the same house; moved in the same day, witness thinks, that witness moved out of the house. That the fence witness put around it was the same one that was there when Schoeflin went there. When witness went there, no fence was around the lot, and no houses. That no house was ever built on the lot, since witness knew it, until after the big fire in 1884, when old man John Eliza put up his little stand, in December, 1884. It is the same place he now uses.

Mrs. Margaret Summer, mother of plaintiff, testified that her husband, Adam G. Summer, was seised and possessed of the lot. That it has been vacant for a number of years; not occupied until defendant took possession of it, something over a year ago. Does not know of plaintiff's possession within seven years. That Mr. Summer was engaged in some business upon the lot, but she does not know what the business was.

Plaintiff testified she had never had possession since her father's death.

Fleming & Daniel, Bullock & Burford, and *R. L. Anderson,* for appellant.

RANEY, C. J., (*after stating the facts.*) Appellant sued appellee in ejectment, and the result was a judgment in favor of defendant.

The first error assigned is the refusal of the judge to admit in evidence a certified copy of the record of a deed of the land in controversy, a lot in Ocala, from Hubbard L. Hart and Mary Elizabeth Hart, his wife, to A. G. Summer and Henry Smith. The deed purports to have been executed for and in consideration of $600, in Thomas county, state of Georgia, July 9, 1863. Its conclusion is as follows:

"In testimony whereof, we, the said party of the first part, have hereunto set our hands and seals this, the day and year first above written. HUBBARD L. HART. [Seal.] M. E. HART. [Seal.] Signed, sealed, and delivered in presence: JACOB KUBITSKIK. T. C. BRACEWELL, J. P."

The certificate of the acknowledgment made by the grantors of the execution of this deed is as follows:

"State of Georgia, Thomas county. Be it remembered that on this 22nd day of July, A. D. 1863, personally came before me, the undersigned deputy-clerk of the circuit court in and for the county and state aforesaid, Hubbard L. Hart and Mary Elizabeth Hart, who respectively acknowledged, each for himself and herself, and the said Mary Elizabeth Hart, being absent from her husband, the said Hubbard L. Hart, acknowledged voluntarily, without fear or compulsion of or from her said husband, that they signed, sealed, and delivered the foregoing instrument for the purposes therein mentioned. In wit-

ness whereof, I herewith set my hand and seal of office the day and year above mentioned. T. C. BRACEWELL, Deputy-Clerk S. & J. C."

The deed thus executed and acknowledged was admitted to record in the office of the clerk of the circuit court of Marion county on the 30th day of July, 1863, by the clerk of that court. His certificate of the record need not be set out. A copy of this record, duly certified March 19, 1888, by the then clerk, being offered in evidence, was objected to by defendant on the general ground that the deed had not been duly proven, acknowledged, and recorded as required by law; and, the objection having been sustained, the ruling was excepted to.

The particulars wherein the acknowledgment or the copy of the record was objected to as being deficient are not stated in the bill of exceptions. Still, whatever objection might have been taken here to the generality of the objection below has been waived by the specifications of the particular grounds of objection in the brief of counsel for appellant, upon whose behalf alone the cause has been argued before us. Carpenter v. Dexter, 8 Wall. 524.

These grounds of objection are: (1) That it does not appear that the parties making the acknowledgment were known to the officer taking the acknowledgment; (2) a deputy cannot take an acknowledgment; (3) it does not appear that the officer acted within his jurisdiction; (4) the acknowledgment was taken before an officer who had no authority to take acknowledgment of deeds in this state.

At the time of the execution and acknowledgment of the deed in question, viz., July, 1863, the statute regulating the acknowledgment or proof, made out of the state, of deeds conveying any interest in real estate within the state, for the purpose of being used or of entitling such deeds to be recorded here, was that of February 3, 1834, entitled "An act concerning the authentication of conveyances," as amended by act of February 27, 1840. The first section of the act of 1834 provided that the deed should be acknowledged by the party or parties executing the same, or that the execution thereof by such party or parties should be proved by a subscribing witness thereto, "before the officers hereinafter named, and in the manner and form hereinafter mentioned;" and its second section enacted that no acknowledgment or proof of any such deed "executed or acknowledged out of the state should be taken by an officer or officers aforesaid unless the officer taking the same shall know or have satisfactory proof that the person making such acknowledgment is the individual described in, and who executed, the deed or instrument under seal." Its third section provides, "in addition to the requisites contained in the preceding sections," for the privy examination of married women (residing out of the territory) executing such an instrument; and the fourth section made provisions as to the acknowledgments made out of the territory, but within the United States, and was supplanted and expressly repealed by the above-mentioned act of 1840. This statute, entitled "An act in amendment of" the former act, enacted that all such instruments acknowledged out of the territory, but within the United States or its territories, with the intent to be used or recorded here, should be acknowledged or proved before one of the commissioners appointed under the act of January 24, 1831, and in those cities or counties wherein no commissioner "is or shall be appointed under said law, or in case of his sickness, death, or inability to perform the duties of his office where he may have been appointed," that such acknowledgment and proof might be taken before the chief justice, judge, presiding justice, or president of any court of record of the United States, or of any state or territory thereof, having a seal and a clerk or prothonotary; but that no proof or acknowledgment taken by any such chief justice, judge, presiding justice, or president should entitle such instrument to be recorded, unless taken within some place or district to which the jurisdiction of the court to which he belongs should extend, and that the place of taking such acknowledgment should be set forth in the certificate, and also that the court of which he was such officer was a court of record; and that such certificate of acknowledgment should be accompanied by a certificate of the clerk or prothonotary of the court, under its seal, to the effect that the former officer was duly appointed or authorized as such judge, justice, or president. The fifth section of the act of 1834 relates to acknowledgments or proofs taken out of the United States, but in North or South America or in Europe; and the sixth or remaining section is that the certificate of such acknowledgment, as aforesaid, by the officer before whom the same shall be taken, shall contain and set forth substantially the matter required to be done or proved to make such acknowledgment effectual by this act.

The above legislation is to be found in Thompson's Digest, pp. 181, 182, and McClellan's Digest, pp. 216, 217, the word "state" being properly substituted for that of "territory," when applicable to Florida.

Thus the law as to such acknowledgment or proof stood in 1873; and we may further observe that, up to this time, acknowledgments or proof made in the state had to be made before the officer authorized by law to record the instrument, or before some judicial officer, (Act Nov. 15, 1828; McClell. Dig. § 6, p. 215,) or before a notary public, (Act Feb. 8, 1861; McClell. Dig. § 3, p. 792.)

It is entirely clear that there was in 1863 no law in this state authorizing the admission to record of a deed acknowledged out of the state, and in another state of the United States, before a deputy-clerk or the clerk of any court, nor before even a judge of any such court, not a court of record, and having a seal and clerk or prothonotary; and unless legislation, subsequent to that in force at the time this record was made, has legalized the record, there was no error in the ruling of the judge excluding the transcript as evidence, under section 21 of article 16 of the consti-

tution, which section is as follows: "Deeds and mortgages which have been proved for record, and recorded according to law, shall be taken as *prima facie* evidence in the courts of this state without requiring proof of the execution. A certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law shall be admitted as *prima facie* evidence thereof, and of its due execution, with like effect as the original, duly proved: provided, it be made to appear that the original is not within the custody or control of the party offering such copy."

There was approved by the governor on the 24th day of February, 1873, a statute entitled "An act providing for the acknowledgment of deeds and other conveyances," whose first section, after providing that deeds, executed in this state, of any interest in lands herein, shall be executed in the presence of two witnesses, who shall subscribe their names as such, and that the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the circuit court, notary public, or justice of the peace within the state, enacts that if any such deed or conveyance of land shall be executed in any other state, territory, or district of the United States, such deed may be executed according to the laws of such state, territory, or district, and the execution thereof may be acknowledged before any judge or clerk of a court of record, notary public, justice of the peace, or other officer authorized by the laws of such state, territory, or district to take the acknowledgment of deeds therein, or before any commissioner appointed by the governor of this state for such purpose. Its second section provides that, if such deed be executed in a foreign country, it may be executed according to the laws of such country, and that any execution thereof may be acknowledged before certain officers designated therein; they being some of those designated in the fifth section of the act of 1834, and others besides. The third section is to the effect that if any such deed or other conveyance shall be executed and acknowledged in any other state or country, before any officer not having an official seal, he shall have attached thereto a certificate of the clerk or other proper certifying officer of a court of record, or certificate of the secretary of state, minister extraordinary, minister resident, *charge d'affaires*, commissioner, or consul, as the case may be, that the person whose name is subscribed to the certificate of acknowledgment was at the date thereof such officer as he is therein represented to be, that he believes the signature of such person subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of such state, territory, district, or foreign country. The fourth section of this statute is as follows: "Any deed or conveyance heretofore executed and acknowledged in compliance with the provisions of this act shall have the same force and effect, and be as valid, as if the same had been executed after the passage of this act." The fifth or remaining section, providing that future conveyances, not recorded within six months after their execution, shall be void as against subsequent purchasers, was held void, on account of not being within the expression of the title of the act, in Carr v. Thomas, 18 Fla. 736.

A purpose of this act, as applicable to conveyances made in any other state of lands located here, was the adoption of the laws of that state regulating the acknowledgment of conveyances of any interest in real estate located there. This is made entirely clear by the provision of the third section, which requires that the certificate therein provided for, in cases where the officer taking the acknowledgment has no official seal, shall state that the deed "is executed and acknowledged according to the laws of such state, territory, district, or foreign country." This provision implies, beyond doubt, that, wherever an acknowledgment shall be in accordance with the laws of the state where it was executed and acknowledged, it will be sufficient, however wanting it may be in any requisite prescribed by previous laws of our own state as to acknowledging deeds executed beyond its limits. It is unnecessary to stop to inquire if the second section of the act of 1834 is repealed; for, even if it is not, and a deed acknowledged in accordance with its provisions, as amended by the act of 1840, will still be entitled to record, it is entirely clear that the act of 1873 has established at least an additional rule, which renders any acknowledgment made in accordance with the laws of the state where it is executed sufficient, though its certificate does not state, in compliance with former legislation, that the officer taking the acknowledgment knew or had satisfactory proof that the person making it was the individual described in, and who executed, the deed. Had the deed in question been executed, acknowledged, and recorded subsequent to the act of 1873, there would certainly have been nothing in the first objection made to the introduction of the copy of the record thereof; nor is there anything in this objection, if the fourth section, supra, of the act of 1873, is not ineffectual, in so far as applicable to the circumstances of the case before us.

The power of a legislature, in the absence of any inhibiting constitutional limitation, to cure by retroactive legislation defective acknowledgments in all cases where the purpose of the acknowledgment is admission of the instrument acknowledged to record, or its use as evidence, is, except as against prior vested rights, unquestionable. The legislature, when enacting the statutes of 1834 and 1840, could have dispensed with any requirement as to acknowledgments to be found in them; and, this being so, it has the authority, at least in all cases of mere irregularity, or where no vested rights are affected, the power to do the same by subsequent legislation. Cooley, Const. Lim. (5th Ed.) 458, 471; City of Jacksonville v. Basnett, 20 Fla. 525; Webb, Record Title, § 97; Gordon v. Collett, 107 N. C. 362, 12 S. E. Rep. 332; Barto v. Morris, 15

Ohio, 408; Watson v. Mercer, 8 Pet. 88; Buckley v. Early, 72 Iowa, 289, 33 N. W. Rep. 769; Green v. Abrahams, 43 Ark. 420; Johnson v. Richardson, 44 Ark. 365.

The intention of the legislature in enacting the fourth section of the act of 1873 was at least to render valid any irregularity in the acknowledgment of a deed of conveyance of land which had been previously executed in another state, if the execution of the deed and of the acknowledgment were in compliance with the laws of the state where the execution took place. This intention extended to making the acknowledgment as valid, at least, from the approval of the statute, as if at the time of the execution of the acknowledgment the law of this state had provided that deeds of conveyance executed according to the law of the state of their execution might be acknowledged according to the laws of the state regulating the acknowledgment there of deeds of lands located there.

Upon the trial of the cause, the plaintiff, to support the introduction of the above deed as testimony, read in evidence sections 2690, 2705-2707 of the Code of Georgia of 1873. The substance of these sections, so far as material here, is as follows:

Sec. 2690. A deed to lands in Georgia must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser or some one for him, and be made on a valuable or good consideration.

Sec. 2705. Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the lands lie.

Sec. 2706. To authorize the record of a deed to realty, it must, if executed in Georgia, be attested by a judge of a court of record of that state, or a justice of the peace, or notary public, or the clerk of the superior court in the county in which the three last-mentioned officers, respectively, hold their appointments; or if, subsequent to its execution, the deed is acknowledged in the presence of either of the above-named officers, that fact certified on the deed by such officer shall entitle it to be recorded.

Section 2707 relates to proof by a subscribing witness.

These sections are shown by the Code to be legislation of prior date to the execution and acknowledgment of the deed under discussion.

It is apparent from the first of these sections that the deed, considered as separate from the acknowledgment, was executed in accordance with the law of Georgia; and as it was signed, sealed, and delivered in the presence of two subscribing witnesses, such execution was also, we may state, in compliance with our own laws in force at that time, controlling the mere transfer of the title from Hart; and hence the deed is one which, in so far as the conveyance of Hart's fee is concerned, is valid and effectual under the laws of both states.

There was in the Georgia law nothing requiring the certificate to state that the officer taking the acknowledgment knew or had satisfactory proof that a person making an acknowledgment was the individual described in, and who executed, the deed; and, this being so, the first objection made to the acknowledgment and copy of the record offered in evidence fails. Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. Rep. 214; Sanford v. Bulkley, 30 Conn. 344.

The second and fourth objections will be considered together. Reversing the order of their statement, they are, in effect, that the acknowledgment was taken before an officer who had no authority to take it, according to (such being our understanding of the use made of the word "in" by counsel in stating their fourth objection) the laws of this state, and was, moreover, taken before a deputy of such officer, and that a deputy could not take such an acknowledgment.

To decide whether the acknowledgment was made before or taken by an officer recognized by the act of 1873 as competent to take it, we must first ascertain what officer took it. According to the body of the certificate, it was taken before a deputy-clerk of the circuit court of Thomas county, Ga., but, when we look at the signature to the certificate, we find that he does not sign as acting in that capacity, and, moreover, we are not informed that there was any "circuit court" in Georgia. Counsel for appellant contends that the words and initials, "Deputy-Clerk S. & J. C.," stand for and mean, "Deputy-Clerk of Superior Court and Justice of Peace." To reach this conclusion they invoke the aid of the attestation of the deed, in which it will be found that a person of the same name, "T. C. Bracewell," is one of the attesting witnesses; he affixing to his signature there the initials, "J. P." There is no doubt that the instrument acknowledged may be resorted to for support to the acknowledgment. Einstein v. Shouse, 24 Fla. 490, 5 South. Rep. 380; Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. Rep. 214; Owen v. Baker, 101 Mo. 407, 14 S. W. Rep. 175; Wells v. Atkinson, 24 Minn. 161; Samuels v. Shelton, 48 Mo. 444; Sharpe v. Orme, 61 Ala. 263; Carpenter v. Dexter, 8 Wall. 513; Luffborough v. Parker, 12 Serg. & R. 48. In Carpenter v. Dexter, 8 Wall. 513, the deed purported to have been signed, sealed, and delivered in the presence of two witnesses, one of whom signed his name as "Wendell, Jr." The certificate of acknowledgment purported to have been taken before and signed by "H. Wendell, Jr., Justice of the Peace," and stated that "the above-named Walter T. Davenport, who has signed and sealed and delivered the above instrument of writing, personally appeared before" such undersigned justice of the peace, and acknowledged the same; but it omitted to state, in the language of the statute, that the person making the acknowledgment was personally known to the officer to be the person who executed the deed, or had been proved by credible witnesses to be such. The court, after observing that "one of the subscribing witnesses was the justice of the peace before whom the acknowledgment was taken," and referring to the above statement of the cer-

tificate as following immediately the attestation clause, remarks: "Read thus, with the deed, the certificate amounts to this: that the grantor personally appeared before the officer, and in his presence signed, sealed, and delivered the instrument, and then acknowledged the same before him. An affirmation in the words of the statute could not more clearly express the identity of the grantor with the party making the acknowledgment." In Luffborough v. Parker, 12 Serg. & R. 48, the statute required that deeds should be proved by a subscribing witness, and A. B. made the proof, which did not state that he was a subscribing witness, yet by reference to the deed it appeared from his name that he was one, and the proof was held sufficient. It is apparent that in the former of these cases the identity of the witness and of the person taking the acknowledgment is presumed from identity of name, and that a similar presumption is made in the second case as to the person subscribing the deed as a witness and the one proving its execution; yet the court does not make this presumption supply of itself, in the former case, the express statement as to identity of the grantor and person acknowledging required by the statute to be made. In the other case no corresponding statement as to identity was exacted by the law controlling the certificate of proof of execution. Where a deed is referred to in a certificate in such manner as to connect the former with the latter, or make it substantially a part thereof, as is the case here, and, reading them together, there can be found a substantial compliance with the demands of the statute, the certificate should be sustained; but we cannot supply the statutory requirement of an express statement of a fact in a certificate by a mere presumption of such fact, and for the reason that the officer's statement, and not the presumption, is the evidence expressly called for by the statute to prove the particular fact. This rule is not violated in either of the above cases, nor by our concluding here, as we do, that the witness and deputy-clerk Bracewell were one and the same person. Mott v. Smith, 16 Cal. 534; Hogans v. Carruth, 18 Fla. 588. This conclusion or presumption does not, however, render the certificate of Bracewell sufficient under the second section of the act of 1834; there being absent from it the substantial affirmative statement as to the identity of parties to be found in Carpenter v. Dexter.

The certificate of itself, or aided by the instrument acknowledged, must (unless parol evidence be admissible for such purpose,—a point not presented) show the character of the officer taking the acknowledgment; and, when we have learned this much, we must ascertain whether he was authorized to take it. The title of the officer may be written out fully in the body of the certificate, and when this is done its omission from the signature is immaterial, (Colby v. McOmber, 71 Iowa, 469, 32 N. W. Rep. 459; Brown v. Farran, 3 Ohio, 140;) or it may be affixed to the signature, and, if so, this is, of itself, sufficient, (Devlin, Deeds, § 501; Russ v. Wingate, 30 Miss. 440.) The use of initials generally understood to stand for the title of an office will answer. In Rowley v. Berrian, 12 Ill. 198, where an officer affixed to his signature, "N. P. for the City of Quincy, in Adams County, Illinois," the initials were held to mean "Notary Public;" and "J. P." was decided to signify "Justice of the Peace" in Shattuck v. People, 4 Scam. 477. In Russ v. Wingate, 30 Miss. 440, the certificate began, "State of Mississippi, Hancock county," and concluded: "Given under my hand and seal this day and year above written. LEWIS Y. FOLSOM, J. P. H. C. [Seal.]" There was no other designation of the officer, yet it was held to be a sufficient designation of the officer as a justice of the peace. See, also, Final v. Backus, 18 Mich. 218; Sparrow v. Hovey, 41 Mich. 708, 3 N. W. Rep. 198; State v. Manley, 1 Tenn. 428; Stinson v. Russell, 2 Tenn. 40; Major v. State, 2 Sneed, 15; Burton v. Pettibone, 5 Yerg. 442. In McDonald v. Morgan, 27 Tex. 503, the affidavit of a subscribing witness to a deed executed in Liberty county, Tex., was made March 13, 1838, before a person signing himself, "George W. Miles, R. L. C.," which was followed by a certificate of the record on May 4, 1838, of the deed "in my office," headed "Republic of Texas, Liberty County," and signed as above. A statute in 1841 validated all records of deeds acknowledged before certain officers, among whom was "the clerk of the county court in whose office such record is proposed to be made." The law in force at the time of the record made clerks of the county courts recorders for their respective counties; and it was held that the official character of the officer as clerk of the county court and *ex officio* recorder was sufficiently indicated. Somewhat on the same line is Owen v. Baker, 101 Mo. 407, 14 S. W. Rep. 175, where there was a certificate giving at the outset the state and county, and signed, "James C. Jackson, Recorder," and stating in the body that the grantor appeared "in open court" and acknowledged the deed; such certificate being followed by a statement similarly signed, 20 days subsequently, to the effect that the subscriber had duly recorded the instrument. The statutes required the acknowledgment to be made before the circuit court of the county wherein the estate was situated, and that the clerk of the court should indorse upon the deed a certificate thereof, "under the seal of the court;" and it also made the clerk of the designated court recorder of deeds. "Jackson, who signed the certificate," says the opinion, "was recorder only by virtue of his office as as circuit clerk. His description of himself, therefore, as recorder, indicated likewise that he was circuit clerk, and, with the recitals in the acknowledgment, made it clear that it was taken by him as clerk. As circuit clerk, he was authorized to take the acknowledgment, but as recorder he had no such authority. * * * In this case the acts of the sheriff [the grantor] and court, described in the certificate of Jackson, were valid if performed before him as clerk, but not as recorder."

Not only do the courts hold initials sufficient to indicate the character of the officer taking an acknowledgment, but they do not permit clerical errors to defeat or render acknowledgments ineffectual, when they, considered alone, or read in connection with the instrument acknowledged, fairly show a substantial compliance with the statute. In Blythe v. Houston, 46 Tex. 65, 79, there was offered in evidence a certified copy of the record of a deed, which was objected to on the ground that the certificate of acknowledgment did not show of what county the officer giving the certificate was notary public, nor that he was a notary public when the acknowledgment was taken. The certificate commenced, "The state of Texas, county of Hopkins," and recited the appearance of the parties before the "undersigned authority," and concluded, "Witness my hand and official seal at Douglass, this 6th day of October, A. D. 1854," being signed, "John R. Clute, Notary Public N. C." "The objection" says the supreme court of Texas, "was, we think, properly overruled. * * * The discrepancy between the county named in the outset, and the letters designating his county, appended to the signatures, might easily be accounted for, and certainly was not of sufficient importance to invalidate the record." In reaching this conclusion the court remarks that McDonald v. Morgan, supra, "is nearly in point as to the sufficiency of the signature, which, it must be assumed, was authenticated with the official seal of the notary, showing the words, 'Notary Public County of ——, Texas.'" Bank v. Harrison, 39 Mo. 433, is a case in which the notary public who took the acknowledgment of a deed offered in evidence described himself in the body of the acknowledgment as a notary public within and for the county of Livingston, but appended to his signature his official character in the following words: "Notary Public Howard County;" and the supreme court said they were inclined to think that the deed should have been admitted, but, being excluded, there was still evidence enough to show a *prima facie* right to recover. In Agan v. Shannan, 103 Mo. 661, 15 S. W. Rep. 757, the certificate of acknowledgment, after stating that W. L. H. Frazier appeared in the probate court, in open court, and acknowledged the deed, concluded, including the signature, as follows: "In testimony whereof, I, W. L. H. Frazier, judge of said court, have hereunto set my hand and affixing my private seal. * * * M. L. WYRICK, Probate Judge." A private seal was affixed, and there was also a statement that no seal of office had yet been provided. It was held, overruling Lincoln v. Thompson, 75 Mo. 623, that the certificate was good.

Viewing the certificate of acknowledgment in the light of the Georgia law, it must be held sufficient if we can learn from the certificate, either alone or aided by the instrument acknowledged, that the acknowledgment was made before or taken by any officer authorized by such law to do so. From the Georgia law, as proved, it appears that, among other officers, either a clerk of a superior court or a justice of the peace could take in that state an acknowledgment of a conveyance of land situate therein; and hence, if the description following and constituting a part of the signature fairly indicates either of these officers, the acknowledgment must be sustained. Invoking, as we lawfully may and properly should do, the aid of the attestation of the deed, our conclusion is that each of the above official capacities is sufficiently indicated. The final "C." may, in the light of the authorities, be regarded as a clerical error, and intended for a "P.;" and, so treating it, the quotation would read, "Deputy-Clerk of the Superior, and Justice of the Peace." The omission of the word "Court," or the letter "C.," as standing for "Court," after the letter "S.," cannot be regarded as material; but its absence, in view of the liberal principles of law always obtaining and to be applied in support of these instruments, will be supplied. The letter "S." can, in view of the Georgia law, be given no other signification than as standing for "Superior;" and informed as we are, by this law, that a clerk of the superior court may perform the official functions in question, we must elect between ignoring the clear indication of the words "Deputy-Clerk Superior," and defeating the acknowledgment, or of regarding them in the light of the statute and supplying the word "Court" as a clerical omission, and sustaining the certificate. Instruments like these, say the authorities, must be construed *ut res magis valeat, quam pereat*, and in dealing with them it should be the aim of the courts to preserve and not to destroy. Einstein v. Shouse, 24 Fla. 490, 5 South. Rep. 380; Kelly v. Calhoun, 95 U. S. 710; Carpenter v. Dexter, supra; Touchard v. Crow, 20 Cal. 150, 160. It is the policy of the law, observes the supreme court of Minnesota in Collender Co. v. Brackett, supra, to uphold certificates of this character; and, wherever substance is found, obvious clerical errors and all technical omissions or defects will be disregarded. Again, should we read, as it might be said we should, the final "C." as standing for or intended to indicate the word "Court," so that the entire suffix to the signature should read, "Deputy-Clerk of Superior and Justice Court," it seems to us entirely clear and reasonable to hold that thus read, in connection with the attestation, it was intended by the officer to indicate his dual official capacity of clerk and justice. If nothing followed the signature but "J. C." or "Justice Court," we would be obliged, in view of the attestation and the law, to hold that it was a clerical error or an inaccuracy, and intended to indicate the official character of justice of the peace; and it is nothing more than reasonable to hold that the last two initials, if to be read, the former as "Justice," and the latter as "Court" or "Courts," were used, the former as standing for "Justice," and the latter as applying, not only to it, but also to "Superior" as indicated by the letter "S." Again, if it is to be assumed that "J." does not stand for "Jus-

tice," but for some other word, there is still enough to signify the office of clerk of the superior court.

Inartificialness in the execution of these instruments cannot be permitted to defeat them, if, looking at them as a whole, we find that they reasonably and fairly indicate a compliance with the law.

In reaching this conclusion, we have not overlooked the use of the word "circuit" in the body of the certificate. Our judgment as to this is that, in the absence of evidence that there is any such court in Georgia, the suffix to the signature must control, as showing that the person taking the acknowledgment was acting in the authorized official capacity indicated by it, and that the word "circuit" was written at least unadvisedly, even if by the officer himself, and is to be controlled by the designation following his signature, which is to be presumed to have been made by him, and to have been a subsequent, if not the last, act in the matter. Carlisle v. Carlisle, 78 Ala. 542.

In what has been said, the fact that the acknowledgment was taken by a deputy, if taken in the capacity of clerk of the superior court, instead of that of a justice of the peace, has not been noticed. In Hope v. Sawyer, 14 Ill. 254, a question arose upon the legality of the record in Illinois of a deed acknowledged in Missouri; the certificate of acknowledgment being signed in the name of the clerk of the circuit court, "by E. Baker, Deputy-Clerk." It was objected that the acknowledgment should have been made before, and certified to by, the clerk, in person. "The objection," says the opinion, "is not well founded. The acknowledgment purports to have been taken by the clerk, and it is certified in his name and under the seal of the court. *Prima facie*, this is sufficient. The seal of the court proves itself, and we must presume that it was affixed by the proper officer. The presumption is that the clerk was authorized by the laws of Missouri to act through a deputy, and that Baker was regularly appointed as such. The deputy had the power to use the name of the clerk, and attach the seal of the court. * * * The certificate in question was none the less the act of the clerk because made by his authorized deputy." Devl. Deeds, § 475; Webb, Record Title, § 62. In Small v. Field, 102 Mo. 104, 14 S. W. Rep. 815, where an acknowledgment of a deed to land in Missouri, taken before a deputy-clerk of a territorial district court in Washington Territory, was held sufficient, notwithstanding the statutes of the United States providing for the appointment of the clerk of such court made no provision for a deputy, though deputy-clerks of territorial courts are expressly spoken of elsewhere in the statutes, the supreme court of Missouri observed: "If necessary to uphold this certificate, we would presume that a law of the territorial legislature was in existence, authorizing the appointment of a deputy-clerk. * * * Moreover, the seal of the court, being affixed to the certificate, carries with it *prima facie* evidence that it was rightfully affixed, and throws the burden of overcoming the *prima facie* case thus made on the objectors to the sufficiency of the certificate." Musser v. Johnson, 42 Mo. 74.

In the case before us, it is to be presumed, from the words of the certificate to such effect, that the seal of office of the clerk of the superior court was impressed upon the original certificate. The absence from the record or from the transcript of such seal, or anything as representing it, is not sufficient to overcome the presumption created by such words. The ordinary provisions of statutes regulating the recording of instruments do not contemplate the inscription of public official seals upon the record. Devl. Deeds, § 700; Webb, Record Title, § 74; Geary v. City of Kansas, 61 Mo. 378; Hammond v. Gordon, 93 Mo. 223, 6 S. W. Rep. 93; Ingoldsby v. Juan, 12 Cal. 564; Smith v. Dall, 13 Cal. 510; Jones v. Martin, 16 Cal. 166; Griffin v. Sheffield, 38 Miss. 359; Hedden v. Overton, 4 Bibb, 406; Sneed v. Ward, 5 Dana, 187; Ballard v. Perry, 28 Tex. 347; Witt v. Harlan, 66 Tex. 660, 2 S. W. Rep. 41; Coffey v. Hendricks, 66 Tex. 676, 2 S. W. Rep. 47; Gale v. Shillock, (Dak.) 29 N. W. Rep. 666. In Jones v. Martin, supra, where, as here, the body of the certificate indicated a seal by apt words, the words "No seal" appeared in the certified copy, where the notarial seal should have been; and it was held that these words did not imply that no seal was affixed to the instrument by the notary who took the acknowledgment, but was a mere note of the recorder of the place of the notarial seal, which he probably had no means of recording, and which it was not necessary that he should record.

As it is to be presumed from these words of the certificate that a seal was impressed upon the original, the only distinction between the case at bar and those cited from Illinois and Missouri is that here the certificate is signed by the deputy simply in his own name, without using that of the clerk. There is conflict of authority as to how such certificates of acknowledgment should be executed when they are made by deputies. In Tennessee it was held (Beaumont v. Yeatman, 8 Humph. 542) that such certificates should be in the name of the deputy; and likewise, in a late case in Georgia, where an acknowledgment was taken out of the state, (MacKenzie v. Jackson, 82 Ga. 80, 8 S. E. Rep. 77;) and in California a certificate was held valid which stated that "before me, the undersigned, county clerk of Sonoma county, personally appeared * * *," and was signed, "John A. Brewster, Deputy County Clerk of Sonoma County," the principal's name not appearing, (Touchard v. Crow, 20 Cal. 150.) See, also, Rose v. Newman, 26 Tex. 131; Cook v. Knott, 28 Tex. 85. In Talbott's Devisees v. Hooser, 12 Bush, 408, where the acknowledgment was in fact taken by the deputy-clerk, but the name of the clerk alone was signed by such deputy to the certificate, the acknowledgment was decided by the supreme court of Kentucky to be valid, and this, too, although the deputy was a minor; the statute not prescribing the qualifications of a deputy.

The doctrine of this case is that all official acts should be done in the name of the clerk, and not in that of the deputy. The view expressed in Devlin on Deeds (section 474) is that the signature of the deputy alone does not invalidate the acknowledgment, but that the better practice is for the deputy to sign the name of the principal, by himself as deputy. That this is the better rule in all cases where a deputy acts, we will not deny; but in view of the conflict of authority, and the liberal views governing, in cases of these acknowledgments, we cannot hold this certificate invalid on account of the manner in which the deputy has signed, but must regard it as sufficient in this aspect; and this being so, and the presumption being that the official seal of the clerk of the superior court of Thomas county, Ga., was affixed to the original certificate of acknowledgment, and rightfully so, (Touchard v. Crow, Small v. Field, supra,) the certificate must be sustained, though executed by a deputy and in another state. That the act is one which in its nature may be performed by a deputy cannot be denied, (Devl. Deeds, § 473; Webb, Record Title, § 62;) and there is, in view of the authorities cited above as to deputies, and the manner in which they may sign, in the fact that the name of the clerk does not appear, nothing to except this certificate from the rule which presumes, *prima facie*, that the appointment of Bracewell as the deputy-clerk was valid. Hope v. Sawyer and Small v. Field, supra.

If we refer the taking of the acknowledgment to Bracewell's capacity as justice of the peace, then the certificate shows that he had an official seal, as such officer; and no other evidence of such capacity is required by the act of 1873, supra.

In Carpenter v. Dexter, supra, it is announced as law that where one state recognizes acts done in pursuance of the laws of another state the courts of the former will take judicial cognizance of those laws, so far as may be necessary, to determine the validity of the acts alleged to be in conformity with them. We find no other decision to this effect; the general rule being that the statute law of another state is to be proved according to the law of the former, in which the trial is had. Tuten v. Gazan, 18 Fla. 751; Session v. Reynolds, 7 Smedes & M. 130; Whart. Ev. § 302; Greenl. Ev. §§ 486, 489. We may remark, however, that we are not advised that the application of the rule announced by the supreme court of the United States would have led to a conclusion against the validity of the acknowledgment in question.

A further question, suggesting itself, is, what effect is to be given the fact that the record in Marion county was made before the act of 1873? Does this fact except such record, or a transcript thereof, from the effect of the provision of our constitution set out above? The act of 1873 was, in effect, an amendment of the existing prior legislation referred to in this opinion. As has been shown in the statement of that legislation, a purpose of it was the regulation of the acknowledgment and proof, made out of the state, of deeds of lands here, for the purpose of their being used or recorded here. Upon the approval of the act of 1873 the acknowledgment of the deed became as valid as it would have been, from the date of its execution, had it been acknowledged after the approval of the act; and a record of this deed, made upon the originally defective acknowledgment, immediately after the statute became operative, would have been as valid, for all purposes involved in this cause, as if the deed had been acknowledged subsequent to the approval of the statute. This deed, as acknowledged, standing upon the record, as it did, at the time the act became effective, we see no good reason why the record was not, from that time, as valid as if it had been made immediately after the approval of the statute; or, in other words, why it was not duly recorded from that time. Such, we think, was the logical and necessary effect of the statute upon the existing record. The deed was duly recorded from that time, and the record or a certified copy was admissible, under the section of the constitution set out above. East v. Pugh, 71 Iowa, 162, 32 N. W. Rep. 309; Fowler v. Merrill, 11 How. 375.

No objection that the original was not within the custody or control of the party offering the copy appears to have been made, and hence we conclude that this requirement was complied with or waived.

That the officer acted within his jurisdiction appears sufficiently upon the face of the certificate. Devl. Deeds, §§ 482, 486.

Other assignments of error need not be noticed.

The judgment must be reversed and remanded for proceedings not inconsistent with this opinion. It will be so ordered.

PARKER, Treasurer, *et al.* v. STATE, to Use of SUMMIT BANK.

(*Supreme Court of Mississippi.* Feb. 22, 1892.)

PUBLIC SCHOOLS—APPLICATION OF SCHOOL FUND.

Under act of March 18, 1886, changing the public school year so as to begin on October 1st and end on September 30th, instead of beginning January 1st and ending December 31st, as provided by the Code of 1880, the taxes levied for school purposes by the county supervisors, on or before September 1st of each year, were not made applicable to the expenses for the year following that in which they were imposed, but continued, as under the Code of 1880, applicable to the expenses of the year in which they were imposed, until the passage of act of February 22, 1890, which distinctly declares that all school funds "received and collected" within the scholastic year shall constitute the common-school fund of the county of that scholastic year.

Appeal from circuit court, Amite county; W. P. CASSEDY, Judge.

Action by the state, for the use of the Summit Bank, against James A. Parker, treasurer of Amite county, and the sureties on his official bond. Judgment for plaintiff, and defendants appeal. Reversed.

D. C. Bramlett, for appellants. *T. McKnight*, for appellee.

COOPER, J. This suit was brought against Parker, treasurer of Amite county, and the sureties upon his official bond,

to recover for the use of the Bank of Summit the amount of 71 school warrants issued by proper authority to the teachers in the public schools of said county during the scholastic year beginning October 1, 1889, and ending September 30, 1890. Parker's term of office began on the first Monday of January, A. D. 1890. The facts proved, or offered to be proved, were that the warrants sued upon were legally issued, and are now owned by the usee, the Bank of Summit; that they were issued to teachers for services rendered for the scholastic year beginning October 1, 1889; that $8,000 of the taxes levied for school purposes at the September, 1889, meeting of the board of supervisors was received by the defendant Parker, a large part of which was paid to him by the tax collector in school-warrants issued between January 1, 1889, and October 1st of that year; and that the treasurer paid out as much as $2,000 of that fund on warrants issued between those dates; and also that the school fund for the year beginning October 1, 1889, was exhausted by such and other lawful disbursements. On these facts the court instructed the jury to find for the plaintiff, which was accordingly done, and from a judgment on the verdict the defendants appeal.

It will be seen that the single question presented in this cause is whether the taxes levied by the county authorities in September, 1889, were appropriable under the law to school warrants issued to teachers for services rendered in the scholastic year beginning October 1, 1888. To determine this question it will be necessary to examine the statutes upon the subject. By the Code of 1880 a consistent and complete scheme for the maintenance of public schools was provided. The principal funds were directed to be provided by state distribution, and by the levy of local taxes by county or municipal authorities. Of these, the principal or original fund was that supplied by the state, which was to be supplemented by the imposition of local taxes. The scholastic year began on January 1st, and ended with the 31st day of December. By section 724 of the Code, it was provided that, whenever the amount of the school fund in the state treasury in any fiscal year should not amount to $200,000, the state treasurer should transfer from the general fund to the common-school fund a sufficient amount to make the sum of the school fund $200,000. By section 725 it was provided that this fund should be distributed among the several counties of the state, according to the number of educable children therein, which distribution was to be made by the auditor on the second Monday of July and January. Section 727 required the treasurer of each county "to make a report to the county superintendent of education on or before the 1st day of July, annually, showing the amount of the school fund, if any, in the treasury, and the amount that can be made available during the current year for common-school purposes, as nearly as he can make said estimate from *data* accessible to him." By section 698, the county superintendent of education was directed "to make a report to the board of supervisors, on the first Monday in July, annually, of the number of schools established, or to be established, in the county for the current scholastic year; the monthly cost of maintaining each, and the total monthly cost; the amount of common-school funds in the treasury, or to be in the treasury, available for the common schools of the year; and the amount necessary to be added thereto, to maintain the schools five months, and to pay the salary of the county superintendent." By section 730, the board of supervisors of each county was required, "on or before the first Monday in September, annually, to levy a tax upon the taxable property of such county not to exceed three mills on the dollar, to be collected as other county taxes for general purposes, and at the same time, and to be paid into the county treasury to the credit of the common-school fund, to make up any deficiency in the aggregate amount of common-school funds arising from other sources, necessary to maintain the public free schools of said county during the time required by law."

It thus appears that under the Code of 1880 the school fund for each year (aside from sums received as poll-taxes) consisted of the state distribution, supplemented by the sum derived by the levy of the county tax. Of this there was received one-half the state fund in July of the scholastic year, and the other half in January following, and the sums derived from the levy of the tax by the board of supervisors as the same was collected by tax collectors, whether the same was paid by the tax-payer or collected by sale of his property. The fund derived from the county taxes belonged to the year in which it was imposed, whether collected during that year or after its expiration. The scheme was an annual one, as was decided in Foote v. Brown, 60 Miss. 155. On the 18th of March, 1886, there was approved an act entitled "An act in relation to free public schools," under the provisions of which, it is contended by the appellee, a different application of the county tax was made. It is said by appellee that while, under the Code of 1880, the tax levied by the board of supervisors at its September meeting in the year 1886 would have been a part of the common-school fund of that year, the effect of the act of March 18th was to withdraw it from the fund for the year 1886, and carry it forward as a part of the fund for the next ensuing scholastic year, and that, as a necessary consequence, the tax of each succeeding year was appropriable to the school fund of the scholastic year next following its levy. The act of March 18, 1886, presents difficulties of construction, as is generally the case with crude and imperfect legislation. Under the Code of 1880, the current and scholastic years were identical, and the scheme provided for the support of the schools was symmetrical and complete. By the sixty-fifth section of the act of 1886, the scholastic year was changed so as to begin on October 1st and end on September 30th; but

the provisions of the Code of 1880 having reference to the current year, and intelligible there as applied to the scholastic year, because the current and scholastic years were the same, were brought forward *in totidem verbis* into the act of 1886, under which the scholastic year differed from the current one. The act, by express provisions, repealed the Code chapter, except sections 732 to 744, inclusive, which unrepealed sections have no reference to the question under consideration. It is improbable, impossible to say when the legislature intended the act to become operative. By section 78 it is declared "that this act shall be in force from and after the 1st of September, 1886: provided, that sections 37 to 45, inclusive, and such other sections as may be necessary to put this act into operation, be in force from and after its passage." This language would seem to indicate that the act was to be "operative" from the date of its approval, but not to be "in force" until September. What, if anything, was meant by this section we do not attempt to discover. It is certain that the scholastic year 1886 was contracted by the act so as to end on September 30, 1886, instead of December 31st, as it would have done under the Code of 1880. But we are unable to discover a purpose on the part of the legislature to withdraw any portion of the fund for that scholastic year. The only portion of the act tending to indicate such purpose is the provision of section 12 that the superintendents of the several counties shall, on the first Monday of July, annually, make a report to the board of supervisors of the number of schools established in the county for the current scholastic year, the monthly cost of maintaining each, and the total monthly cost; the amount of common-school funds in the treasury, or to be in the treasury, for the common schools of the next year; and the amount necessary to be added thereto to maintain the schools five months, and to pay the salary of the county superintendent. But, by the seventy-second section of the act, the county treasurer, who furnishes the superintendent with the *data* upon which his estimate is to be made, was required to make report to him of the amount "in the treasury, and the amount that can be made available during the current year for common-school purposes." The seventy-fifth section of the act, prescribing the duty of the board of supervisors in levying the tax for school purposes, is identical with section 730 of the Code, under which we have seen that the tax levied would clearly have been for the scholastic year 1886.

A construction of the act by which the tax levied in September, 1886, should be carried to the next scholastic year, would be manifestly unjust to those who had rendered services as teachers during the year commencing January 1, 1886, in that it would leave no sufficient fund for their payment. Another result of this construction would be to cut from the school fund its center, leaving the distribution of the state fund made in July, 1886, to the scholastic year 1886, and then carrying to the next scholastic year the county tax levied in September, and payable in October, and then turning back to the year 1886 the state distribution of January, 1887. As opposed to this construction is the certain fact that the whole of the state fund for the scholastic year 1886 remained appropriable to that year, and that by section 5 of article 8 of the constitution no county neglecting to maintain the public schools for a period of at least four months was entitled to participate in the state distribution. It ought not to be assumed that the legislature intended either to permit the distribution of the state fund to a county failing to comply with the condition prescribed by the constitution, or that it intended to disable it from compliance by withholding permission from the local authorities to raise, by taxation, a sum sufficient for the support of the common schools, so as to entitle the counties to receive the state distribution. We are therefore of opinion that the county taxes levied by the board of supervisors in September, 1889, was under the act of March 18, 1886, appropriable to the payment of school-warrants issued in the scholastic year beginning October 1, 1888, and ending September 30, 1889. By the ninth section an act entitled "An act to amend the school law," approved February 22, 1890, it is declared that "all school funds received and collected within the scholastic year shall constitute the common-school fund of the county of that scholastic year." Under the view we have taken of the act of 1886, all taxes for common-school funds levied in September were appropriable to the scholastic year then current. The act of February 22, 1890, distinctly and unmistakably announces a different rule. But it does not appear that the appellant Parker, as county treasurer, made any payments after February 22, 1890, on warrants of the preceding scholastic year, or that he received from the tax collector any such warrants received by the tax collector after that time. Since the warrants for the scholastic year ending September 30, 1889, were entitled to be paid by the taxes collected under the levy made on the first Monday of that month, until the passage of the act of February 22, 1890, it is not shown that appellant has in any respect made an unlawful application of the school fund. The tax-payer had the right to pay his school taxes in the warrants for the payment of which the tax was levied, and the collector was entitled to a credit for such as he had received before the enactment of the act of 1890. So, also, the treasurer might lawfully pay out the funds in his hands on such warrants before the passage of said act. There is nothing in the record to show any disbursement of the fund after February 22, 1890. If that fact was shown, the only question presented would be whether it was competent for the legislature to divert the fund raised for the payment of the warrants of the year 1889 to the school fund of the next year,—a question upon which it is not now necessary to express any opinion. Judgment reversed.

(69 Miss. 196)

BOWIE v. GREENVILLE ST. RY. CO.

(*Supreme Court of Mississippi.* Oct. 26, 1891.)

STREET RAILWAYS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—ALIGHTING.

In an action against a street-railway company for personal injuries, a complaint alleging that plaintiff, while a passenger on defendant's car, requested to be put off at a certain point, and, in expectation that the car would stop as requested, got on the rear step so as to be ready to alight, and that the car, instead of stopping, was so negligently run as to throw him to the ground, and injure him, is not demurrable on the ground that it shows contributory negligence on plaintiff's part.

Appeal from circuit court, Washington county; R. W. WILLIAMSON, Judge.

Action by Louis Bowie against the Greenville Street-Railway Company for personal injuries. The amended declaration alleged that plaintiff went upon defendant's car, requested to be put off at a certain point, and, in expectation that the car would stop as requested, went to the rear of the car, and got on the step, so as to be ready to get off; that, instead of stopping as was expected, the car was so negligently run as to throw him to the ground, and injure him. A demurrer was sustained to the declaration, on the ground that plaintiff was guilty of contributory negligence; and, plaintiff declining to amend further, judgment was rendered against him. Plaintiff appeals. Reversed.

Wilford H. Smith, for appellant. *Jayne & Watson*, for appellee.

CAMPBELL, C. J. The demurrer to the amended declaration should have been overruled. The special cause of demurrer is that the declaration shows that plaintiff's negligence contributed to the injury complained of. We are not willing to affirm that the fact that the plaintiff got on the step at the rear end of the car ready to descend to the ground, under the circumstances stated in the declaration, constituted contributory negligence on his part. The averment is that he had requested the car to be stopped, and, in the confident belief that it would be stopped, he put himself in a position to alight, and "he was by the negligence and carelessness of said company's driver thrown from said car," and injured. The declaration requires an answer. Reversed, demurrer overruled, and cause remanded.

(69 Miss. 218)

NOGALES CLUB v. STATE.

(*Supreme Court of Mississippi.* Nov. 2, 1891.)

INTOXICATING LIQUORS—SALES BY SOCIAL CLUB.

A social club, having a back room partly disconnected from its parlors and fitted up with a sideboard from which drinks are sold by a salaried steward to members and visitors at a price fixed, under the laws of the club, by a "governing committee," is, if drinks are so sold without a license, or to a minor member, indictable under the law prohibiting unlicensed retailing, and sales to minors, and declaring (Code, § 1112) that any person who shall directly or by any evasion or subterfuge violate any provisions of the act shall be liable to indictment.

Appeal from circuit court, Warren county; J. D. GILLAND, Judge.

Indictment against the Nogales club for selling intoxicating liquors without a license, and for selling to a minor. From a judgment of conviction, defendant appeals. Affirmed.

It appeared that defendant was a social club organized for social pleasures of its members; that the club-house had rooms fitted up as parlors and dancing halls, for use of members, their families, and lady friends; but that in a back room, disconnected partly from the other rooms, there was fitted up a sideboard or bar from which "drinks," intoxicating and otherwise, were sold to members and visitors at a price fixed, under the laws of the club, by the "governing committee" of the club, and that the liquors were thus sold and dispensed by a steward who was regularly employed by the club on a salary, but who had no interest in the sale of the liquors. One Cloud was a minor, and a member of the club, by permission of his parents, but liquor was sold to all members of the club by the regularly employed steward, without a license to retail, and was sold to said Cloud without the knowledge or permission of his parents.

Dabney & McCabe, for appellant. *T. M. Miller*, Atty. Gen., for the State.

CAMPBELL, C. J. We unhesitatingly adopt as sound the views of those courts which have held that such a device as was resorted to by the appellant in disposing of vinous and spirituous liquor was a violation of the law against unlicensed retailing. State v. Mercer, 32 Iowa, 405; Marmont v. State, 48 Ind. 21; Rickart v. People, 79 Ill. 85; Martin v. State, 59 Ala. 34; State v. Lockyear, 95 N. C. 633. It must be so, unless an association of persons may lawfully do what none of the individuals could, and it would be a reproach to the law if this were so. "If any person shall directly, or by any evasion or subterfuge, violate any provision of this act, then the person so offending (and also any person who may own or have any interest in any vinous or spirituous liquor sold contrary to this act) shall be liable to indictment," etc. Code, § 1112. Under this language there is no ground for controversy as to the guilt of appellant.

Affirmed.

(69 Miss. 86)

GREENVILLE ICE & COAL CO. v. CITY OF GREENVILLE.

(*Supreme Court of Mississippi.* Dec. 14, 1891.)

TAXATION—EXEMPTIONS—ICE FACTORIES.

Act March 9, 1882, entitled "An act to encourage the establishment of factories in this state, and to exempt them from taxation," and (section 1) declaring exempt from taxation for 10 years the machinery used for the manufacture of cotton or woolen goods, yarns or fabrics composed of these or other materials, or for the making of all kinds of machinery or implements of husbandry, "or all other things or articles not prohibited by law," exempts only machinery used for making articles of like character with the articles enumerated, and does not exempt ice factories.

Appeal from circuit court, Washington county; R. W. WILLIAMSON, Judge.

The city of Greenville levied a tax on the factory of the Greenville Ice & Coal Com-

pany, which tax was resisted upon the ground that the factory was exempt. There was judgment in favor of the city, and the company appeals. Affirmed.

Jayne & Watson and *Calhoon & Green*, for appellant. *Campbell & Starling*, for appellee.

WOODS, J. The language of the statute entitled "An act to encourage the establishment of factories in this state, and to exempt them from taxation," approved March 9, 1882, is marvelously infelicitous in many, and absolutely meaningless in some, of its parts, if its letter is rigidly adhered to. The statute in its first section declares exempt from taxation, for a period of 10 years, "the machinery used for the manufacture of cotton or woolen goods, yarns or fabrics composed of these or other materials, or for the making of all kinds of machinery or implements of husbandry, or all other things or articles not prohibited by law," etc. It would seem, from an attentive examination of this language, that the legislative intention was to encourage the establishment of manufacturing enterprises in this state, to the extent of exempting from taxation, for the period named: (1) Machinery used for the manufacture of cotton and woolen goods, and other fabrics composed of like materials; and (2) machinery used for making all kinds of machinery or implements of husbandry, and all other articles or things of like character with those last enumerated. The words "not prohibited by law" convey no meaning, and may be disregarded in any effort to ascertain the construction of the statute, inasmuch as neither the manufacture of any textile fabrics, nor machinery nor agricultural implements, nor any other manufactured product are prohibited by law. The general words, "all other articles or things not prohibited by law," by a well-known rule of statutory interpretation, must be referred to the particular words which they immediately follow, and will include only articles or things *ejusdem generis* with those specifically enumerated, unless the context clearly requires that the general words shall be construed in their larger signification. We nowhere find in the act any words or provisions indicative of a clear legislative purpose to extend the exemption further than the specifically enumerated cases, and others of like character. It must not be forgotten, too, that this well-known rule of interpretation is of special application and force in seeking to ascertain the legislative intent in statutes which require strict construction. Statutes imposing burdens of taxation receive strict construction, and statutes exempting from the common burden of taxation must likewise receive such construction. Furthermore, if we look to the fourth section of this very obscure and imperfect statute, the foregoing view will receive strong confirmation. This fourth section, if it means anything, declares that all capital hereafter employed in canning factories and capital employed in the operation of the Clement's attachment shall be exempt from taxation, as provided in the first and second sections of the act. Now, canning factories and the Clement's attachment are not *ejusdem generis* with the specifically enumerated cases exempted from taxation in the first section of the act. They were not included in the words, "all other articles or things not prohibited by law," and are therefore themselves specifically named for exemption in the fourth section. This exemption of canning factories, etc., in the fourth section, is wholly idle and meaningless if all factories, of every character and description, had already been exempted by the general words in section 1 which we have been considering. The statute must be held to mean all those other manufactured articles or things of character similar to the particular classes just then enumerated, to-wit, machinery used for making machinery or implements used in husbandry. The party pleading exemption from taxation has imposed upon him the burden of clearly showing his title to the immunity claimed, and, if his right may be fairly said to remain in doubt, the claim must be denied. We are of opinion that factories for the manufacture of ice are not entitled to the exemption provided by the statute. Affirmed.

(69 Miss. 491)

STATE v. HEMINGWAY *et al.*

(*Supreme Court of Mississippi.* Nov. 30, 1891.)

PRINCIPAL AND SURETY—MORTGAGE TO INDEMNIFY SURETY—VALIDITY—EQUITY—DISMISSAL OF BILL.

1. A deed by a defaulting state treasurer of all his property, in trust to indemnify the sureties on his bond, is valid, and takes precedence of any lien the state may subsequently acquire by judgment against him.

2. Such a deed is not objectionable, because it is to indemnify the sureties on different bonds given by the grantor for several terms during which he held office, and is subject to the subsequent ascertainment as to during which term the default occurred, and which set of sureties is liable.

3. Nor is such deed rendered invalid by the failure of the trustee to take possession and control of the property immediately after its execution.

4. Where a suit in equity has reached a stage where defendants are interested in having a decree previously rendered maintained, and other matters settled, in order that justice may be done between them, and a further decree is necessary, complainant cannot dismiss the bill without their consent.

Cross-appeals from chancery court, Hinds county; H. C. CONN, Chancellor.

Bill by the state against W. L. Hemingway and others. Hemingway was state treasurer, and when his term of office expired he failed to turn over to his successor certain moneys belonging to the state which were reported by him to be in his hands. Pending the investigation of the treasury books to ascertain the amount of the default, he executed a deed of all his property to a trustee for the benefit of the sureties on his several official bonds, he having occupied the office of treasurer for several terms, and it then being unknown when the default occurred, or which bond was bound. The deed provided that the property should be sold, and the proceeds used, for the benefit of those

sureties who should have to answer the demand of the state, should any default be finally ascertained. The bill was filed by the state to cancel the deed, and to subject the property conveyed thereby to the claim of the state against Hemingway, leaving the state afterwards to go against his sureties for any balance. The defendants answered, claiming the right of Hemingway to indemnify his sureties. There was a decree upholding the conveyance, and dismissing the bill, except in so far as to require that the trustee should pay over all money in his hands, and to come into his hands, in liquidation, *pro tanto*, of the judgment against the sureties. The state appealed generally, and the defendants appealed because the bill was dismissed over their objection. Affirmed on the state's appeal, and reversed on the appeal of defendants.

T. M. Miller, Atty. Gen., for the State. *Nugent & McWillie*, *W. P. Harris*, *J. B. Harris*, and *Calhoon & Green*, for defendants.

CAMPBELL, C. J. An unbroken line of adjudged cases and text-books sustains the proposition that a mortgage for indemnity of sureties is valid,—the liability of the surety being a sufficient consideration for such a mortgage,—and such a conveyance will be held to have precedence of any subsequent lien on the property incumbered. This is the undoubted rule as between individuals, and we are not aware of any distinction between the rights of parties to obligations to the state and others, and fail to perceive why a principal debtor to the state may not indemnify the sureties on his bond to the state, in the same manner as if the obligation was to an individual. Indeed, there is greater reason for sustaining an indemnity by a principal of his sureties as against the state than in case of private persons, for the state takes no account of the property of its official. That is not looked to by the state. It makes no distinction between a millionaire and a pauper in this matter. The same bond is required of all incumbents alike, without regard to what they may possess, or what may be their character or habits. The prescribed bond is the security the state exacts in all cases alike. Individuals in their dealings may be largely influenced by the solvency and wealth of a principal debtor, and his character and business capacity and habits, and may be less exacting as to the sureties required because of the large property of the principal. Not so with the state, as already stated. If, then, it is the unquestioned right of the sureties of a principal debtor to a private creditor to receive indemnity, *a fortiori* should the right of sureties of a public debtor to have indemnity be recognized and upheld. The state did not look to the individual means of its officer in approving the bond he gave for each term as the condition of being qualified for the office, but the persons who became his sureties on the bonds may have been largely influenced to become such because of his possessions and prospects. Therefore there was nothing in the situation to preclude the valid execution by Hemingway of a conveyance of his effects for the indemnity of the sureties on his several official bonds. Nor do we think the conveyance he made was subject to legal exception because of the contingency expressed in it on which it was to be made available to the payment of ascertained liability in exoneration of the sureties. It is true that, being for the indemnity of sureties on several bonds, it necessarily contemplated ascertainment of liability or nonliability as to each of the bonds before it could be known how to apply the property conveyed; but there is nothing in that to condemn the conveyance. The mere fact that delay may occur in settlement of rights growing out of a conveyance of property as security is not a valid objection to it. The delay here contemplated is only that incident to legal proceedings necessary to adjust the rights of the several beneficiaries of the conveyance. The state has no right to complain of this delay as an objection to the conveyance by Hemingway, for, as we have seen, its security prescribed by itself was the bond; and the conveyance for indemnity, being valid, created a lien entitled to precedence over any lien the state could acquire by judgment against Hemingway; and besides, the conveyance, being for the payment of his liability to the state, in exoneration of his sureties, was enforceable by the state for that purpose, and has actually been so enforced by the decree made. On all of which grounds we conclude that the conveyance was not involved. Nor do we find any ground to condemn it upon the facts attending and following its execution, all of which are explained in such manner as to uphold the conveyance. It is not an assignment, and subject to the strict rules in such cases, but a mortgage enforceable on a contingency consisting of future developments; and the failure of the trustee to take complete and exclusive possession and control of the property immediately after the conveyance, and the dealing with the property for some months after, are not sufficient to cause it to be declared fraudulent in fact. We concur with the chancellor in upholding the conveyance.

It was error to allow the dismissal, against the objection of the defendants, of the bill, in the several matters wherein it was dismissed. The cause had reached a stage where it was too late to dismiss without the consent of the defendants. The bill sought to have the conveyance declared invalid on several views of it, or, if held valid, to enforce it directly in favor of the state, and to take possession of the property conveyed by it, and administer the trust if valid, and, if invalid, to apply the property to satisfy a decree against Hemingway, and to compel an accounting with all the sureties on the two bonds, so as to fix liability where it might belong, and relieve the state from uncertainty as to this, and also to vacate some conveyances of land embraced in Hemingway's conveyance which he and Waite had made since it was made. Testimony had been taken in the cause, and a stipulation had been entered

into between the solicitors on both sides as to certain matters of fact to be considered as proved, and certain letters and official reports were agreed to be received in evidence. Much of this agreed testimony relates to the inquiry on which bond liability is chargeable. The case had been heard by the chancellor, who, on the 14th March, 1891, made a decree adjudicating that the conveyance is valid and enforceable in behalf of the state, but primarily for the exoneration of the sureties on the two bonds; that Hemingway was entitled to homestead exemption; and that sale should be made of the property embraced in the conveyance on certain terms, (included in which was the consent of the attorney general,) and the net proceeds should be paid into the state treasury, with certain other matters relating to the administration of the trust property not necessary to be mentioned. The attack made by the bill on the conveyance had failed. Its prayer to enforce the conveyance as a security for the state was granted. The question, where the liability as between the two sets of sureties should fall, was left open, with a reservation to the court of the right to do justice between them by final apportionment of the proceeds of the trust property according to their rights, upon adjustment of the respective liabilities. The decree made March 14, 1891, was based on, and could be justified only on the assumption of, a final decree ascertaining where, among the sureties, liability is. The requisite parties were before the court; the trust property was in its possession; a decree had been made adjudicating the chief matter of controversy, and directing payment of money into the state treasury; testimony by depositions and agreements had been taken and filed; the cause had been set for final hearing, after the expiration of time allowed for taking testimony; and it was too late to dismiss the parts of the bill proposed and allowed. The defendants had acquired rights by what had occurred which entitled them to object successfully at that stage of the suit to a dismissal.

The decree already made in the cause required as its complement a further decree on the very matters as to which the bill was dismissed, without which that decree could not stand. It had been made, and the defendants were interested in its maintenance. In such a condition of things it is not allowable for the complainant to dismiss against the objection of the other parties. The cases to this effect are numerous. Seymour v. Jerome, Walk. Ch. 356; Watt v. Crawford, 11 Paige, 470; Cozzens v. Sisson, 5 R. I. 489; Bank v. Rose, 1 Rich. Eq. 292; Chicago & A. R. Co. v. Union Rolling-Mill Co., 109 U. S. 702,[1] which last case contains an extensive review of authorities on the subject, English and American. All seem to agree that, in the stage of this case at which it was when the dismissal occurred, it was not allowable to dismiss, without the consent of all concerned. After laborious investigation and protracted consideration we have reached the conclusion that the dismissal of the bill should not have been allowed; and we affirm the decree on the appeal of the state, but on the cross-appeal the decree dismissing parts of the bill is reversed, and the cause remanded for further proceedings in the chancery court in accordance with the views expressed in this opinion.

[1] 3 Sup. Ct. Rep. 594.

GEORGIA PAC. RY. CO. v. BRADFIELD.

(*Supreme Court of Mississippi.* Jan. 11, 1892.)

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

A brakeman on a railroad construction train, who, in spite of the warning of a fellow-servant, attempts to replace on a moving flat-car cross-ties which have become displaced so as to project over the end of the car, and is knocked from the car and killed, is guilty of such negligence as will prevent a recovery from the railroad company for his death.

Appeal from circuit court, Lowndes county; L. E. HOUSTON, Judge.

Action by M. A. Bradfield against the Georgia Pacific Railway Company for the death of her husband. Deceased was a brakeman on a construction train of defendant. Some of the flat-cars were loaded with cross-ties, and some of them had become displaced, so that their ends jutted over and beyond the end of the car on which they were placed. Deceased, though cautioned as to the danger by a fellow-employe, attempted, while the train was in motion, to adjust the cross-ties, and in so doing was knocked from the train and killed. Defendant asked an instruction peremptorily charging the jury to find for it, which was refused, and there was a verdict for $10,000 for plaintiff, and a judgment thereon. Defendant appeals. Reversed.

Fox & Roane, for appellant. *S. M. & W. C. Meek*, for appellee.

COOPER, J. The unfortunate man, for whose death damages are sought by this suit, was the victim of his own rashness and negligence. Familiarity with the dangerous character of his vocation had begotten contempt of its perils, and, in disregard of the circumstances, which a man of the slightest prudence should have heeded, he voluntarily engaged in an effort to adjust the deranged ties on a flat-car, and to so place himself in a situation from which escape in safety would have been almost miraculous. The facts are undisputed, and from them no other conclusion can be drawn but that the deceased palpably contributed to his death. The peremptory instruction asked by the defendant should have been given. Reversed and remanded.

(69 Miss. 215)

KIRK v. STATE.

(*Supreme Court of Mississippi.* Jan. 18, 1892.)

GAMING—SELLING TICKETS FOR RAFFLE.

Under Code, § 2851, declaring any person guilty of gaming, and liable to indictment, who, "in order to raise money for himself or another, shall publicly or privately put up a lottery, to be drawn or adventured for, or any prize or thing to be raffled or played for," or who "shall sell, or expose for sale, any lottery ticket," an indict-

ment will not lie against one who sells, or offers for sale, a chance in a "raffle."

Appeal from circuit court, De Soto county; JAMES T. FANT, Judge.

Indictment against Charles T. Kirk for playing at, betting upon, encouraging, and promoting a raffle for money. From a judgment of conviction, defendant appeals. Reversed.

Morgan & Buchanan, for appellant. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. By section 2851 of the Code it is declared that "if any person, in order to raise money for himself or another, shall publicly or privately put up a lottery, to be drawn or adventured for, or any prize or thing to be raffled or played for, or if any person shall sell, or expose for sale, any lottery ticket, such person shall be guilty of gaming, and on conviction," etc. The indictment charges that the defendant did "play at and bet upon, encourage and promote, a certain game of chance, called 'raffle,' for money," etc. The proof was that the defendant offered for sale in Mississippi a chance in a raffle to be played in the state of Tennessee, and sold one such chance. It is not made unlawful to encourage or promote "raffling," nor to sell a chance in a raffle. The statute condemns him who puts up, for himself or another, property to be raffled for; but no penalty is declared against him who sells chances in a "raffle." It is otherwise as to lottery tickets, for the statute expressly so declares. Judgment reversed.

GOODBAR *et al.* v. TATUM.

(*Supreme Court of Mississippi.* Jan. 25, 1892.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—PARTNERSHIP.

1. On a contest, as to the right to partnership property, between the assignee for the benefit of the creditors of the firm and subsequent attaching creditors, the assignee testified explicitly that all the property mentioned in the deed of assignment was delivered to him by the firm when they delivered the deed. One of the partners testified that, so far as he knew, all the partnership assets had been applied to the payment of the debts; but he also testified, when asked if he got any money from the firm for himself, that he may have got as must as $20 or $25. *Held*, that the evidence failed to show with sufficient certainty that the $20 or $25 was part of the assigned estate, and the assignment should be upheld.

2. In such contest, the assignment having been of partnership effects only, any question as to the good faith of one of the partners in dealing with his individual lands is immaterial, as he was not bound to assign his individual estate.

Appeal from circuit court, Grenada county; R. W. WILLIAMSON, Judge.

Powell & Son made an assignment, preferring certain creditors, and the assigned property was turned over to the assignee, S. T. Tatum. Goodbar & Co. and other creditors, who were not preferred, sued out an attachment against the property. The assignee interposed a claim under the deed of assignment, and a trial of the claimant's issue resulted in a verdict and judgment in his favor. The attaching creditors appeal. Affirmed.

Slack & Doty and *Nugent & McWillie*, for appellants. *William C. McLean*, for appellee.

WOODS, J. The testimony of Tatum, assignee, is explicit to the point of the delivery of all the property embraced in the deed of assignment by the assignors. The evidence of Tatum is unqualified on this particular matter. In reply to counsel for appellants, Tatum declares that all the goods and property mentioned in the deed of assignment were delivered to him by the assignors when they delivered him the deed. W. H. Powell, one of the assignors, was asked, "Has the firm of W. H. Powell & Son applied all their assets, as far as you know, to the payment of their debts?" and to this he replied, "Yes, sir; so far as I know." These statements appear to us, and have always appeared to us, to be perfectly maintainable, examination being had of all the other evidence in the transcript, except as affected, or seeming to be affected, or supposed to be affected, by the information found also in W. H. Powell's testimony. We quote from the record: "Question. Did you get any money from W. H. Powell & Son for yourself? Answer. I may have got as much as $20 or $25. I have it yet,—what I have not necessarily spent. I have spent about $6 or $8 of it at the hotel here this week. Q. That was just to live on,—to support yourself? A. Yes, sir; I expected to die, and thought it would bury me, may be." We are of opinion that the evidence, thus taken together, fails to show with certainty that the $20 or $25, referred to in the testimony of W. H. Powell, was part of the assigned estate. We would be constrained to supply a palpable failure in the proofs to declare, as a fair inference from the proved facts, that W. H. Powell took this money either at the time the deed of assignment was made or preparatory thereto. We do not feel authorized to say this is a certain, reasonable inference, deducible from the known facts. The other contentions of appellant are so plainly groundless that we think it unnecessary to enter upon them. It may be said that this was a general assignment of partnership effects only, and that W. H. Powell did not assign, or profess to assign, his individual estate, nor was he bound to do so in making the general assignment of the partnership effects. Any consideration of the good faith of W. H. Powell in dealing with his individual lands would be wide of the mark, in the present controversy. The judgment of the court below must be affirmed.

(69 Miss. 611)

STATE, to Use of BARNETT, v. DALTON *et al.*

(*Supreme Court of Mississippi.* Jan. 25, 1892.)

SHERIFF—NEGLIGENCE—DESTRUCTION OF GOODS BY FIRE—CHALLENGE OF JUROR.

1. The fact that plaintiff in attachment selects a person, and has the sheriff appoint him his deputy to levy the attachment, is not such interference with the sheriff as will release him from liability for the negligence of such deputy resulting in the destruction of the goods by fire after they have been levied on.

2. A sheriff is not liable for the destruction by fire of goods attached by him, and which he allowed to remain for a few days in the store-room wherein they were found, where it does not appear that there was any reason to think the store-house unsafe.

3. Error of the court in allowing defendant a fifth peremptory challenge is not ground for reversing a judgment for him if plaintiff had an impartial jury, as plaintiff has no vested right to any particular juror, but only to an impartial jury.

Appeal from circuit court, Prentiss county; L. E. HOUSTON, Judge.

Action by the state, for the use of J. T. Barnett, against A. J. Dalton and others, the sheriff, and the sureties on his bond, for the loss of goods levied on by the defendant sheriff, and alleged to have been destroyed by fire through his negligence. Barnett sued out an attachment against one Maxwell, who lived and did business away from the county-site; and when the writ was issued he named a person, and requested the sheriff to appoint him to go out and levy the attachment, which request was acceded to. The person appointed proceeded to the store-house of Maxwell, and levied the attachment upon a stock of goods; and, as the goods could not then (Saturday) be sold, they were, at the request of Barnett's agent, left in the house where found, and were burned. The sheriff defended, (1) because the plaintiff interfered by selecting the deputy who levied the writ, and (2) because the goods were as safe where they were left after the levy as they would have been if moved to any other place in the neighborhood. There was judgment for defendants. Plaintiff appeals. Affirmed.

B. A. P. Selman and *J. M. Boone*, for appellant. *Boone & Allen*, for appellees.

WOODS, J. We fail to discover any merit in the position of the appellees as to the supposed interference of the appellant, or his agent or attorney, in the matter of the appointment of the deputy, Kimball, and the consequent release from liability of the sheriff because of the alleged negligence of this deputy. It is not unreasonable intervention for the plaintiff in a suit to express a desire to have some one levy the process, and discharge other duties imposed by law upon the sheriff, who is familiar with and competent for such official work. Not only is this not such intervention in the discharge of the sheriff's duty by a party litigant as will relieve the officer from liability, but it seems only the usual and natural effort of the party litigant to quicken the diligence of the official, and to promote the faithful performance of his duty. It is equally certain, however, that there was not that want of care in the dealings of the sheriff with the goods which will render him and the sureties liable for the loss sustained in the destruction of the store-house and its contents. The reasonable care which was the measure of the officer's duty did not necessarily require the immediate removal of the goods from the house where they were found when levied upon to the county-site or elsewhere; and it is not made clear that the removal to Millicen's store-house would have rendered the goods more secure than in the Maxwell store-house. The plaintiff's agent thought the latter store-house reasonably safe, for the goods were to be left there, without any thought or suggestion of probable loss in so doing, at this agent's request, from Saturday until the Monday or Wednesday following. Millicen, too, said on trial that Maxwell's store-house was as secure as his, in so far as danger of loss from burning went; and, undisputedly, the loss complained of resulted from burning.

The action of the court in permitting to appellees a fifth peremptory challenge was erroneous, but the error is not reversible. The plaintiff, as has long been held in this state, had no vested right in any particular juror. He had a right to an impartial jury, and this right seems to have been enjoyed by him. We decline, moreover, to reverse, because another trial, properly conducted, could only result in a judgment for the appellees on the evidence before us. Affirmed.

(69 Miss. 398)

BROWN v. STATE.

(*Supreme Court of Mississippi.* Feb. 1, 1892.)

CRIMINAL LAW—INTERFERENCE BY BAILIFF WITH JURY.

On a prosecution for murder, after the jury had been considering their verdict, having been instructed that if they should find defendant guilty they might fix his punishment at imprisonment for life instead of capital punishment, the district attorney, without any intention that his remark should be communicated to the jury, stated to the bailiff that, if they would examine the instruction, they would promptly reach a verdict. The bailiff pointed out the instruction to the jury, stating that it was his desire that they should not delay their decision, as he did not wish to wait longer, and they found a verdict of guilty, and fixed defendant's punishment at imprisonment for life. *Held*, that the bailiff's officious interference was ground for reversal.

Appeal from circuit court, Coahoma county; GEORGE WINSTON, Judge.

Indictment against Frank Brown for murder. The case was given to the jury under the evidence and instructions of the court,—one of the instructions for the state being that the jury had the right under the law to fix the punishment of the prisoner at imprisonment for life, if he was found guilty. After the jury had been considering the verdict, the bailiff, whose duty it was to wait on them, was told by the district attorney, in speaking of the failure of the jury to promptly return a verdict of guilty in view of the evidence, that, if the jury would examine the instruction above referred to, it would promptly reach a verdict; but there was no intention on the part of the district attorney that the remark should be communicated to the jury. The bailiff, however, did point out to the jury the instruction referred to, and the jury found defendant guilty, and fixed the punishment at imprisonment for life in the state penitentiary. Judgment was so entered, and defendant appeals. Reversed.

J. W. & W. D. Cutrer, for appellant.

COOPER, J. We are not prepared to affirm that no injury resulted to the appellant from the suggestion of the bailiff

to the jury that his personal desire was that they should not longer delay their decision, as he wished to be relieved of further waiting, and his officious intermeddling by pointing out an instruction (by which the jury were told that it was within their power to find the defendant guilty of murder, and award the punishment of imprisonment for life instead of capital punishment) upon which, in the opinion of the prosecuting attorney, they would agree upon a verdict. It is to be hoped that the zeal of the bailiff was abated by his being retired, under the order of the court, to the common jail, and that in his reflections there it has occurred to him that one on trial for his life has rights which even a bailiff must respect. Judgment reversed.

(69 Miss. 435)

KANSAS CITY, M. & B. R. CO. v. CANTRELL.

(*Supreme Court of Mississippi.* Feb. 1, 1892.)

RAILROAD COMPANIES—KILLING STOCK ON TRACK—EVIDENCE—INSTRUCTIONS.

1. In an action against a railroad company for the killing of plaintiff's mare by one of defendant's trains, defendant's employes testified that the night was dark, that the mare jumped on the track only a short distance in front of the train, and that the collision could not be avoided; while plaintiff's witnesses testified that the night was bright, and that the mare's tracks were found running several hundred yards down the track, until she was overtaken and killed. *Held*, that an instruction to find for defendant was properly refused.

2. In an action against a railroad company for the killing of a mare by one of its trains, where the mare was running at large, an instruction that it was the engineer's duty to ring the bell, and blow the whistle, and reverse the engine, and to do everything in his power, in the ordinary discharge of his duty, to save the animal's life, is erroneous, as, in the case of animals running at large, the railroad company is not bound to exercise the utmost care in running its trains, but only such reasonable care as a prudent man, engaged in the same business, would use to prevent injury to or destruction of animals.

Appeal from circuit court, Monroe county; G. J. LEFTWICH, Special Judge.

Action by A. C. Cantrell against the Kansas City, Memphis & Birmingham Railroad Company to recover damages for the killing of a mare by one of defendant's trains. Defendant's employes testified that the night was dark, that the mare jumped on the track only a short distance in front of the train, and that the collision could not be avoided; while plaintiff's witnesses testified that the night was bright, and that the mare's tracks were found on the road-bed running several hundred yards down the track, and until the mare was overtaken by the train and killed. There was a verdict and judgment for plaintiff, and defendant appeals. Reversed.

J. W. Buchanan, for appellant. *Clifton & Eckford*, for appellee.

WOODS, J. The judgment must be reversed because the instructions, especially 2 and 3, given for the plaintiff below, held the defendant corporation and its servants to a higher degree of accountability than is required by law. If the first instruction was designed to inform the jury that the use of air-brakes, or the employment of a large corps of brakemen on the freight train in question, would have averted the killing of the mare, perhaps, and that the failure of the defendant to provide air-brakes or a larger corps of brakemen was a failure to do all in the power of the defendant, in the ordinary discharge of its duty, to avert the killing, then it was clearly erroneous. Its language is not free from ambiguity, and, in view of the evidence offered as to the non-use of air-brakes and of numerous brakemen on the train, the jury may have been misled. The second instruction declares that it was the duty of the engineer to ring the bell, and blow the whistle, and reverse the engine, and to do everything in his power, in the ordinary and diligent discharge of his duty, to save the life of the animal. This does not state the correct measure of defendant's accountability in cases where recoveries are sought for injuries done to animals running at large. The rule of diligence for fixing responsibility is said in Railroad Co. v. Miller, 40 Miss. 45, to impose upon the railroad the exercise, not of the utmost care, in such cases as we are considering, but only such reasonable care, in running its trains, as a prudent man, engaged in the same business, would use to prevent injury to or destruction of animals. To ring a bell, or blow a whistle, or reverse an engine, or to do any other particular act, may not be required of the railroad company in every case, and under all circumstances. The ringing of the bell, in one case, may afford timely warning, and, in another case, it may be an idle, or even mischievous, employment; and this is equally true when applied to the other acts referred to in the instructions, the failure to do which by the defendant is supposed in the instruction to be negligence. The court properly refused the peremptory instruction prayed by defendant. There were sharp, and not immaterial, conflicts in the evidence, and the issue was rightfully held by the court as belonging to the domain of a jury's determination. Reversed and remanded.

(69 Miss. 393)

NEWMAN *et al.* v. STATE.

(*Supreme Court of Mississippi.* Feb. 1, 1892.)

INCEST—UNLAWFUL COHABITATION—INDICTMENT.

1. An indictment alleging that defendants, being uncle and niece, "did cohabit together, and were guilty of adultery and fornication, he, the said N., being a married man, and she, the said H., being an unmarried woman," is not good as an indictment for incest, under Code, § 2701, because incest is a felony, and it is not alleged that the act was feloniously done.

2. Nor is the indictment good as an indictment for unlawful cohabitation, under Code, § 2700, since it does not aver that there was habitual sexual intercourse, which is the gist of the offense.

Appeal from circuit court, Panola county; JAMES T. FANT, Judge.

Indictment against Josh Newman and Helen Newman, charging that, being uncle and niece, defendants "did cohabit together, and were guilty of adultery and fornication, he, the said Josh Newman, being a married man, and she, the said

Helen Newman, being an unmarried woman," etc. Defendants were convicted of unlawful cohabitation, and appeal. Reversed.

Ira D. Oglesby, for appellants. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. The motion in arrest of judgment should have been sustained. The indictment charges no offense. It is not good as an indictment for incest, under section 2701 of the Code, for the reason that incest is a felony, and the indictment fails to aver that the criminal act was feloniously done. Bowler v. State, 41 Miss. 570. It does not charge the offense of unlawful cohabitation, under section 2700 of the Code, for it fails to aver that the parties were guilty of habitual sexual intercourse, and that is the gist of the offense. Carotti v. State, 42 Miss. 334; Kinard v. State, 57 Miss. 132; Granberry v. State, 61 Miss. 440. The judgment is reversed, judgment on the verdict arrested, and the defendants directed to be held to answer such indictment as may be preferred against them.

(69 Miss. 403)

McIVER v. CLARKE.

(*Supreme Court of Mississippi.* Feb. 1, 1892.)

ATTORNEY AND CLIENT—CONTRACTS—FAILURE TO PAY LICENSE—EQUITY.

1. Where only one member of a firm of attorneys has paid his privilege tax, prescribed by Code, § 589, imposing a license tax on each person (not each firm) practicing law, and declaring that all contracts made with any person who shall violate the act, in reference to the business carried on in disregard of the law, shall be null and void, an entire, joint, and several contract made with the firm for their services is void, though the other member may have paid his license; and a claim thereunder cannot be enforced by an assignee of the firm.

2. Where such an assignee files a bill in equity to enforce the claim, tendering with her bill the difference between the claim and the amount of a loan due from her to the person from whom the claim is alleged to be due, and asking that defendant be compelled to surrender notes deposited with her as collateral for the repayment of the loan, the fact that defendant answers, setting up the invalidity of the contract on which the claim is based, and makes her answer a cross-bill asking to enforce payment of the collateral, does not entitle complainant to a decree on the ground that defendant, to entitle her to the affirmative relief prayed, must do equity by paying what is due from her under the condemned contract, since defendant is not voluntarily in court, and merely sets up the defense that the contract was void, which, if held, would leave her free to enforce payment of the collateral.

Appeal from chancery court, Lee county; NEWNAN CAYCE, Special Chancellor.

Bill by Mrs. M. E. Clarke against Mrs. Alice McIver. Complainant borrowed money from defendant, giving as security therefor notes of a debtor to her, which were secured by a lien on land they were given to purchase. Defendant had, prior to her loan to complainant, employed the firm of Lacey & Clarke as her attorneys in a suit against a savings institution, which had become involved, and this firm of attorneys held a claim against her for services in said suit, and this claim they transferred to complainant. Mr. Lacey, one of the attorneys of the firm, had not paid his privilege tax at the time the contract for their services was made, or when the services were performed. The bill was to compel defendant to surrender the notes she held as collateral, and complainant tendered with her bill the difference between the claim transferred to her by Lacey & Clarke, and the note due by her to defendant. Defendant answered, making her answer a cross-bill, setting up the fact that one of the attorneys had not paid his privilege tax, and that neither he, the firm, nor any one claiming under them, could enforce any contract made while under disability through this failure to pay the privilege tax, and praying an enforcement of the lien given to secure the notes held by her as collateral. There was a decree for complainant. Defendant appeals. Reversed.

Houston & Reynolds, *Houston & Woods*, and *T. J. Buchanan, Jr.*, for appellant. *Clarke & Clarke* and *Calhoon & Green*, for appellee.

WOODS, J. The contract sued on is an entire one. It secures upon the one side the services of Messrs. Lacey & Clarke, as attorneys, in the suit of appellant against the Okolona Savings Institution; and upon the other side it secures from Mrs. McIver the lowest fee chargeable for such professional services under the fee-bill of the Okolona bar. The services were to cover the entire litigation, and were to be paid for by such lowest fee. Not each step taken, or each labor performed, in the progress of the cause, was to be paid for, but the litigation in its entirety was to be conducted by the attorneys, and paid for by the client. The contract was joint with the attorneys, and their right of action thereon is a joint right. The license tax was payable by each member of the law firm. It is imposed by section 589 on each person practicing law, and not upon each firm practicing law, and so must be paid by each person, whether practicing alone or in connection with one or more others as a firm. By this section, too, it is declared that "all contracts made with any person who shall violate this act, in reference to the business carried on in disregard of this law, shall be null and void." And by the same section a penalty is denounced against any person who shall exercise any of the privileges enumerated in the act without first paying the price and procuring the license required. The business of practicing law in violation of the act is as clearly made unlawful as the business of carrying on a mercantile venture, the keeping of a restaurant, or any oher business for the lawful conduct of which prepayment of a privilege license tax is required. In the case of the delinquent lawyer, just as in the case of the delinquent merchant, there is found legal incapacity to enforce any contracts made in the prosecution of the business, and the infliction of a penalty upon the delinquent. This legal incapacity to reap, in part at least, the fruits of the venture, whether in mercantile or legal life, coupled with punishment for carrying on

the business in violation of law, must be held to stamp the business, no matter what its nature, as unlawful. The law does not absolutely prohibit the prosecution of the business, but it will not lend its assistance to help the contemner of its requirements in his efforts to reap the fruits of his labors. It simply leaves him where his unlawful conduct has placed him. It leaves him where it found him.

The supposed difficulty in the case before us arises out of the fact that Clarke, one of the law firm in question, is shown to have paid the privilege license required, and the assumption that this payment by one member of the firm will operate to relieve Clarke & Lacey, either wholly or partially, of the incapacity which is imposed upon one member of the firm as a person. The difficulty, however, is not real. The firm was an entity, engaged in the practice of law. The contract which gives rise to the question we are considering was a single, entire one. The right of action under that contract is joint as to Lacey & Clarke. The business, as to Lacey, was clearly unlawful. His capacity to successfully contract in the business in which his firm was engaged was "infected with fatal infirmity;" and this fatal infirmity, inhering in one of the essential parts of the single entity,—the law firm of Lacey & Clarke,—extends to and incapacitates the entire entity. Any other view would unmistakably frustrate the plain intent of the statute, and this view is the logical outcome of what we have held in Carter v. State, 60 Miss. 456; Harness v. Williams, 64 Miss. 600, 1 South. Rep. 759; and Pollard v. Insurance Co., 63 Miss. 244.

It is said by counsel, however, that, even if the contract of Lacey & Clarke with appellant be non-enforceable by the appellee, still the appellant properly lost below, and must lose here, because she is seeking affirmative relief by her cross-bill against the appellee, and has not offered to do equity by paying what is due from her under the condemned contract. The reply is that appellant is not voluntarily in court at all. She was brought in at the instance of appellee in an effort, in part, to enforce collection of the sum supposed to be due under the infected contract; and, defensively, to meet this attempt, she shows the insuperable barrier to a successful recovery on Lacey & Clarke's claim against herself. True, appellant asked leave to set up this defense by an amendment to her answer and cross-bill, but it is clearly by way of answer, as showing the incurable infirmity in the claim. The effect of this defensive matter, if successfully pleaded and supported, will be to disentangle appellant herself from the demand of Lacey & Clarke's assignee, and to leave herself free to collect the balance due her by appellee by enforcing against Siddall payment of the purchase-money notes then held by her as security for payment of Mrs. Clarke's note to appellant, and this, in fact, is just what appellant sought to do,—to have affirmative relief by enforcing the vendor's lien against Siddall. The contract of Lacey & Clarke with Mrs. McIver is not enforceable, and the defense attempted to be set up by appellant in the court below was properly pleaded, and should have prevailed for her protection. Reversed and remanded.

(69 Miss. 475)

JAMISON v. MOSELEY.

(*Supreme Court of Mississippi.* Feb. 15, 1892.)

ASSAULT AND BATTERY—JUSTIFICATION—BURDEN OF PROOF—INSTRUCTIONS.

1. In an action for damages for assault by shooting, though, where defendant admits the shooting, the burden is on him to prove justification, yet plaintiff cannot invoke the aid of this principle in making out his case, and cannot, after proving the admission, delay introducing his evidence, to show the circumstances of the shooting, until after defendant has introduced his evidence in justification, and then bring in his evidence in rebuttal, but must disclose his entire case by evidence in chief.

2. In an action for assault by shooting, plaintiff introduced evidence that, while he and defendant were engaged in an altercation, the latter made a movement as if to draw a weapon, whereupon he (plaintiff) made an effort to defend himself by drawing his pistol, and that defendant then shot him. Defendant introduced evidence that the movement made by him merely consisted of his moving his hand from the top of his cane, and placing it on his lap, without any intention to draw a weapon or assault plaintiff, and that plaintiff immediately began to draw a pistol; whereupon defendant drew his own, and fired simultaneously with or a little after plaintiff. *Held*, that an instruction that if the jury believed that defendant made a movement as if to draw a pistol, apparently aggressive, and then plaintiff made an effort to defend himself, and thereupon was shot by defendant, they should find for plaintiff, was erroneous, as it justified plaintiff in acting on appearances, and denied defendant the right to act upon the facts as he claimed they existed; whereas, if plaintiff misinterpreted defendant's movement and drew his pistol, defendant was justified in drawing his, and shooting in self-defense.

Appeal from circuit court, Clay county; C. H. CAMPBELL, Judge.

Action by E. A. Moseley against A. J. Jamison for assault and battery. Judgment for plaintiff. Defendant appeals. Reversed.

Fox & Roane, for appellant. *Beall & Pope* and *W. T. Houston*, for appellee.

COOPER, J. This is an action by appellee to recover damages from appellant for an assault and battery by shooting. The plaintiff proved by a witness (Mrs. Smith) that defendant, on the day of the shooting, stated to her that he had shot the plaintiff. He then proved by his physician the character of the wound received, the length of time plaintiff was confined to his bed, and the probable future result of the wound. Other witnesses were then introduced to prove the extent of damages inflicted, and the plaintiff then rested. The defendant then introduced certain eye-witnesses of the difficulty, whose testimony tended to show that the plaintiff was the aggressor in the difficulty, and that the defendant justifiably shot him. The plaintiff then introduced other witnesses, whose testimony tended to prove that the defendant provoked the difficulty, and that the plaintiff, having reasonable ground to apprehend an attack, prepared to defend himself, and was thereupon fired upon and wounded by the defendant. While the evidence introduced by the re-

spective parties was generally favorable to the party by whom offered, some parts of the defendant's evidence was in some respects favorable to the plaintiff, and some parts of that for the plaintiff tended to support the defendant's defense of justification. It is sufficient to say that the evidence upon the developed case was conflicting, and that a verdict for either party, upon proper instructions, would be sustained. The court gave many instructions, both for the plaintiff and the defendant. Among those given for the plaintiff, the 4th, 10th, and 13th are assigned for error. They are as follows: "(4) The court instructs the jury, for the plaintiff, that, as the defendant has admitted that he shot Moseley, the burden of proof is on the defendant, and, unless the defendant has proven by a preponderance of evidence, so as to satisfy the jury, a full legal justification for the shooting of Moseley, the jury will find for the plaintiff." "(10) The court charges the jury that if they believe from the evidence that, while the plaintiff was in the discharge of his duties as an attorney, the defendant used language to the plaintiff that was irritating, and thereupon the plaintiff retorted in like language, and then the defendant demanded to know to whom plaintiff referred, making a movement at the time as if to draw a pistol, apparently aggressive, and then plaintiff made an effort to defend himself, and thereupon was shot and wounded by the defendant, they will find for the plaintiff, and will give him such damages," etc. "(13) The court instructs the jury for the plaintiff that if they believe from the evidence that the plaintiff has shown that he was shot and wounded by the defendant, as alleged in plaintiff's declaration, and that the plaintiff's evidence showing such assault and battery failed to show any excuse, justification, or mitigation of such assault and battery, and that plaintiff further showed in evidence that he suffered actual damages in loss of time and money expended, amounting to $259, and other actual damages, consisting of mental and physical suffering, then the jury will find for the plaintiff the amount of such actual damages, so shown in evidence, including what they may deem adequate compensation for mental and physical suffering, unless they believe from the evidence that the defendant is proven, by a preponderance of the evidence, to their satisfaction, to have been justified in so shooting and wounding plaintiff; and if said evidence, so introduced after plaintiff had established his right to recover, leaves the matter in doubt as to whether the defendant was justified or not, then the jury must, under their oaths, find for plaintiff," etc.

It is proper to state, before considering these instructions, that by our statute (Code, § 1549) the defendant, in an action for assault and battery, under the plea of "not guilty," may give in evidence any mitigating circumstance to reduce the damages, notwithstanding he may also have pleaded a justification. The rule announced by the fourth and thirteenth instructions for the plaintiff, which is, in effect, that a defendant in an action for assault and battery, who seeks to justify the battery, has the burden of proof upon that issue, is correct; but as stated in these instructions, and under the peculiar development of the case by the plaintiff, it should not have been given to the jury, or, if given, the jury should have been advised of the circumstances of its application. A plaintiff may not invoke the principle as an aid to him in making out his case, and more especially may he not, by withholding his evidence which should be put in in chief, and developing it as rebutting the defendant's case, gain an advantage by indirection to which he would not be entitled if he had proceeded in the ordinary method of disclosing his case.

There were many witnesses of the difficulty, several of whom were in attendance at the trial in the plaintiff's behalf. Instead of disclosing the circumstances of the rencounter by the testimony of his witnesses, the plaintiff resorted to proof of an admission made by the defendant to one who was not present that he had shot the plaintiff, and having then proved his damages rested his case; thus forcing the defendant to first disclose the circumstances of the shooting, and holding his own evidence in reserve, to be used to rebut the defense rather than to establish his own case. The manifest purpose of this course of procedure was to wrench the rule of law that one who relies upon an affirmative defense must establish it, to the prejudice of the defendant, and to gain an undue advantage by refusing to fully develop his own case. In the administration of justice there are many arbitrary and abstract rules and principles which experience has shown to be essential. But the end and purpose of all of them is that justice in the concrete case shall be reached, and it is not permissible to evade or misapply them. The burden of proof on the whole case was upon the plaintiff, and if, in making out the whole case, the plaintiff's evidence showed, or tended to show, that the shooting by the defendant was lawful under the circumstances, the defendant was entitled to the benefit of such evidence. The presumption of law is that a battery is malicious or unlawful; but, when the facts are fully disclosed, there is no longer room for presumption, and if, on all the facts, the jury is unable to say that the battery was unlawful, the plaintiff must fail of recovery.

The tenth instruction is erroneous, for the reason that it permits a recovery by the plaintiff if he misinterpreted the purpose of the defendant in "making a movement at the time as if to draw a pistol, apparently aggressive," and thereupon made an effort to defend himself, (by drawing his own pistol,) and was then shot by the defendant. The defendant contended, and introduced evidence to show, that the movement to which this instruction refers was the innocent one of taking his hand from the top of his cane, and placing it upon his lap, (he then being seated,) without any intention to draw a weapon or to assault the plaintiff, who immediately began to draw his

pistol; whereupon he (the defendant) drew his own, and fired simultaneously with or a little after the plaintiff. Under the instruction as given, the plaintiff was justified in acting upon appearances, while the defendant was denied the right to act upon the facts as he contends they existed. If the parties used irritating language towards each other, and the defendant made "a movement at the time as if to draw a pistol apparently aggressive," but in fact was not intending either to draw a weapon or to assault the plaintiff, and the plaintiff, misinterpreting the defendant's act, thought it necessary to defend himself by shooting the defendant, we are not aware of any principle of law under which the defendant was precluded from anticipating the imminent and impending attack, so long as in so doing he acted only in necessary self-defense. Under the tenth instruction, this right was distinctly denied him. Reversed and remanded.

(29 Fla. 289)

MCDERMOTT v. THOMPSON.

(*Supreme Court of Florida.* Jan. 27, 1892.)

MINORS—HOW MADE PARTIES IN EQUITY—PLEADING BY STRANGER.

1. Where minors are to be made parties defendant in a suit in equity, subpœna should be issued to such minors, and regularly served upon them in the presence of their legal guardian, or in the presence of the person who has the present care and custody of them. Then a guardian *ad litem* for such minors should be appointed by an order of the court, and such guardian *ad litem* should also be served with subpœna in the cause.

2. Where a stranger to the cause interposes any pleading in an equity suit for and on behalf of minors interested in the issues thereof, as their guardian *ad litem*, and the record fails to show that such party has ever been appointed or authorized by the court to act in said cause as such guardian *ad litem*, all the pleadings so interposed by such stranger are nugatory, and do not bind such minors; and all orders and proceedings in said cause predicated upon such pleading will be set aside as void.

(*Syllabus by the Court.*)

Appeal from circuit court, Monroe county; HENRY L. MITCHELL, Judge.

Bill by John L. McDermott against John E. Thompson, executor of Olivia Gibbons, deceased, and George Edward Gibbons and Thomas Eugene Gibbons, minors, to set aside the will of deceased, and for an accounting by the executor. From an order dismissing the bill on a demurrer interposed by G. Bowne Patterson as guardian *ad litem* of the minors, complainant appeals. Reversed.

John A. Henderson, for appellant.

TAYLOR, J. On the 20th day of January, 1882, John L. McDermott filed his bill in equity in the circuit court of Monroe county, sixth judicial circuit, against John E. Thompson, as executor of the will of Olivia Gibbons, deceased, and against George Edward and Thomas Eugene Gibbons, minor children of Olivia Gibbons, deceased, praying that the last will of Olivia McDermott, who was formerly, before her marriage with McDermott, called Olivia Gibbons, made before her marriage with McDermott, be set aside as illegal and void, and for an accounting by John E. Thompson as the executor of such will, etc.

John E. Thompson, as executor, answered. Testimony was taken, and the cause submitted to the chancellor, and a final decree therein was rendered in the court below on the 24th of April, 1882, setting aside the will, and declaring it to have been revoked because of the fact that it was made by the testatrix prior to her second marriage, devising all of her property to children by a former marriage, and having had issue of a son by her second marriage with McDermott, who was not provided for by said will. From this decree the cause was appealed to this court, and this court at the January term, 1883, rendered a decision therein (19 Fla. 852) reversing the decree of the court below because of the failure to make the minor children of Olivia Gibbons by her first marriage parties to the suit by proper service upon them of process in the cause, and because of the want of proper answer for such minors through a guardian *ad litem*. In the former decision of this court in the cause it was distinctly decided that the subpœna in the cause should be served upon the minors in person, and upon a guardian *ad litem* for them appointed by the court, and that the service on the minors should be in the presence of their legal guardian, if they have one, or in the presence of such person as had for the time being the actual care or custody of such minors. After the decision of this court, subpœna seems to have been issued to such minors, but the return of service thereof is defective, because it does not show the names of the minors upon whom it was served; neither does it show that it was ever served upon any guardian *ad litem* for such minors, appointed by the court. On the 2d day of June, 1883, after the service of subpœna on the minors, of which the imperfect return was made as aforesaid, G. Bowne Patterson, as guardian *ad litem* for the minors George E. and Thomas E. Gibbons, interposed a demurrer to the bill. This demurrer was subsequently, on September 11, 1884, sustained by the court below, and the bill dismissed; and from this order the cause is appealed a second time to this court. How, or by what authority, G. Bowne Patterson got into the case as guardian *ad litem* for these minors, we have been unable to discover from anything in the record. There is no order of court appointing and authorizing him to act in that capacity, and there is no subpœna directed to or served upon him, citing him in that or any other capacity to appear and answer for and on behalf of said minors. We are constrained to conclude from this *status* of the record that the requirements of the former decision and mandate of this court have not been complied with, and that the said minors are not yet properly before the court. With that decision we are fully in accord. It pointed out with sufficient particularity what was necessary to be done in order to get the minors properly before the court: (1) That a guardian *ad litem* should be appointed by the court for such

minors; (2) that such minors should be personally served with subpœna in the presence of their legal guardian, or in the presence of such person who had the care and custody of them; and (3) that such guardian *ad litem* should be served with subpœna in the cause. None of these requisites have been complied with. It follows that all the proceedings and orders had and made in the cause since the former decision of this court in the premises must be set aside and reversed, with directions to supply the omissions in the proceedings therein, and herein pointed out; and it is so ordered.

MALONE, J., of the second circuit, sat in the place of RANEY, C. J., who was disqualified.

(29 Fla. 335)

CONOVER v. RUSS.

(*Supreme Court of Florida.* Jan. 27, 1892.)

EJECTMENT—MAPS AS EVIDENCE.

Where the land in controversy in an ejectment suit is located adjacent to the boundary line between two counties, the location of which boundary line is involved in such doubt, uncertainty, and dispute as to render it seriously doubtful as to which of said two counties said land belongs, and the defendant relies entirely upon a tax-title to the land, acquired in one of such counties, and it appears that the land was assessed and sold for the same year's taxes in both counties, and the plaintiff has redeemed from the sale in one of them, but not from the sale in the county that resulted in defendant's tax-title, the material issue, under these circumstances, that most vitally affects the validity of such tax-title, is the true *locus* of the land. In the trial of this issue the official maps of the county in which the plaintiff claimed the land to be, and from the tax-sale in which he redeemed them, are entirely proper and highly pertinent evidence to throw light upon the leading fact in issue,—the true *locus* of such land; and it is error to exclude such maps from evidence, when they show the land to be part of the county in which the tax redemption has been made.

(*Syllabus by the Court.*)

Appeal from circuit court, Orange county; JOHN D. BROOME, Judge.

Ejectment by Simon B. Conover against John C. Russ. Verdict and judgment for defendant. New trial denied. Plaintiff appeals. Reversed.

Charles Swayne, for appellant. *Mershon & Rogers*, for appellee.

TAYLOR, J. Simon B. Conover, as plaintiff in the court below, on the 20th day of January, A. D. 1886, instituted his action of ejectment in the circuit court of Orange county, in the seventh judicial circuit, against the appellee, John C. Russ, to try the title to, and recover the possession of, the following described lands: Lots 1, 2, 3, and 4 of section 12, township 20 S., of range 26 E. To the declaration the defendant pleaded the general issue. The cause was tried before a jury in Orange county on the 13th of June, 1887, and resulted in a verdict for the defendant, Russ. The plaintiff moved for a new trial upon divers grounds, which being denied, judgment was entered for the defendant, and from this judgment the plaintiff, Conover, appeals to this court. From the conclusions we have reached, after a careful consideration of the case, some discussion of the evidence becomes necessary. The plaintiff, to prove the issues on his behalf, introduced a deed to himself as grantee, made by the board of trustees of the internal improvement fund of Florida, dated the 23d of February, A. D. 1869, in which deed the said lands are described as "lying and being in Sumter county, Fla.," which deed, as appears from the indorsements thereon, was duly recorded in the Sumter county records on the 23d of May, 1871. The plaintiff then offered in evidence a certified transcript from the assessment rolls of Sumter county, showing that the lands in question were assessed for taxes in Sumter county for the years 1878, 1882, 1884, 1885, 1886, and 1887, accompanied by a certified copy of a portion of the map of Sumter county used and recognized by the officials of that county, that included the lands in question, and other adjacent lands along and near the supposed boundary line between the counties of Sumter and Orange, for the purpose of showing that said land lay in Sumter county at that time. This certified transcript of records and map of Sumter county were ruled out by the court, which ruling we think was erroneous. From the further developments at the trial it became evident that the defendant, Russ, claimed the land solely under a tax-deed acquired from the officers of Orange county, in pursuance of an alleged assessment and sale of the land for taxes for the year 1877 in Orange county; and it was further developed that the same land was assessed for taxes for that year (1877) in Sumter county, and sold to the state for such taxes in Sumter county, and that Conover, the plaintiff, redeemed the same from the state, and paid the taxes for the year 1877 that had been assessed thereon in Sumter county. The relative rights of the parties plaintiff and defendant depended then, in great measure, upon the solution of the fact as to whether these lands, in the year 1877, formed a part of the territory of Sumter or that of Orange county. If the land at that time formed a part of the territory of Sumter county, then it follows, as a matter of course, that the assessment and sale thereof for the taxes of that year in Orange county were a nullity, and that Russ acquired no title whatever by his tax-deed made in Orange county. For this reason it became highly important at the trial to establish the fact clearly as to which of the two said counties this land belonged in 1877; and as the land was located quite near to or upon the boundary line between the two, and as the exact location of that boundary line was enveloped in much obscurity, uncertainty, doubt, and dispute, both counties continuing, after the year 1877, to assess this land as part of their respective territory, we think that the maps of Sumter county, offered in evidence by the plaintiff and ruled out by the court, became not only competent, but entirely proper and highly pertinent, evidence in the cause, as throwing light upon the leading fact in issue,—the proper *locus* of the land. Tate v. Gray's Lessee, 1 Swan, 73; Carmichael v. Trustees, 3 How. (Miss.) 84; McClin-

tock v. Rogers, 11 Ill. 279; Steele's Heirs v. Taylor, 3 A. K. Marsh. 225; Bruce v. Taylor, 2 J. J. Marsh. 160; Alexander v. Lively, 5 T. B. Mon. 159; Doe v. Hildreth, 2 Ind. 274; Den v. Van Houten, 22 N. J. Law, 61. We think the ruling of the court excluding these maps of Sumter county was such fatal error, and of such damaging effect upon the plaintiff's rights in the premises, that it is cause for reversal; and, having arrived at this conclusion, we deem it unnecessary to notice any other questions presented.

The order of the court is that the judgment of the court below is reversed, and that a new trial be granted.

MALONE, J., of the second circuit, sat in the place of Mr. Justice MABRY, who was disqualified.

(29 Fla. 233)

CLARK *et al.* v. POPE.

(*Supreme Court of Florida.* Feb. 9, 1892.)

ATTORNEYS' FEES—VERDICT—WEIGHT OF EVIDENCE—OFFER OF SETTLEMENT—EFFECT.

1. Where there is a conflict between the evidence introduced by the plaintiff and that offered by the defendant, the settlement of the question belongs to the province of the jury; and, under a well-settled rule on this subject, the appellate court will not disturb the verdict of the jury.

2. While it is true that a verdict of a jury, unsupported by evidence, or against the evidence, will not be sustained, yet a verdict cannot be set aside on the ground that it is excessive, and not justified by the evidence, where a witness, who is uncontradicted, testifies for plaintiff that the amount due from defendant is larger than the amount of the verdict rendered.

3. An offer of settlement made by plaintiff, but not accepted by defendant, is not binding on either party, and it is incumbent on plaintiff, after such offer, to establish by evidence the amount of his demand against the defendant.

(*Syllabus by the Court.*)

Error to circuit court, Duval county; JAMES M. BAKER, Judge.

Suit by Frank W. Pope against Clark & Loftus to recover for services as an attorney at law. Verdict and judgment for plaintiff. New trial denied. Defendants bring error. Affirmed.

R. B. Archibald, for plaintiffs in error. *John E. Hartridge*, for defendant in error.

MABRY, J. The defendant in error commenced a suit in September, A. D. 1887, in the circuit court for Duval county, against plaintiff in error, to recover the sum of $1,005, alleged to be due for services rendered as an attorney at law. The material averments of the declaration are as follows: "For that the said defendants are indebted to plaintiff in the sum of one thousand and five dollars, for money payable by defendants to plaintiff, for legal services as an attorney at law, done and rendered by plaintiff for defendants at their request."

"And in a like sum for work done in and material provided by plaintiff for defendants, at their request."

"And in like sum for money received by defendants for the use of the plaintiffs."

"And in like sum for money found to be due from defendants to plaintiff on an account stated between them." And in consideration of the premises said defendants promised to pay said several sums of money to the plaintiff on request, yet they have disregarded their said promises, and have not paid the same or any part thereof, to plaintiff's damage $1,300. A bill of particulars for $1,005 is attached to the declaration. To all the counts of the declaration defendants pleaded that they "never were indebted as alleged," and issue was joined thereon. The cause was tried in said court in May, A. D. 1888, and a verdict for $780 rendered in favor of plaintiff. Defendants below made a motion for a new trial, assigning three grounds, viz.: *First*, the "verdict had no basis in the evidence to rest upon, and was contrary thereto;" *second*, said "verdict was contrary to the law and the charge of the court;" and, *third*, "said verdict was excessive, and was not justified by the evidence." This motion was overruled, and defendants brought the case here upon writ of error.

The only questions presented for our review are those contained in the motion for a new trial, made in the circuit court. The testimony introduced on the trial, and the instructions of the court to the jury, are before us by bill of exceptions; but no objections were made to any part of the evidence, nor were any exceptions taken to any part of the instructions to the jury.

The plaintiff in error testified as a witness in his behalf that he was a practicing lawyer, and that in July, 1887, Mr. Clark, of the firm of Clark & Loftus, defendants, came into his office in Jacksonville, Fla., with insurance policies aggregating in amount $15,000, and said the insurance companies that issued the policies refused to pay more than nine or ten thousand dollars on a loss by fire a short time previous. That Clark made a statement of the matter to witness, and wanted his counsel. Witness advised Clark not to settle for such sum, as the policies could be collected. That, after advising with witness as a lawyer, Clark placed the claims against the insurance companies in his hands, as an attorney, for collection. That witness proceeded to prepare proofs of loss, which were very voluminous, and it took about a week's work for himself and clerk to furnish each company with proof of loss, and copy for defendants. That this involved many visits to the place of business of defendants, and an examination of their firm books. When proofs were made in proper form they were sent by mail to the insurance companies by witness, with a demand for payment. This was written in the name of defendants, as requested by Clark. That soon after the proofs were forwarded to the companies the adjusters returned to Jacksonville, and Mr. Clark came to the office of witness, and informed him that they had offered $13,000 as a settlement, and asked witness' advice about it. Witness advised that the claims were good for $15,000. Clark said he thought he had better take it, as different parties were suing him, and it would injure his credit; and that $13,000 would be better for him now than $15,000 in the future. Witness told him that, in view of the case, he could

take the $13,000 if he wished, but that $15,000 could be collected; and thereupon Clark decided to take the $13,000, and asked for the policies, and witness' clerk went to the safe, got them out, and gave them to him, not suspecting that Clark intended to play any trick; and, supposing he would pay witness' fee when the money was collected, the policies were handed to Clark. When Clark first came to consult with witness, he asked what he was to be charged. Witness told him that the usual charge was 10 per cent., but, as this claim was for a large amount, he would not charge so much. Witness did not say what the charge would be, because he did not know how much work was involved in it. Clark paid witness $50 on account after adjusters had settled with him. He asked witness what his charge was, and witness told him that he would take $650. Witness then offered to take $650 because he wished to be very reasonable, having done some business before for defendants, and thinking it would be paid without any trouble. When Clark first consulted witness he said the insurance companies had offered between nine and ten thousand dollars; that they demanded a reduction of 20 per cent., or $3,000, for deterioration of furniture, $1,000 for property stolen the night of the fire, and over $1,000 for property saved. After advising with witness fully about it, Clark decided not to take it, and put the policies in witness' hands for collection. When proofs were sent to companies by due course, the adjusters returned to Jacksonville, and offered $13,000. The entire matter was conducted through witness, and on his advice.

Columbus B. Smith testified on behalf of plaintiff that he was present when Mr. Clark came to see Mr. Pope in reference to the insurance claims; that he heard Mr. Clark speak to Mr. Pope in reference to his charges, and also heard Mr. Pope say the regular charge was 10 per cent., but he would not charge Mr. Clark that much. Mr. Clark came to the office a number of times. Witness was about a week typewriting the proofs, as they were very voluminous. Witness was in the office when Mr. Clark came, after the proofs had been sent off and payment demanded. Mr. Clark said the adjusters had returned, and offered $13,000. Witness was not right close to them, but not far off; did not hear all of the conversation between them, but heard what was stated. Mr. Pope asked witness to unlock the safe, and get the policies for Mr. Clark, which he did, and handed them to him.

A. W. Cockrell, a witness for plaintiff, testified that he was an attorney at law, and that, in his opinion, 10 per cent. of the sum recovered is a proper fee to charge for the services rendered by the plaintiff; that 10 per cent. of the amount collected is a just and reasonable fee. Witness does not mean 10 per cent. of the amount in excess of $10,000, but 10 per cent. of $13,000.

Edward F. Clark testified, on behalf of the defendants, that he was one of the defendants, and in the latter part of June, 1887, the firm of Clark & Loftus lost their stock of furniture by fire. That said furniture was insured for $15,000, and the adjusters of the insurance companies, upon investigation, offered to settle for $10,000, but he refused to settle for that amount, and it became necessary to make up proofs of loss. That he went to Mr. Pope with the insurance policies, and said to him that the companies had offered to pay $10,000, but he would not accept that in settlement. He then told Mr. Pope that he wanted proofs of loss prepared, to present to the insurance companies. That witness did not put the claims in Mr. Pope's hands for collection. The insurance companies had not positively refused to pay then, but had simply made the offer of $10,000. That witness did not ask Mr. Pope to do anything more than prepare the proofs and send them in to the insurance companies; and that he did not employ Pope as a lawyer, to collect the amount due, but simply as a clerk, to make out the proofs. That he asked Mr. Pope what he would charge, but he would not tell. He simply replied that they would not quarrel about the charges. Pope did not tell witness that the usual rate was 10 per cent., but that he would not charge witness that much. Witness asked repeatedly what would Mr. Pope's fee be, and he replied in the same manner, —that he did not know, but they would not quarrel about fees. When witness refused to accept the offer of the insurance companies, the agents said that proofs of loss would have to be made up; and, after the proofs were forwarded, the companies settled at $13,000. Witness went to Mr. Pope's office to get the policies, and saw them scattered over the desk. Witness got the policies, and the adjusters paid him $13,000. After this, Mr. Pope called on witness for $50, which was paid him. About two weeks later he called again, and asked for $100, and witness asked him what he was going to charge defendants. Pope said he was entitled to a commission of 5 per cent. for collecting the money, which would make $650, and witness said it was not fair; that the claims had not been placed in Pope's hands for collection, but only to make up the proofs of loss.

In rebuttal, plaintiff testified that it was untrue, as testified to by Mr. Clark, that he did not put the policies in witness' hands for collection, but simply to make proofs; that Clark put them with plaintiff, as a lawyer, for collection. The proofs were made out by plaintiff, as the initial steps in the collection, and not at the request of Mr. Clark to make out proofs. He did not ask plaintiff to make proofs, but placed the claims in his hands for collection; and the proofs were made out because, after the refusal of the companies to pay, that was the first step to take. It is untrue, as stated by Clark, that plaintiff did not tell him that the usual rate was 10 per cent., but that plaintiff would not charge him that much. Plaintiff did so tell him. It is untrue, as stated by Clark, that when he came to get the policies he found them scattered over the desk. They were in plaintiff's safe, and plaintiff's clerk took them out of the

safe, at plaintiff's direction, and handed them to Clark. Columbus B. Smith further testified that he heard Mr. Pope tell Mr. Clark that the usual rate was 10 per cent., but that he would not charge him that much; that when Mr. Clark came for the policies they were not scattered over the desk, but were in the safe, from which witness took them, by the direction of Mr. Pope, and handed them to Mr. Clark.

The above is a full statement of the evidence. There is a square issue between plaintiff and defendants as to whether or not the insurance claims were placed in the hands of the former as an attorney at law for collection. The settlement of this question belongs to the province of the jury, and, under the well-settled rule on this subject, the appellate court will not disturb their verdict. Wilson v. Dibble, 14 Fla. 47; Schultz v. Insurance Co., Id. 73; Nickels v. Mooring, 16 Fla. 76; Coker v. Merritt, Id. 416; Mayo v. Hynote, Id. 673.

Counsel for plaintiffs in error concedes that the verdict cannot be set aside on this ground, but he contends that the verdict is excessive, and there is no evidence to sustain the finding of the jury to the extent they have gone. The process of reasoning by which he arrives at this conclusion is this: that the plaintiff, according to his own showing, has done nothing but prepare proofs of loss, and submit same to the insurance companies; and in consequence of this work the said companies paid $3,000 more than they had previously offered. Hence it is contended that the plaintiff cannot recover compensation for anything except the $3,000. It is unquestionably true that a verdict of a jury, unwarranted by the evidence, and directly against it, will not be sustained. Schultz v. Insurance Co., 14 Fla. 73; Alvord v. Little, 16 Fla. 158; Wilson v. Marks, 18 Fla. 322; Railway Co. v. Roberts, 22 Fla. 324; Miller v. White, 23 Fla. 301, 2 South. Rep. 614. The testimony, however, submitted to the jury, must we look to in determining whether or not the verdict must be sustained. In the record before us, A. W. Cockrell testifies that he is an attorney at law, and that 10 per cent., not on the amount in excess of $10,000, but on $13,000, the amount collected, is a just and reasonable fee for the services rendered by the plaintiff. Defendants introduced no evidence in opposition to this testimony as to what was a reasonable fee to allow the plaintiff. The verdict is not for as much as the witness testified the plaintiff was entitled to, and hence it cannot be said that the verdict is unsupported by evidence. It is conceded that the verdict cannot be disturbed as against the weight of the evidence. Young v. Whitney, 18 Fla. 54. This being the case, we are unable to disregard the evidence of the only witness as to the value of the services rendered. The evidence shows that the plaintiff, Frank W. Pope, offered to take $650 for his services rendered the defendants, but this was not accepted; and he says he "offered then to take $650, because he wished to be very reasonable, having done some business for defendants before, and thinking, of course, it would be paid without any trouble." This offer did not bind either party, and, in the absence of any agreement as to the amount to be paid for the services, it was incumbent upon the plaintiff to establish by evidence what was a reasonable fee for his services. The testimony of the witness is that plaintiff is entitled to 10 per cent. on $13,000, and defendants have not controverted this testimony.

On the record before us we see no ground for disturbing the judgment of the circuit court, and it is therefore affirmed.

(29 Fla. 248)

McSWAIN v. HOWELL.

(*Supreme Court of Florida.* Feb. 9, 1892.)

APPEAL — OBJECTIONS NOT RAISED BELOW — VERDICT — WEIGHT OF EVIDENCE.

1. Where no exceptions are taken in the trial court to the charge of the court, either in a motion for a new trial or otherwise, it is too late to raise such objections for the first time in the appellate court.

2. When no objection is made to the introduction of testimony on the trial of a cause, the rule is that such testimony is considered as received by consent, and no objection can be urged on appeal that was not made in the trial court, except as to its sufficiency.

3. A mere recital of a ground for a new trial, based upon matters *in pais*, in a motion, is no evidence that the matters so recited are true.

4. A verdict of a jury will not be set aside as against the weight of the evidence, unless it appears to be so palpably against the evidence, or against such a very strong preponderance of evidence, that great injustice seems to have been done, leading to the conclusion that the verdict was the result of prejudice, excitement, or other improper influences operating upon the minds of the jurors.

(*Syllabus by the Court.*)

Appeal from circuit court, Walton county; JAMES F. McCLELLAN, Judge.

Action by C. E. Howell against G. D. McSwain for a breach of contract. Verdict and judgment for plaintiff. New trial denied. Defendant appeals. Affirmed.

Daniel Campbell, for appellant. *D. L. McKennon*, for appellee.

MABRY, J. This is an action at law instituted in the circuit court for Walton county, in the first judicial circuit of Florida. C. E. Howell, appellee, was plaintiff, and G. D. McSwain, appellant, was defendant, in the circuit court.

In a special count in the declaration it is, in substance, alleged that on or about the 1st day of February, A. D. 1887, plaintiff and defendant entered into a contract whereby the plaintiff was to build for defendant a house in the town of De Funiak Springs, for a house and lot in said town, the property of defendant, and estimated by plaintiff to be worth $1,200; that it was understood and agreed, by and between both parties, that the defendant would make plaintiff a deed to said house and lot at any time when called on for that purpose, as plaintiff might desire it to raise money to complete said house to be constructed for defendant, and also to enable plaintiff to carry on his business as contractor and carpenter; that soon after the making of said contract plaintiff began work on said house, agreed to be built, and called upon defendant several

times while said house was in progress of construction, for the deed to said house and lot agreed to be executed, and that defendant, after promising to execute said deed soon, under various pretexts put plaintiff off until just before said house was completed, and then absolutely refused to execute said deed; that plaintiff completed said house according to contract, and defendant accepted and received it, and it was worth $1,200; that defendant failed to make the said deed to said house and lot for plaintiff, or pay him anything for the said building so constructed and accepted, though often requested so to do, and which has damaged plaintiff in the sum of at least $500 in addition to the value of said building, by preventing him from taking other contracts, injuring his credit, and involving him in lawsuits, with heavy costs and attorney's fees.

There are other counts in the declaration. One is for $1,240.65 for furnishing material and building a house for defendant at his request, and the common counts for like sum of money lent by plaintiff to defendant at his request, and for like sum paid by plaintiff for use of defendant at his request, and for like sum of money found to be due from defendant to plaintiff on an account stated between them.

A demurrer to that portion of the declaration which claims damages for refusal to execute deed to house and lot, interposed by defendant below, was sustained by the trial court. Issue was joined upon three pleas of defendant, and the cause submitted to a jury for hearing. The first plea—which is to the common counts—is that defendant was never indebted to plaintiff as alleged in the declaration. The second plea, also directed to the common counts, is that plaintiff, at the commencement of said suit, was, and still is, indebted to defendant in the sum of $138.75, with interest, which sum defendant is willing to set off against plaintiff's claim. The third plea, directed to the special count, is that plaintiff agreed to build for defendant a house of certain dimensions for a house owned by defendant, situated in East De Funiak, and which was estimated to be worth $800; that plaintiff agreed to furnish all material and do the work in a workman-like manner, and deliver the house to defendant free from all liens of carpenters or material-men, and that defendant would then deliver to plaintiff a deed to said house and lot in East De Funiak; that plaintiff went into possession of said house in East De Funiak, and occupied the same, and when not in the occupancy thereof leased it to others; that before plaintiff had made much progress on said house he desired a deed executed for the building in East De Funiak, but defendant did not execute said deed, as it was not agreed by defendant to execute deed until the said house was completed; that plaintiff said he was unable to carry out his contract unless he could raise money, and defendant then indorsed for plaintiff, and he received $425 thereon; and that after the house was considered completed by plaintiff, and before the commencement of this suit, defendant executed and tendered a deed to plaintiff for the house and lot as agreed upon, and that he was always ready and willing to execute said deed after the said house was completed. Upon these pleas issue was joined, and the jury to whom the cause was submitted rendered a verdict in favor of the plaintiff for $842.66⅔.

A motion for a new trial was made by defendant, McSwain, on the alleged grounds that: (1) "The verdict of the jury was contrary to the evidence;" (2) "the verdict of the jury is against the weight of evidence;" (3) "the verdict of the jury is unsupported by the evidence;" (4) "the verdict of the jury is contrary to law;" (5) "the verdict of the jury is against the charge of the court;" (6) "the jury permitted the bailiff to come into their room during their deliberations, and was asked something in reference to his opinion about the case then under consideration." This motion was overruled, and defendant appealed.

Appellant, McSwain, assigns in this court the following as errors: (1) The court erred in admitting evidence to prove the value of the house, and of the material used in building the house, charged in plaintiff's bill of particulars filed; (2) the court erred in its charge to the jury, in substance, that the plaintiff could recover in this action, notwithstanding the evidence might show that the plaintiff accepted an indorsement by the defendant to aid in building the house after defendant had refused a deed to plaintiff; (3) the court erred in refusing to set aside the verdict, and grant a new trial; (4) the court erred in its charge to the jury, stating, in substance, that the plaintiff could recover in this action, though the jury should believe from the evidence that there was an express contract between the parties, and that the house and lot of the defendant in East De Funiak was the consideration agreed upon by the parties for the building and furnishing material of the house by the plaintiff for the defendant; (5) the court erred in overruling the motion of the defendant for a new trial.

The 1st, 2d, and 4th assignments of error endeavor to raise questions which we cannot consider. No exception whatever was taken to the charge of the court, or any part thereof, either in the motion for new trial or otherwise, and it is too late to raise objections to the charge of the trial court for the first time in the appellate court. This question has been so thoroughly considered in recent decisions of this court that we deem it unnecessary to go over the authorities again. Parrish v. Railroad Co., 28 Fla. —, 9 South. Rep. 696; Richardson v. State, 28 Fla. —, 9 South. Rep. 704; Pinson v. State, 28 Fla. —, 9 South. Rep. 706. We are not at liberty to disregard the rule announced in these decisions. It does not appear from the bill of exceptions before us that any objection was made to the introduction of any testimony on the trial of this cause. The rule on this subject is that, where no objection is made to the introduction of testimony, it is considered as received by consent, and no objection can be urged here that was not taken in the

court below, except as to its sufficiency. Tuten v. Gazan, 18 Fla. 751. No objection having been made to any testimony in the circuit court, such objections cannot be raised here.

The third and fifth assignments of error are the same, and present as error the overruling of the motion for a new trial. The various grounds of the motion for a new trial may be considered under two heads: *First*, that the verdict of the jury is unsupported by the evidence; and, *second*, that the jury permitted the bailiff to come into their room during their deliberations, and was asked something in reference to his opinion about the case then under consideration. The bill of exceptions shows that the motion for a new trial was overruled, but it is silent as to what evidence, if any, was introduced on the hearing of the motion to sustain any ground thereof. A mere recital of a ground for a new trial, based upon matters *in pais*, in a motion, is no evidence that the matters so recited are true. See authorities supra.

We find copied into the record an affidavit made by one J. R. Tucker, who says that he was bailiff of the jury in the case of C. E. Howell, plaintiff, v. G. D. McSwain, defendant, and that "during the deliberations he is satisfied the jury asked him something in reference to the case then under consideration; the exact words or language he does not now remember." We do not concede that the statements of this affidavit are sufficient to authorize the setting aside of the verdict, but, if we were to admit this much, we would be unable to refer to the affidavit in passing upon the ruling of the motion, for the reason that there is nothing to show us that it was used in evidence on the hearing of said motion in the circuit court. In reviewing decisions of trial courts based upon matters *in pais*, a bill of exceptions, or something tantamount thereto, is necessary in order to bring such matters before the appellate court. Hellen v. Steinwender, 28 Fla. —, 10 South. Rep. 207. Here we have no such evidence, and hence nothing to sustain the ground alleged in reference to the bailiff going into the jury-room.

We have examined the evidence certified to us by the bill of exceptions, and, without going into a discussion of it in this opinion, state our conclusion that there is no error in the action of the court in overruling the motion for a new trial on the ground that the verdict is unsupported by the evidence. In Wilson v. Dibble, 14 Fla. 47, it is said: "Where a verdict is so palpably against evidence, or against such a very strong preponderance of evidence, that great injustice seems to have been done, leading to the conclusion that the verdict was the result of prejudice or excitement or other improper influences, there should be no hesitation in setting it aside." Here it was held that a new trial should not be granted as against the weight of evidence, unless the preponderance is such as to warrant the opinion that the verdict was produced by improper influences. In the case before us there is a conflict between the evidence produced by plaintiff and the defendant, and, under the rules on this subject announced in our decisions, we are unable to say that the verdict was unsupported by the evidence. Nickels v. Mooring, 16 Fla. 76; Schultz v. Insurance Co., 14 Fla. 73.

The judgment of the circuit court is affirmed.

(29 Fla. 590)

STATE *ex rel.* CITY OF JACKSONVILLE v. JACKSONVILLE ST. R. CO.

(*Supreme Court of Florida.* Feb. 9, 1892.)

CONTROL OF STREETS—LEGISLATIVE POWER—HORSE RAILROADS—COMPENSATION TO ABUTTERS—REPAIRS—ORDINANCE—MANDAMUS.

1. The dominant control of highways and streets is vested in the legislative power of the state, and, by virtue of legislative enactment, a railroad, operated either by steam or animal power, may be constructed across or along them without the consent of the municipal authorities.

2. It is competent for the legislature to authorize the construction of a street railway, operated by horse-power, as distinguished from one operated by steam, in the public streets, without providing any compensation to abutting property holders along the street through which such road may be constructed. This is upon the theory that such roads are not additional burdens upon the soil of the street, but are legitimate uses of the highway, in furtherance of the purposes for which they were originally dedicated.

3. It is within the power of the legislature to delegate to municipal corporations the right to license or permit railroad companies to lay railroad tracks in the streets in such manner as not to divert them from their original uses; but a difference exists between the power of a municipal corporation to grant a corporate franchise and the right to permit a corporation vested with such franchise to place railroad tracks in the public streets. If the municipal body can ever grant a corporate franchise, such power must be expressly conferred by the legislature.

4. The authority of a general nature to regulate and control the streets usually granted to municipal bodies is generally deemed sufficient to clothe the municipal body with the right to grant or refuse, or otherwise to regulate, the use of the streets for street railways operated by horse-power.

5. The general powers conferred upon municipal bodies by the act of the legislature, chapter 1688, Laws of Florida, as amended by the act of 1877, c. 3024, to regulate, improve, alter, extend, and open streets, and to regulate and control the construction, grading, and repairs of streets, pavements, and sidewalks, invested such bodies with authority to impose by ordinance upon street railways operated by horses, thereafter to be constructed, the duty to keep the portions of the streets between the tracks of said railways and two feet on each side in as good repair and condition as the city keeps the balance of the street, and of even grade with the street.

6. Under an ordinance requiring a street-railway company to keep the portions of streets between its railway tracks and two feet on each side thereof in as good repair and condition as the city keeps the balance of the streets, and of even grade with the street, it is the duty of said street-railway company not only to keep the space between its tracks and two feet on each side of even grade with the balance of the street, and in as good repair as the city keeps the balance of the street, but also to pave the portions of streets between its said tracks and two feet on each side thereof when the city paves the balance of the streets.

7. Where the measure of duty imposed by ordinance on a street-railway company is to keep the portions of streets between its railway tracks and two feet on each side in as good repair and condition as the city keeps the balance of the

street, if the balance of the street has in fact been paved under the supervision and control of the city, and is kept in this condition, this is sufficient to require said company to pave under said ordinance; and it is immaterial that there may have been irregularity in the procedure, or a departure from prescribed methods for procuring the pavement of streets.

8. To pave a street is not necessarily to change its grade, as a paving may be done in any way that will make a compact, even, hard surface.

9. *Mandamus* will lie against a street-railway company to compel it to perform a clear legal duty to the public.

(*Syllabus by the Court.*)

Original proceedings in *mandamus* by the city of Jacksonville against the Jacksonville Street Railroad Company to compel the performance of duties in relation to the improvement of certain streets.

Cooper & Cooper and *S. E. Foster*, for plaintiff. *John E. Hartridge*, for defendant.

MABRY, J. This is an original proceeding here by *mandamus*, instituted by the city of Jacksonville against the Jacksonville Street-Railroad Company to coerce the performance of certain alleged duties in reference to the paving and repairing portions of certain streets of said city upon and through which said street-railroad company has constructed and is now operating its street railroad.

It is alleged in the alternative writ substantially as follows: That the city of Jacksonville is a municipal corporation existing under the laws of the state of Florida, in Duval county, and through its officers has charge and control of the streets within the city limits; and that the Jacksonville Street-Railroad Company is a public corporation and common carrier for hire, existing under the laws of Florida, and as such owns, maintains, and operates a street railway upon and through certain public streets of the said city, among which are Hogan, Bay, Newnan, Union, Cedar, and Beaver streets. That on the 14th day of January, A. D. 1880, the said city of Jacksonville, by ordinance, granted to the said Jacksonville Street-Railroad Company the right to construct a railway along the streets of said city, a copy of the ordinance being attached as an exhibit to the alternative writ. That the provisions of said ordinance required of said street-railroad company, and by accepting the same said company engaged, contracted, and agreed with said city, that the tracks of said street railroad should be laid down in the best and most approved mode of constructing street railways, and said streets and parts of streets so used by said company for their railroad track, switches, turnouts, crossings, and sidings should be kept, for at least two feet outside of said tracks, in as good repair and condition as the said city keeps the balance of said streets, and of even grade with the streets, (except in cases of regrading,) so that carriages and other vehicles can cross said street-railway track with ordinary ease; and thereby it became and is the duty of said Jacksonville Street-Railroad Company to keep the parts of said streets so occupied by its tracks, switches, turnouts, crossings, and sidings, and for at least two feet outside of said tracks, in as good repair and condition as the said city keeps the balance of said streets. That thereafter the said city paved or caused to be paved with cypress blocks certain of the streets occupied by the tracks of said street railway, to-wit: In the year 1885, Bay street, from Bridge street to the east side of Market street; in the year 1890, Hogan street, from Bay street to the north side of Adams street; and Bay street, from the east side of Market street to Liberty street; and thereupon it became, and still is, the duty of said street-railroad company, under the terms of said ordinance, to pave the space between the rails of its said tracks, and two feet on each side thereof, in said streets where, by the authority of said city, the said streets were so paved, in like manner, and with like material, and of even grade, with the paving of the balance of said streets by the authorities of said city. That, although it was the duty of said street-railroad company to pave the portions of said streets, and keep the same in such condition, it has failed so to do at the following points and places, to-wit: On Bay street, at the intersection of Laura street with said Bay street, for a distance of 30 feet, more or less; on Bay street, from the east side of Market street to Liberty street; and on Hogan street, from Bay street to the north side of Adams street. That, under the provisions of said ordinance, it was and is furthermore the duty of said street-railroad company to keep the said streets and parts of streets so used by it for its railway tracks, switches, turnouts, crossings, and sidings, and at least two feet outside of the same, of even grade with the streets, and in such manner that carriages and other vehicles could and can cross said tracks with ordinary ease; but, although such was and is the duty of said company, it has failed and refused to keep the parts of said streets occupied by its said tracks, switches, turnouts, crossings, and sidings of such grade with the balance of said streets, and in such manner that carriages and other vehicles could and can cross the same with ordinary ease, to-wit: On Bay street, from the east side of Liberty street to a point 20 feet, more or less, east of Laura street; on Newnan street, from Bay street to Union street, thence eastwardly along Union and Cedar streets, to a point near the south-east corner of the old city cemetery, where the boundary line, as it formerly existed, crosses said Cedar street; and on Hogan street, from the north side of Adams street to Beaver street, thence along Beaver street west to a point about half way between Bridge and Clay streets, where the boundary line of said city, as it formerly existed, crosses Beaver street. That said street-railroad company has been often requested by the authorities of said city to perform its said duties in reference to the paving and keeping in condition and repair said streets, but has absolutely refused to perform its said duties, or any of them, and still re-

fuses so to do, to the wrong and injury of the public of said city. By reason of the failure of said street-railroad company to perform its said duties in the premises, the use of said streets by the public as public highways for public travel and transportation is greatly impaired and lessened, and the parts of streets at the points above mentioned rendered unsafe, and unfit for use and travel by the public, and many points almost impassable by the public in vehicles on account of depressions between the paved portions of the streets and the tracks, and between the rails of the tracks of said street railway, varying from six to twelve inches in depth; and on unpaved portions of said streets, on account of the tracks and the space between the rails not being kept of even grade with the streets, but having depressions and elevations between the rails of the tracks, caused by the use of said streets by said railroad company for its railway, said depressions and elevations causing a difference in the level with the balance of the street of from six to twelve inches.

The answer of the respondent, the street-railroad company, is, in substance, as follows: It is admitted that the city of Jacksonville, as alleged in the alternative writ, caused certain streets mentioned to be paved; but it is averred that said streets were not paved by reason of any ordinance of the city of Jacksonville or law of the state of Florida, or by reason of any tax levied for the purpose of paving streets. That said streets were paved under an agreement between the abutting property holders and the city of Jacksonville, by the terms of which the abutting property holders were to pave the streets in front of their several properties, and the city was to pave the intersections of streets and crossings; and that the same was done under the supervision of the city. That as to those certain portions of said streets paved between the rails of respondent's railway, when called upon to pay for same, after consideration, it did so with the express stipulation and averment that it did it as a gratuity and contribution, and not as a recognition of any right to compel it to pave. That as to others of the streets not mentioned in the alternative writ as paved, where the abutting property holder declined to contribute for paving purposes, the street, so far as his property's frontage was concerned, was not paved; and, so far as the property holder's property who contributed was concerned, it was paved in front of his holding; presenting a picture of one-half of the street being paved where the property holder was willing to furnish the means, and the other half unpaved where the property holder declined to contribute. That the city of Jacksonville has never adopted any ordinance for carrying into execution the charter under which it now exists, so far as providing for a method of paving is concerned; and that no ordinance of the city was in force at the time of the incorporation of respondent, regarding the paving of the streets, or providing the method for paving the streets, and no ordinance has since been adopted for such purposes. That the city of Jacksonville did adopt the ordinance set forth in the alternative writ, but avers that it was not adopted until the 14th day of January, A. D. 1880, long after respondent's corporate existence, and could in no way lawfully impair or infringe any of respondent's rights; and that its rights in the streets of the city existed without regard to this ordinance and at the time of its adoption. That it was incorporated under an act of the legislature of the state of Florida, providing for the incorporation of railroads and canals, approved February 19, 1874, and that its letters patent bear date the 24th day of December, A. D. 1879, a copy of which is attached to and made a part of its answer; and that at the time of the granting said letters patent the streets of said city, each and every of them, were unpaved, and so remained until the time of the paving, as alleged in the alternative writ. That, as to filling in said streets between the rails of its tracks, it admits that it is its duty to keep them in condition relative to the grade established at the time of the construction of its tracks, but avers that it is not its duty to keep them plumb with the balance of the street, when the grades have been changed, and that in changing the grades it is the duty of the city to fill them in; and in reference to the allegation in the alternative writ, that it accepted the provisions of said ordinance, it accepted the same no further and to no greater extent than the same was valid and binding in law, and only in the way as other citizens accepted the same, by remaining passive; and admits its track was laid and road built subsequent to the passage of said ordinance.

To this answer of respondent the municipal corporation, relator, has filed a demurrer, assigning the following grounds: (1) That the allegations thereof are uncertain; (2) that the allegation, the streets were not paved by reason of any ordinance or law, is irrelevant and immaterial to case made by alternative writ; (3) that the answer is uncertain and evasive as to what streets respondent contracted to pave, does not allege same to be at places named in writ; (4) answer is irrelevant as to some streets—not those mentioned in writ—being paved only in part; (5) answer is not responsive, and is irrelevant, in that it alleges no ordinance exists in city of Jacksonville as to paving; (6) the answer presents no defense when it alleges that the ordinance mentioned in writ does not interfere with its corporate rights under its act of incorporation; it neither admits nor denies that it acquired its right to construct said street railway from the ordinance, and inspection of the act of incorporation and ordinance shows the respondent operates its railroad in said streets by virtue of said ordinance; (7) the streets in said city of Jacksonville, under general incorporation act of 1868, in force in 1880, were under control of said city council, and respondent could not lawfully construct street railroad thereon without consent of city council; (8) the ordinance set out in the writ fixes the duties of the street-railroad company in the

respect sought to be enforced by this proceeding, and the answer shows no reason why respondent should not perform the duties set out in the writ; (9) the answer presents no defense or response to the writ.

The duties of respondent, it is alleged, are imposed by the ordinance in question; and, as it is maintained in the answer that the rights of respondent in the streets of Jacksonville exist without regard to this ordinance, the first question to be settled is to what extent the said ordinance is binding upon the respondent street-railroad company. It is admitted that the ordinance was passed before the street railway was constructed. The allegation in the alternative writ is that "the city of Jacksonville, by ordinance, granted to said Jacksonville Street-Railroad Company the right to construct a railway along the streets of said city," and "that the provisions of said ordinance required of said street-railroad company, and by accepting the same said company engaged, contracted, and agreed with said city, that the tracks of said street railroad should be laid down in the best and most approved mode of constructing street railways, and said streets and parts of streets so used by said company for their railroad track, switches, turnouts, crossings, and sidings should be kept for at least two feet outside of said tracks in as good repair and condition as the said city keeps the balance of said streets, and of even grade with the streets, (except in cases of regrading,) so that carriages and other vehicles can cross said street-railway track with ordinary ease, and thereby it became and is the duty of said street-railroad company to keep the parts of said streets so occupied by its tracks, switches, turnouts, crossings, and sidings, and for at least two feet outside of said tracks, in as good repair and condition as the said city keeps the balance of said streets."

In reply, respondent alleges that said ordinance was passed long after its corporate existence, and by virtue of its incorporation it had the authority to construct, equip, maintain, and operate a street railroad upon and through the streets of said city; and that said ordinance can in no way lawfully impair or infringe any of its rights, and that its rights in said streets exist without regard to said ordinance. In reference to the allegation that respondent corporation accepted the provisions of said ordinance, it is alleged that "it accepted the same no further and to no greater extent than the same was valid and binding in law, and only in the way as other citizens accepted the same, by remaining passive."

The position of counsel for respondent is that, said street-railroad company having become incorporated before the passage of said ordinance to construct a street railway in the streets of the city of Jacksonville, it has the right, by virtue of article 5, section 10, of chapter 1987, Laws of Florida, approved February 19, A. D. 1874, to construct its road across, along, and upon any street of said city, without regard to the action of the city council, and that no ordinance of said city could impose any other obligations upon said company than those prescribed by said act of the legislature. It is proper to state here, our understanding is that the Jacksonville Street Railroad is a horse railway, as distinguished from one whose cars are propelled by steam.

The first section of the ordinance, after granting the right of way through the streets, provides that said street-railroad company may operate its road with all necessary motive power; but the third section provides that it may use steam motive power on certain streets mentioned; and, as the question of paving here does not relate to any streets where steam-power is permitted by the ordinance, we conclude that the right of the city to deal with horse railways is alone involved.

The legislature has undoubtedly supervision and control of highways and streets, and may authorize the construction of a railroad, operated either by steam or animal power, across or along them. This results from the dominant power which the state possesses over all its highways; and it may be done without the consent of municipal authorities. 2 Dill. Mun. Corp. § 656; Elliott, Roads & S. pp. 562, 563; Pierce, R. R. p. 246; Lawson, Rights, Rem. & Pr. § 4003; Eickels v. Railway Co., 78 Ind. 261; Railroad Co. v. Mayor, etc., 45 Ga. 602; Hodges v. Railway Co., 58 Md. 603.

It is also true that the legislature can authorize the construction of a horse railway, as distinguished from one operated by steam, in public streets, without providing any compensation to abutting property holders along the street through which such road may be constructed. This is upon the theory that it is a legitimate use of the highway, and the exercise of a public right of travel over it. Such are not considered as additional burdens upon the soil of the street, but as improvements in the use of the same for the very purpose for which they were dedicated. In the progress of civilization they are regarded as the best and cheapest mode yet devised of utilizing streets without at the same time diverting them from the use to which they have been devoted, and in which the public have a special interest. Our own court has adjudicated this point in the case of Randall v. Railroad Co., 19 Fla. 410, and it is sustained by many authorities. 2 Dill. Mun. Corp. (4th Ed.) § 725; Cooley, Const. Lim. 556, and authorities cited to sustain the texts; Eickels v. Railway Co., supra.

As we are dealing with questions relating to the rights of horse railways, or railways operated by animal power, in public streets, it is not necessary to refer to the conditions upon which the legislature can authorize the appropriation of streets by railroads propelled by steam. It is furthermore true that the legislature can delegate to municipal or local bodies the power to grant or refuse the right to place railroad tracks in public streets. Here it may be proper to say that there is a material difference between the power of a municipal corporation to grant a corporate franchise, or authority to construct

a street railroad and take tolls and emoluments for services, and the right to license or permit corporations vested with such franchises to lay tracks in streets in such manner as not to divert them from their original uses. If the municipal body can ever exercise the power to grant such corporate franchises, it must be expressly conferred by the legislature. The cases of Davis v. Mayor, 14 N. Y. 506; People's Railroad v. Memphis Railroad, 10 Wall. 38,—were decided, we understand, upon the theory that the municipal bodies had no such power. It is conceded that the Jacksonville Street-Railroad Company is a corporation organized for the purpose of constructing the street railway, and the only question under this branch of the case is to what extent the municipal body can impose conditions upon the laying of the tracks on the streets. The legislature unquestionably has the power to confer upon the municipal government the right to control and regulate such matters. Elliott, Roads & S.; Lawson, Rights, Rem. & Pr. supra.

In reference to the terms of the legislative grant to municipal bodies in such matters, the distinction between ordinary railways operated by steam and horse railways is still maintained. While the legislature has the power to confer upon municipal corporations the right to permit or refuse the use of the streets for railways operated by either steam or horse power, the authority of a general nature to regulate and control the streets usually granted to such bodies is not deemed sufficient to authorize the appropriation of the streets by steam railways, but such powers are usually ample to clothe the municipal body with the right to grant or refuse or otherwise to regulate the use of the streets by horse railways. 2 Dill. Mun. Corp. (4th Ed.) § 724; State v. Railway Co., 85 Mo. 263; Atchison Street Ry. Co. v. Missouri Pacific Ry. Co., 31 Kan. 660, 3 Pac. Rep. 284; City of Indianola v. Railway Co., 56 Tex. 594.

The respondent, the street-railroad company, it is alleged became incorporated in December, A. D. 1879, before the ordinance in question was passed, and that by virtue of chapter 1987, supra, it is claimed that it acquired the right to lay its tracks in the streets of said city, free from the imposition of any burdens other than those prescribed by said act. It is not claimed that by laying down its railway tracks it could interfere with the use of the streets as highways, or would not be liable to repair and keep them in the condition in which they were when the road was constructed. Railroad Co. v. State, 23 Fla. 546, 3 South. Rep. 158. Its contention is that the measure of its obligations in reference to the condition of the streets is found in the said act of the legislature, and not in the said ordinance. The ordinance was passed in January, A. D. 1880, and the act of the legislature which respondent claims prescribes its duties in the premises was approved February 19, A. D. 1874. In March, A. D. 1877, the legislature, by an amendment of the act of 1869, conferred upon city or town councils the power to regulate, improve, alter, extend, and open streets, lanes, and avenues; to cause encroachments and obstructions, decayed buildings and ruins, to be removed; and to regulate and control the construction, grading, and repairs of all streets, pavements, and sidewalks within the city or town limits. Sections 2, 3, c. 3024, Laws Fla.; sections 17, 19, pp. 248, 249, McClel. Dig. The grant of authority over streets conferred by the sections above mentioned without doubt invested the city with authority to regulate and control the construction, improving, grading, and repairing of all streets within her limits. Such powers are conferred upon the local bodies, which are agencies of the state government, to be exercised by them in behalf of the public and for the public good. Not only are they invested with control and authority over the construction, improvement, and repair of the streets for the benefit of the inhabitants of the local government, but such grants impose certain important duties to the public. City of Jacksonville v. Drew, 19 Fla. 106. The respondent company was incorporated after the passage of the act of 1877, supra; and, if any conflict should exist between this act and the one of 1874, upon which the defense here is based, the former would control; but we perceive no conflict between them, at least as to street railways. Conceding that the respondent company had the franchise right to construct the railroad, yet the manner in which it was to be done, and the amount of contribution to be made by it to the municipal body for the maintenance of the street, in consideration of the benefits thereby derived, were left by the act of 1877 to the regulation of the municipal body. Under the decisions, the general powers conferred upon municipal bodies by said act to regulate and control the construction, improvement, and repair of streets are sufficient to authorize them to impose such conditions as are contained in that portion of the ordinance now under consideration, and hence we conclude that the respondent company is bound thereby.

The next inquiry is, what duties are imposed on the respondent company by the provision of the ordinance in question? The failure to perform two distinct duties under the ordinance is averred. The first one is a failure to pave the portions of the street between the railway tracks of respondent, and two feet on the outside thereof, in certain streets where the city has paved, or caused to be paved, the other portions of the streets; and the second is a failure to keep certain streets and parts of streets used by respondent for its railway tracks, switches, turnouts, crossings, and sidings, and at least two feet outside of the same, of even grade with the streets, and in such manner that carriages and other vehicles can cross said tracks with ordinary ease. The ordinance in question requires the respondent to keep the said portions of streets in as good repair and condition as the city keeps the balance of said streets, and "of even grade with the streets, (excepting in cases of regrading,) so that carriages and other vehicles can cross said street-railway track

with ordinary ease." Independent of the allegation that said ordinance is not binding upon respondent, the only other averment in the answer in reference to the charge that said portions of streets are not kept of even grade with other portions is "that, so far as the filling in of said streets between its rails is concerned, it admits that it is its duty to keep them in condition relative to the grade established at the time that this respondent constructed its track, but avers that it is not its duty to keep them plumb with the balance of the street when the grades have been changed, and that in changing the grades it is the duty of the city to fill them in." There is no averment in the alternative writ that the grades of the streets have been changed where respondent has failed to keep the portions of the streets between its tracks, and two feet on either side, of even grade with the balance of the street. The allegation is that it is the duty of respondent, under the ordinance, to keep the portions of the streets therein mentioned of even grade (except in cases of regrading) with the balance of the streets, and that it has failed to do so in certain places mentioned. The only reply is that it is not respondent's duty to keep said portions of streets plumb with the balance of the streets when the grades have been changed, and that in changing the grade it is the duty of the city to fill them in. This allegation constitutes no answer to the branch of the case now under consideration. It is not claimed that the city has changed the grades of the streets at the points mentioned, or that the portions required by the ordinance to be kept of even grade with the balance of the street are so kept. Under the ordinance, the grade established at the time the railroad track was laid cannot be altered by the city at the expense of respondent; but, as no question of a change of the grade has been presented, it is not necessary to say anything in reference to the relative rights and duties of the respective parties under such conditions. The answer shows no sufficient reason for the failure of respondent to keep the portion of the streets between its railway tracks, and two feet on the outside thereof, of even grade with the balance of the streets in the places mentioned in the alternative writ. This is true of the answer in reference to a failure to keep portions of streets of even grade with the balance of the streets at points where no paving is alleged to have been done on the part of the city.

The duty of the respondent to pave under the circumstances appearing upon the record will now be considered.

The first ground interposed as a defense to the demand on the respondent to pave certain portions of streets between its railway tracks and two feet on either side is that the balance of the streets were not paved by reason of any ordinance of said city, or tax levied therefor, or any law of the state of Florida, but under an agreement between abutting property holders and the city, by the terms of which the former were to pave in front of their respective properties, and the latter were to pave intersections and crossings of streets. It is admitted that the city caused the said portions of streets to be paved, and it was done under the supervision of the city, but it is alleged that no ordinance has ever been passed providing for said paving. It is not claimed that the city has no power to pave the streets, but, as we understand the position of counsel for respondent, it is that no duty devolved upon said street-railroad company to pave the portions between its said tracks and two feet on each side until the city has provided by ordinance for paving the balance of the streets. The respondent's obligation, as has been determined, is measured by the ordinance in question, and by virtue of this ordinance the duty is imposed on respondent to keep the portions of streets between its track, and two feet on each side, in as good repair and condition as the city keeps the balance of the street; and, if the balance of the streets has in fact been paved under the supervision and control of the city, and is kept in this condition, as is alleged here and not denied, this is the measure of respondent's duty under the obligation assumed by it under the ordinance of 1880. It is immaterial to respondent that there may have been irregularity in the proceeding, or a departure from prescribed methods of procuring the pavement of streets, but it is sufficient to require the performance of its obligation that the streets have been actually paved, and are kept or maintained in this condition, by the city in the exercise of its municipal powers.

The remaining question is, does the ordinance in fact impose the duty of paving upon respondent? It is insisted by counsel for respondent that no further duty is imposed by the ordinance than to repair the portions of the streets in question, and that the duty to repair does not include the obligation to pave. The latter part of this proposition we accept as true. It is clear, we think, both from reason and authority, that the duty alone to repair does not carry with it the obligation to pave in the first instance. To repair a street is to restore it to a former condition or state, after decay or partial destruction. Railway Co. v. City of Pittsburg, 80 Pa. St. 72; State v. Railway Co., 85 Mo. 263. Under the duty to repair would doubtless be included the liability to restore any pavement that might be put down by the city, but simply to repair cannot be construed into a duty to place the pavement primarily. Mayor, etc., v. Scharf, 54 Md. 499; Chicago v. Sheldon, 9 Wall. 50; Elliott, Roads & S. pp. 594, 595; State v. Railway Co., supra. Counsel for the city contend that the ordinance in question means more than simply to repair. It, they say, involves the obligation not only to keep the said portions of streets in good repair, but also in as good condition as the city keeps the balance of the streets, and of even grade with the streets, (excepting in cases of regrading,) so that vehicles can cross the same with ordinary ease. In determining the rights and duties of the respective contestants here, a liberal construction should obtain in favor of relator. The

grant to the respondent of the right to use the streets for the prosecution of its business for profit is a benefit and privilege, and the rule is that such grants are construed against the beneficiaries. People v. Newton, 112 N. Y. 396, 19 N. E. Rep. 831; Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala. 465. Taking the language of the contract between the parties here in its literal meaning, independent of the rule above stated, we think it cannot be confined simply to repairs. The respondent must not only keep the portions of streets in good repair, but in as good condition as the city keeps the balance of the streets. The word "condition" is defined by Mr. Webster to mean "mode, or state of being; state or situation with regard to external circumstances; essential quality; property; attribute." We must arrive at the meaning of this ordinance from the language employed in it; and under the rule of construction applicable in such cases we think that when the city paves the balance of the streets the duty under it devolves upon the respondent company to pave between its tracks and two feet on each side. When the city paves, if the railroad company declines, it cannot be said that it keeps the parts of the streets in question in as good condition, or in as good state of being or essential quality, as the city keeps the balance. In order to meet this obligation, the railroad company must also pave. The cases cited by counsel for respondent hold that the duty to repair does not include the duty to pave. They do not go beyond this, we think. In Mayor, etc., v. Scharf, 54 Md. 499, the ordinance required the railroad company "to keep the streets occupied by its tracks, and two feet on each side of its tracks, in thorough repair." It was here held that the company must repair, but not to repave with a new and different material. In State v. Railway Co., supra, the language of the ordinance was that "the space between the rails of said track and the street, for a space of two feet on either side and along the line of said track, * * * shall be kept and maintained in good repair by said railroad company;" and it was held the only duty imposed was one to repair, and not to pave. The provision of the ordinance involved in the case of Chicago v. Sheldon, supra, reads as follows: "The said company shall, as respects the grading, paving, macadamizing, filling, or planking the streets or parts of the streets upon which they shall construct their said railroads, or any of them, keep eight feet in width along the line of said railway on all the streets wherever one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof may be adopted by the common council of said city." In construing this ordinance the court held that it confined the duty of the railroad company to repairs simply. This result is apparent when it is observed that the ordinance provides that the parts of streets should be kept in good repair and condition in accordance with regulations of the common council respecting ordinary repairs. Great weight was also given by the court to this conclusion, because it accorded with the practical construction of the ordinance by both parties. In special assessments subsequently made by the council no attempt was made to assess the railroad property, and after the passage of the ordinance the city entered into another contract with the same company to lay tracks in other streets, and provided therein, in addition to the stipulations in the first contract, that when any new improvements and paving should be ordered, the said company, at its own cost, should make the pavement between its tracks. The construction of this ordinance, in the light of the surrounding circumstances, was that it imposed the duty to repair, and nothing more. There is nothing in the record before us to indicate that the parties understood the contract to require repairs only, and, as we have said, its language carries its meaning beyond this. Railway Co. v. City of Pittsburg, 80 Pa. St. 72; Railway Co. v. Birmingham, 51 Pa. St. 41.

We deem it proper to state that no question of regrading or changing the grade of the street is presented by the pleadings. The ordinance provides that the portions of streets shall be kept in as good repair and condition as the city keeps the balance of the street, and of even grade with the street, excepting in cases of regrading. The thirteenth section of the ordinance expressly provides that the grade of the railway tracks shall not be changed at the expense of the railroad company.

The case made in the alternative writ is that the city paved, or caused to be paved, with cypress blocks, certain portions of the streets, and thereupon it became the duty of respondent, by virtue of the ordinance, to pave the portions between its tracks, and two feet on each side. Paving a street is not necessarily changing its grade, and this may be done in any way that will make a compact, even, hard surface. Burnham v. City of Chicago, 24 Ill. 496; Warren v. Henly, 31 Iowa, 31; In re Phillips, 60 N. Y. 16. The allegation is that, after the paving on the part of the city, it became the duty of respondent under the ordinance to pave. The answer does not set up that the grade was changed. It is true it avers that it is not the duty of respondent to keep its tracks "plumb with the balance of the street when the grade has been changed, and that in changing the grades it is the duty of the city to fill them in." But this is not alleging that the paving by the relator in the case before us was a changing of the grade of the streets.

That *mandamus* is the proper remedy in this case is not denied. It is settled by authority that the writ will lie against such a corporation to compel it to perform a clear duty to the public. Railroad Co. v. State, 37 Ind. 489; State v. Railway Co., 35 Minn. 131, 28 N. W. Rep. 3; State v. Railway Co., 39 Minn. 219, 39 N. W. Rep.

153; People v. Railroad Co., 67 Ill. 118; In re Trenton Water-Power Co., 20 N. J. Law 659; Elliott, Roads & S. 592; High, Extr. Rem. § 320.

Our conclusion is that the answer presents no sufficient defense to the case made in the alternative writ, and the demurrer should be sustained.

(44 La. Ann. 164)

STATE v. DEFFES. (No. 10,975.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

PUBLIC AND PRIVATE MARKETS—DISTANCE BETWEEN—CONSTRUCTION OF STATUTE.

The words "six blocks" in Act No. 116 of 1888 have the same meaning as "six squares" in the former Act No. 100 of 1878. They mean standard squares or blocks of 300 feet each, with the addition of 50 feet for each intervening street, making 2,100 feet by the nearest walking route, regardless of the number of actual squares, short or long.

(*Syllabus by the Court.*)

Appeal from recorder's court of New Orleans; MARIUS S. BRINGIER, Jr., Judge.

Prosecution against S. Deffes for violating a statute against maintaining a private market within six blocks of a public market. From a judgment on conviction, defendant appeals. Reversed, and the charge dismissed.

Branch K. Miller, for appellant. *Carleton Hunt*, City Atty., and *Henry Renshaw*, Asst. City Atty., for the State.

FENNER, J. The case presents a single question, viz., as to the meaning of the words "six blocks," as employed in Act No. 116 of 1888, which provides: "No private market shall be established within a walking distance of six blocks from any public market; the said distance to be interpreted as meaning that represented by six blocks in a walk from the public market to a private market." Whatever difficulty the question might present if it were *res nova*, we regard it as settled by our decisions already rendered. In several cases we held that the words "six squares," as employed in the former Act 100 of 1878, on the same subject, meant standard squares of 300 feet each, together with the width of the intervening streets of 50 feet each, making a uniform distance, by the shortest walking route, of 2,100 feet. State v. Berard, 40 La. Ann. 172, 3 South. Rep. 463; State v. Barthe, 41 La. Ann. 46, 6 South. Rep. 531; State v. Schmidt, 41 La. Ann. 27, 6 South. Rep. 530. In a later case we had before us the new act of 1888, and the ordinance of the city based thereon, No. 4,145, C. S.; and we then said, after referring to those decisions: "Thus, we have it effectually proved by these opinions that the word 'square' in the former ordinance and law meant what was generally understood by that term, and the word 'block' in the later ordinance and law means just the same thing; in other words, 'square' and 'block' are, strictly speaking, convertible terms." State v. Natal, 42 La. Ann. 612, 7 South. Rep. 781.

It being conceded that defendant's private market is distant more than 2,100 feet, by the nearest walking route, from a public market, he is within the protection of the law, as thus interpreted by us, although, owing to their excessive length, there are not six actual blocks or squares between him and the public market. It is therefore ordered and decreed that the judgment appealed from be avoided and reversed, and that the charge against defendant be dismissed; appellee to pay costs of this appeal.

(44 La. Ann. 170)

UNION NAT. BANK v. CHOPPIN *et al.* (No. 10,972.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

PRACTICE—DEATH OF DEFENDANT BEFORE ISSUE JOINED.

1. When a defendant in a cause dies, and has "not answered," further proceedings against his heirs must be conducted in conformity to article 120 of the Code of Practice, and the citation or notice and the delays therein prescribed must be allowed.

2. The case is not affected by the fact that issue had been joined by default. A default is not an answer.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. James; HENRY L. DUFFEL, Judge.

Suit by the Union National Bank against P. F. Choppin, L. H. Choppin, and Joseph E. Choppin. From the judgment, defendants appeal. Reversed.

Pugh & Lambremont, for appellants. *Sims & Poche*, for appellee.

FENNER, J. Appellants assign as error patent on the face of the record that judgment was rendered without citation of the legal representatives of deceased defendants, and without allowing the delays prescribed by law. The facts are: The plaintiff's suit was brought against P. F., L. H., and Joseph E. Choppin. P. F. and L. H. appeared and filed answers. Joseph E. Choppin never answered, but judgment by default was entered against him. At this stage Joseph E. Choppin died. Plaintiff then applied for and obtained an order of court making his legal representatives parties. A copy of this order was served on the representatives, but no citation was served. Subsequently one of these representatives, Mrs. Choppin, died, without having appeared or filed answer. Thereupon plaintiff obtained another order making her heirs parties. A copy of this order was served on said heirs on the 29th and 30th of May, 1891, also without citation. On the 2d of June, 1891, only two clear days after service of above order, the cause was, on plaintiff's motion, set down for trial on June 10th. On that day, over the objection of appellants' counsel, who thereupon withdrew and refused to take part, the case was taken up, tried, and decided.

The law governing the case is found in article 120 of the Code of Practice: "If one against whom there was a cause of action die, leaving one heir only, the suit shall be carried on against such heir as it would have been against the deceased. If the suit had already been brought against the deceased, and he had not answered, it shall not be interrupted, but shall be con-

tinued against the heir by a mere citation or notice served on him to that effect, within the delay for original citations, according as the distance may be from his domicile to the court where the action has been brought." "If, on the contrary, the deceased have one or more heirs, the plaintiff may proceed personally against each of them for the share which he inherits," etc. "If the suit had been already commenced against the deceased, it shall be continued against his several heirs by citing each of them separately, as if there was only one." This article is found in part 1 of the Code. In part 2 are found the two following articles: "Art. 360. When the defendant suffers judgment by default to be taken against him, the issue is joined tacitly, because such defendant is presumed, by his silence, to have confessed the justice of his adversary's demand; therefore the plaintiff is allowed to proceed with his proofs in order to have the judgment confirmed. Art. 361. If, after issue joined, either the plaintiff or defendant die, it is not necessary to recommence the action. It continues between the surviving party and the heirs of the one deceased, pursuant to the provisions enacted in the first part of this Code." Thus the last article (361) expressly refers to the "provisions enacted in the first part of this Code" as defining the methods to be pursued in the continuance of the action. We do not understand plaintiff's counsel to deny that, in a case within the terms of article 120, citation or equivalent notice, allowing the same delays as in original citations, is necessary. His contention is that defendants' case is not covered by that article, because, he claims, default is equivalent to answer. We cannot approve this contention. The Code of Practice recognizes two modes of joining issue,—by default, or by answer. They are not identical, but entirely different and distinct. Both are equally effective in joining the issue. But a default is certainly not an answer; on the contrary, the default is only allowed because the defendant has not answered.

When the respective defendants in this case died they "had not answered;" and the case falls squarely within the exact letter and meaning of article 120, by which alone further proceedings must be governed. We are therefore bound to hold that the precipitate proceedings of plaintiff were in disregard of the legal rights of appellants. It is therefore ordered and decreed that the judgment appealed from be avoided and reversed, and that the case be remanded to the lower court, to be there proceeded with according to law; appellee to pay costs of appeal.

(44 La. Ann. 147)

BARRIOS v. LACROIX *et al.* (No. 10,968.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

SALE OF NOTES—EVIDENCE OF SUFFICIENCY.

The case presents only questions of fact.

(*Syllabus by the Court.*)

Appeal from district court, parish of Lafourche; TAYLOR BEATTIE, Judge.

Action by Berthole Barrios against E. H. Lacroix and W. W. Hunter, Jr., on certain notes executed by Hunter. From a judgment for plaintiff, Lacroix appeals. Modified.

L. P. Caillouet, for appellant. *E. A. O'Sullivan*, for appellee.

FENNER, J. Plaintiff was the holder of six negotiable notes made by one W. W. Hunter, Jr., secured by mortgage and vendor's privilege on a tract of land sold by him to said Hunter. He avers that these notes were fraudulently obtained from him by E. H. Lacroix, under the false pretense that he wanted to have them examined by his lawyer, and that, if found correct, he would buy them; that he never bought the notes, but kept them, and failed to return them, and, while thus in possession, conspired with Hunter to have the said notes, together with their accessory mortgage and privilege, canceled and erased, and did illegally cancel them without plaintiff's knowledge or consent. The only defendants are Hunter and Lacroix. The first filed a general denial. Lacroix also filed a general denial, together with a special denial of the fraud and misconduct charged, and an averment that he bought the notes from plaintiff at a fixed price, and by a completed sale. Judgment was rendered in favor of plaintiff, ordering the reinstatement of his mortgage and privilege, and the return of the notes, or, in default thereof, allowing judgment for the amount thereof, with recognition of mortgage and privilege. Lacroix alone has appealed. We have no concern with the rights of Hunter, who has not appealed, nor with possible intervening rights of third persons, who are not parties. The sole question for our determination is the issue between plaintiff and Lacroix of sale *vel non*. If the allegations of plaintiff's petition be true, certainly Lacroix has no cause to complain of the judgment rendered against him. The issue is purely one of fact. The testimony is conflicting. We have studied and weighed it very carefully. Independently of the consideration justly due to the finding of the judge *a qua*, we have no hesitation in saying that the evidence, taken as a whole, leaves upon our minds an overwhelming conviction that it is correct; that Lacroix never bought or owned the notes; and that his dealings with them were wrongful, and in fraud of plaintiff's rights. We might sustain our conclusion by a discussion of the evidence; but that would be useless, and certainly not agreeable to defendant. It is admitted, however, that the judgment should only cover five of the notes, and that the note maturing January 1, 1891, was validly acquired by Lacroix. The judgment must be amended accordingly. It is therefore ordered and decreed that the judgment appealed from be amended by striking therefrom all that part relating to the first note for $1,000, maturing January 1, 1891, and that, as thus amended, the same be now affirmed, plaintiff and appellee to pay costs of this appeal.

(44 La. Ann. 135)

STATE v. DENNISON. (No. 10,973.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

HOMICIDE—INSTRUCTIONS—PREMEDITATION.

1. A charge to a jury in a criminal case, in which the judge limits himself to instructing the jury as to the law in the case, and refrains from recapitulating the evidence so as to influence them, and does not repeat or state the testimony of a witness, and does not give an opinion as to what facts have been proved or disproved, affords no ground of complaint.

2. A charge in the following words is not error: "And whilst malice and premeditation involve a prior intention to do the act in question, it is not necessary that the intention should have been conceived for any particular time. It is as much premeditation if it entered into the mind a moment before the act as if it entered years before."

(*Syllabus by the Court.*)

Appeal from district court, parish of Natchitoches; DAVID PIERSON, Judge.

Prosecution against E. V. Dennison for murder. From a conviction of manslaughter, defendant appeals. Affirmed.

W. H. Jack, for appellant. *W. H. Rogers*, Atty. Gen., and *D. C. Scarborough*, Dist. Atty., (*M. H. Carver*, of counsel,) for the State.

MCENERY, J. The accused was tried on a charge for murder, and convicted of manslaughter, and was sentenced to hard labor for a period of 10 years. From the verdict thus rendered, and sentence thus imposed, he has appealed on grounds stated in two bills of exception to portions of the written charge of the trial judge. In the first bill it is urged that the district judge trenched upon the facts of the case, and intimated his opinion as to the legal bearing of the evidence to the prejudice of the accused. The part of the charge complained of is as follows. "Although it may be the unwritten law of the land that a husband, father, and brother may lawfully slay one who debauches or deflours his wife, daughter, or sister, no law, written, or unwritten, justifies the settlement of other domestic troubles or infelicities by resort to deadly weapons. Therefore, even if you believe from the evidence that the deceased, Hazlewood, either persuaded the wife of the prisoner to leave his bed and board, or afforded her shelter or protection, (if she quit him of her own accord,) in neither case would such fact excuse the killing. Such family troubles cannot lawfully be adjusted by the deadly bullet. The extreme legal effect of such provocation would be to support the charge of malice." The following are the reasons, appended to the bill by the judge, for the charge: "The defense set up by the prisoner was that the deceased, in conjunction with his father-in-law, had interfered with his domestic relations, and had persuaded his wife to leave him, and go to her father's house. The prisoner had been married about two months to a girl of 16 years of age, without the consent of her parents, and by elopement with the girl. The deceased had been married about six months to a sister of the prisoner's wife, and was living, at the time of the killing, with G. W. Hawthorn, the father of both. The young wife of the prisoner left his bed and board about six days before the killing, for what reason it does not clearly appear; the prisoner claiming that it was on account of the persuasion of the deceased, and her father and the prosecution claiming that it was on account of ill treatment and dissipation of the prisoner, both propositions being supported by some presumption, but unsatisfactory evidence. In the fatal rencounter that took place, the prisoner was the aggressor, assaulting the deceased with a heavy cane, the deceased being unarmed, and offering such resistance as he could with his hands. Upon the interference of three several by-standers, each endeavoring to prevent further violence, the cane was taken from the prisoner, the deceased retired from the conflict followed by the prisoner, who drew a pistol from his pocket, and fired the fatal shot, the parties being about 12 feet apart at the time. The counsel for the accused, in his argument, urged that, by the higher law of the country, not found or sanctioned by the authorities, the jury would be justified in excusing the act of killing, on account of the alleged interference by the deceased in the domestic affairs of the prisoner, as above recited. Much discussion was had before the jury upon the question, and this discussion gave rise to the charge complained of." The second bill of exception is taken to the following charge: "And whilst malice and premeditation involve a prior intention to do the act in question, it is not necessary that this intention should have been conceived for any particular time. It is as much premeditation if it entered into the mind a moment before the act as if it entered years before, and when deliberate malice is shown and established, its continuance down to the perpetration of the homicide will be presumed, unless rebutted."

In the parts of the charge complained of we fail to perceive where there is any violation of section 991, Rev. Laws. The trial judge limited himself to giving the jury a knowledge of the law applicable to the case. He refrained from stating or recapitulating the evidence, so as to influence their decision on the facts, and he did not repeat or state to them the testimony of any witness, nor did he give any opinion as to what facts had been proved or disproved. Rev. Laws, § 991. In the second bill it is urged that the trial judge erred in "assuming a condition of things wholly incompatible with the idea of premeditated malice, and highly prejudicial to the rights of the defendant." In the brief of counsel this objection is explained as referring to the time when the prior intention to kill was conceived; that when it was conceived a "moment" or an "instant" before the homicide the time is "indefinite" and "indivisible," and is "incompatible with the idea of deliberation and premeditation." The defendant was charged with murder. The trial judge, by law, was compelled to charge as to malice. There is no time fixed at which the intention may enter the mind of the accused. As stated by the trial judge, it may be a moment or immediately before

the homicide, and when so conceived is as much malice as if entertained a year or more.

Judgment affirmed.

(44 La. Ann. 158)

STATE v. DONALD *et al.* (No. 10,961.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

HOMICIDE—NEW TRIAL—SUFFICIENCY OF EVIDENCE.

In the allowance or rejection of new trials, particularly in cases resting upon the sufficiency of the evidence administered at the trial to justify a conviction, much reliance must be placed upon the discretion of the trial judge, and his rulings will not be reversed except in very clear cases of error.

(*Syllabus by the Court.*)

Appeal from district court, parish of Jefferson; EMILE ROST, Judge.

Indictment against Abraham Donald, Andrew, *alias* Ben, Ward, and others, for murder. Defendant Ward was convicted, and appeals. Affirmed.

Hamilton N. Gautier, for appellant. *W. H. Rogers*, Atty. Gen., for the State.

WATKINS, J. Appellant, Andrew, *alias* Ben, Ward was jointly indicted with Donald, White, and Dixon for the murder of Cornelius Langman. There was a joint trial, and all were acquitted except Ben Ward, who was found guilty of manslaughter, and, after an ineffectual attempt to obtain a new trial, was sentenced to five years at hard labor, from which sentence he appeals.

Appellant's contention is that the death was inflicted by a gunshot wound, the ball entering the cavity between the seventh and eighth ribs, "ranging in a downward direction of about 43 degrees; * * * that the only shooting done by the accused was while he was standing at the foot [or base] of the levee, some fifteen (15) feet below the deceased, who was standing on the top of the levee;" and from that hypothesis defendant's counsel argues the necessary incompatibility therewith of the verdict, and assigns this as a conclusive reason why the trial judge should have granted the defendant a new trial.

The foregoing constitutes the purport of defendant's application for a new trial, and, as supporting that statement, there was annexed to his bill of exceptions the official certificate and *proces-verbal* of the coroner. Resting upon this certificate and the affidavit of the accused for the governing facts of the case, there is some plausibility for the defendant's contention; but in the record we find the affidavits of three at least of the eye-witnesses of the homicide, which are wholly at variance therewith. One of the affiants says that in the course of a quarrel between several persons, whose names are given, "I left them. Neally [Langman] ran over his wife, knocking her down while doing so, with Abraham Donald and Andrew Ward pursuing him with drawn pistols, shooting at him all the time. * * * Ward and Donald fired pretty near all the chambers of their revolvers." Another of the affiants states that "Neally Langman came down the levee towards Andrew Ward with a drawn pistol. Some firing took place then. I cannot say who fired first. Andrew Ward had his pistol drawn. I am certain they were both shooting at each other. Andrew Ward pursued Langman until he fell against his wife, and then jumped up and ran again, with Ward behind him, from the pigeon-house to the store, where he fell. There Ward hit at Langman with the butt-end of his pistol, while running by. He then had both revolvers in his hands, having taken Langman's pistol from him," etc. Another affiant states that "Ward ran down the levee, and, as he reached the base of the levee, he half wheeled around, and Neally [Langman] went towards him. Then they were shooting at arms-length. When Neally had fired his last shot, he broke and run, and Ward and Donald ran after him. Neally fell on his wife, and the others stumbled over him. Then Ward took the pistol away from him, and hit him [Neally] over the head with the butt." This testimony puts a wholly different phase on the affray from that stated in defendant's motion. The judge did not assign any reasons for his overruling the motion, but on the foregoing statement we are of the opinion that his ruling was manifestly just and correct. Judgment affirmed.

(44 La. Ann. 160)

STATE v. JACKSON. (No. 10,950.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

HOMICIDE—SELF-DEFENSE—EVIDENCE OF CHARACTER—IMPEACHING WITNESS—INSTRUCTIONS.

1. In order to excuse a homicide, the accused must be under the belief that his life is in danger, or he fears some great bodily harm may be inflicted upon him; and said belief must be the result of some overt act or hostile demonstration made by the deceased against the accused.

2. In attacking a witness' general character for infamy, the investigation cannot be restricted so as to define it to particular acts or to particular associates. It must be as to his whole conduct and character, so as to establish such moral depravity that no one would be justified in believing his sworn statement uncorroborated.

3. Whether a witness who was not connected with the homicide, and who was with the deceased at the time of the homicide, was or was not a dangerous character, is immaterial, and no evidence of his character in this respect is admissible.

4. Fear that one's life is in danger will not excuse a homicide, in the absence of an overt act or hostile demonstration on the part of the deceased.

5. When the judge charges substantially what the defendant requests in a special charge, it is sufficient.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; E. T. LEWIS, Judge.

Indictment against William Jackson for murder. Defendant was convicted, and appeals. Affirmed.

Charles W. Du Roy, for appellant. *W. H. Rogers*, Atty. Gen., for the State.

MCENERY, J. The defendant was indicted for murder, tried, and found guilty without capital punishment, and sentenced to imprisonment at hard labor for life, from which judgment he has appealed.

The first bill of exceptions was taken on

the refusal of the trial judge to allow the following question to be propounded to a witness: "Was Ivory Guidry, the deceased, a man capable of carrying out such threats?" The trial judge, in his statement appended to the bill, says: "That the accused shot the deceased down in the public road, and without even the slightest effort on his part to make an assault upon the accused. The accused watched deceased while passing the accused's house in the public road, and fired twice across a fence about ten paces distant, killing deceased almost instantly while deceased was standing still, being halted by accused, and making no demonstration whatever against him." It appears from the statement that the deceased made no hostile demonstration against the defendant. It is immaterial, therefore, what were the previous threats of the deceased against the defendant. They are inadmissible unless a proper foundation is first laid by evidence of some overt act or hostile demonstration made by the deceased at the time of the fatal assault upon him. The ability of the deceased, therefore, to execute threats, when he had shown no intention by any overt act to carry them out, is inadmissible. State v. Demareste, 41 La. Ann. 617, 6 South. Rep. 136; State v. Paterno, 43 La. Ann. 514, 9 South. Rep. 442. There was no demonstration made by the deceased which justified the defendant in believing that his life was in imminent danger. State v. Cosgrove, 42 La. Ann. 753, 7 South. Rep. 714.

The second bill was reserved to the ruling of the trial judge in refusing the following questions to be propounded to the witness Moreau in relation to the character of Jeanbette, a witness for the prosecution: "Do you know the man Jeanbette, and is he not a man who lives and associates with criminal people? Isn't it a fact that his principal associates are lewd and abandoned women?" These questions were asked for the purpose of impeaching the witness' general character. The district attorney urged several objections to the questions, any one of which we think was good. The following objections are conclusive: The question was leading, suggesting the answer, and that the general reputation of the witness only can be inquired into. The question was leading, and therefore properly ruled out. In the case of State v. Parker, 7 La. Ann. 83, this court had occasion to review the law, and to determine the extent to which the investigation of the witness' character can be gone into. In that case the question was as to the infamous character of the witness, which was compounded of a notorious character for acting falsely and fraudulently, of extorting money by force and cheating from the unwary and feeble, and of living among low and abandoned women; that he was idle, dissolute, and profligate, and had no means of support, and no means of obtaining money, other than those set forth. The witnesses swore that although they could not say that the impeached witness had formed any character as to lack of truth, and was false in oath and words, yet from his vices and general bad character they believed he was unworthy of credit, and they would not believe him under oath. In the opinion this court said: "All agree that a man proved by respectable testimony to possess the character described in the bill of exception under consideration would not be entitled to equal credit with a pure and virtuous witness; yet such a man, unless proof is allowed, would stand as fair before the jury as one of the most spotless character." The inquiry, therefore, must be into the general character of the witness, and not permitted to run into collateral facts and particular inquiries as to any particular act or any particular associates. In other words, the inquiry into general character must be of that kind which will show such moral turpitude in the witness that no one would be justified in believing his uncorroborated statement. The inquiry into the witness' character in the instant case did not tend to show that he was infamous, but that his associates were taken from a certain class of people. The inquiry was restricted, and therefore did not come within the reasons stated in the case quoted.

Bill No. 3 was taken to the exclusion by the judge of the following question to a witness: "Was Ivory Guidry, deceased, a dangerous man, and was he a man capable of carrying threats into execution?" The reason stated in sustaining the ruling of the trial judge on bill No. 1 will apply to this.

Bill No. 4 was reserved to the questions: "What is Jeanbette's general reputation for peace and quiet? Isn't he a notoriously dangerous man?" These questions are also leading and objectionable on that account. Jeanbette was a witness. He was in no way concerned in the homicide, and therefore the question was irrelevant.

Bill No. 5 is to the ruling out of threats made by the deceased prior to the homicide. There was no overt or hostile demonstration made by the deceased; therefore, the testimony sought to be introduced was properly rejected. This bill has also been disposed of by the reason given in sustaining the ruling of the trial judge on bills 1 and 3.

Bill No. 6 was taken to the refusal of the trial judge to charge the jury as requested by defendant. The charge requested was: (1) "If a man reasonably and fairly believes his life is in imminent danger, he is excusable in killing his adversary, although it afterwards appear that there was no danger." The imminent danger in which the defendant imagines or believes himself to be must result from some act of the deceased. It is then a question of fact for the jury to find whether the demonstration was of such a character as to impress the accused with a belief that his life was in danger, or that he feared great bodily harm would be inflicted upon him. The law does not excuse a homicide, coolly planned and deliberately executed, committed when the deceased was making no demonstration whatever, and was unarmed, on the public road. (2) "That, if the jury had any reasonable doubt on any material point of the case, they were bound to give the

benefit of such doubt to the accused." Instead of the charge requested by defendant, the trial judge instructed the jury "that they must be satisfied beyond a reasonable doubt that the state had made out its case as to every constituent element of the crime charged, each element thereof being fully explained." The charge was fair, and a concise statement of the law. The defendant had no cause to complain of it. Judgment affirmed.

(94 Ala. 45)

BOSTIC v. STATE.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

HOMICIDE—PROTECTION OF ANOTHER—INSTRUCTION—EVIDENCE.

1. On a trial for murder, it appeared that defendant and one P. went at night to the house of decedent, where P. addressed decedent in abusive language, and decedent attempted to shoot P., who left the house, pursued by decedent. While decedent was pursuing P., he was struck by defendant on the head, causing death. There was evidence that while going to decedent's house P. said, "I expect we will have it to-night," and defendant answered that he would "stand up to" him, (P.) Defendant requested an instruction that if the jury found that defendant killed deceased under an honest belief that it was necessary to prevent deceased from killing P. "without just cause," they should acquit defendant. *Held*, the instruction was properly refused, as it ignored the facts (1) that P. initiated the conflict, and had not manifested a desire to withdraw from it; (2) that defendant had designed to "stand up to" P. if a personal encounter ensued.

2. A request to charge is properly refused, though embodying correct principles, where there is no evidence in the case to support it.

3. Decedent's attending physician testified that, after being wounded, decedent was twice removed from one place to another, and that "it was drizzling" at the time. On cross-examination the witness was asked, "Is it not possible that removing deceased about in his condition in bad weather, over a rough country, caused his death?" There was no evidence that decedent was removed "over a rough country." *Held*, that the answer to such question was properly excluded.

Appeal from circuit court, Limestone county; H. C. SPEAKE, Judge.

Richard Bostic was indicted with John Puryear for the murder of Jesse Brock. A separate trial of Bostic resulted in his conviction of manslaughter in the second degree, from which he appeals. Affirmed.

W. T. Sanders and *W. H. Turrentine*, for appellant. *Wm. L. Martin*, Atty Gen., for the State.

STONE, C. J. It is said in 4 Bl. Comm. 213, that "homicide committed for the prevention of any forcible and atrocious crime is justifiable by the law of nature, and also by the law of England, as it stood so early as the time of Bracton, and as it was declared by statute, (24 Hen. VIII., c. 5.) If any person attempts a robbery or murder of another, or attempts to break open a house in the night-time, (which extends also to an attempt to burn it,) and be killed in such attempt, the slayer shall be acquitted and discharged." Greenleaf states the doctrine substantially the same way. 3 Greenl. Ev. § 115. In Gray v. Combs, 7 J. J. Marsh. 478, this subject was discussed, and the authorities cited. And the subject has been frequently considered in this state. The principle declared is somewhat analogous to that laid down in the older books. In Oliver's Case, 17 Ala. 594, (opinion by DARGAN, C. J.,) is this language: "The law, it is true, will justify the taking of life when it is done from necessity, to prevent the commission of a felony," etc. See, also, Dill v. State, 25 Ala. 15; Noles v. State, 26 Ala. 31; Simpson v. State, 59 Ala. 1; Storey v. State, 71 Ala. 329. Modern decisions have hedged this principle about with some modifying qualifications. If the defense be that the blow was struck to prevent the homicide of another, then that other, as well as the actor, must be in a condition to invoke the doctrine of justifiable defense. Neither he who provokes a difficulty nor his voluntary helper can with impunity resist to extreme results the assault he has provoked, unless he has clearly retired from the conflict; and, to restore him to the full measure of *se defendendo*, his conduct must plainly show that his purpose has ceased to be hostile. Gibson v. State, 91 Ala. 64, 9 South. Rep. 171; Parker v. State, 88 Ala. 4, 7 South. Rep. 98. After night-fall the defendant and Puryear, with two others, went together to the house in which the difficulty occurred. Before reaching the house they learned that deceased was there. Soon after entering the dwelling the altercation commenced. Its first introduction was an inquiry by Puryear, addressed to Brock, asking him why it was that he (Brock) had spoken of him (Puryear) in the manner he had. He answered that what he had said would stand. Very soon Puryear addressed Brock in angry and offensive language, whereupon the latter drew a pistol, and attempted to shoot Puryear. He fired once, the ball passing through Puryear's clothes, and was pursuing him, snapping his pistol at him, but it did not fire. Puryear ran out at the door, Brock pursuing him, when the defendant, Bostic, attempted to disarm him. While he was grappling for the pistol, Brock was struck on the head with a hard substance, probably a rock, which felled him to his knees, and the combat then ceased. Three days afterwards Brock died, and the attending physician gave it as his opinion that the blow on the head caused his death. Up to this point there was no material discrepancy in the testimony. On some very material inquiries the testimony is irreconcilable. Some witnesses testified that when Puryear and his friends were approaching the house in which the difficulty occurred, and after they learned Brock was there, Puryear remarked, "I expect we will have it to-night," and that Bostic said if he did he would stand up to him. Bostic, in his testimony, denied this. There was testimony that Bostic struck the blow which proved fatal, while he and some other witnesses testified that he did not; and there was testimony that when Puryear fled from the house he seized a pole, and was returning into the house to renew the rencounter. On this question the testimony was by Puryear himself, and there

was no testimony that, after the combat commenced, Puryear made any remark of any kind. His intention in leaving the house must, therefore, be gathered from what he did, and not from anything said, for he said nothing. We have stated this much of the testimony because it exerts a material influence on some of the instructions requested by the defendant. Several charges were requested, invoking the doctrine referred to above,—the right of a mere stranger to interfere, even to extreme results, to prevent the commission of a felony attended with force. The charge so asked which most nearly comes up to legal requirements is in the following language: "If you believe from the evidence that the defendant killed the deceased, Jesse Brock, under a well-grounded and honest belief, created by all the circumstances, that it was necessary for him to kill the deceased to prevent the deceased from killing, without just cause, John Puryear, then the defendant is not guilty, and your verdict should be for acquittal." It will be remembered that there was testimony in this case that John Puryear commenced the conversation, and used the first insulting language, which brought on the difficulty. There was also testimony that defendant, Bostic, had promised Puryear to stand up to him should a difficulty ensue. Each of these facts, if believed, exerted an important bearing on the inquiry of defensive resistance, whether made or attempted by Puryear or Bostic. As to the former (Puryear) it imposed on him the duty of withdrawing from the conflict by manifest acts or positive language, one or both, before he could place himself on the solid ground of self-defense, with the rights which pertain thereto; and as to the latter (Bostic) it was not enough that Puryear should have placed himself on defensive ground, as stated above. Certain conditions as to Bostic himself were necessary before he would be justifiable in striking to save Puryear from the threatened violence which his own insulting language had provoked. Bostic was not authorized to strike in defense of Puryear until the latter had clearly manifested a desire and purpose to withdraw from the combat, nor even then, if the blow was struck pursuant to a formed design and purpose to stand up to him in the event that a personal rencounter ensued. The words "without just cause" are neither clear enough nor full enough to authorize the giving of the charge asked, under the testimony found in this record. For reasons still stronger the other kindred charges were rightly refused.

Another charge asked by defendant was in this language: "Although a person originally provoked the conflict, if he withdrew from it in good faith, and clearly announced his desire for peace, and was afterwards pursued by the other person, his right of self-defense revives." The presiding judge refused this charge, giving as a reason that it was abstract. Ignoring all other inquiries involved in this charge, there was not a semblance of proof that after the encounter was entered upon, or after Puryear uttered the insulting language, he announced any desire for peace. This of itself rendered the charge abstract. 3 Brick. Dig. p. 109, § 33; Id. p. 113, § 106.

Dr. Wilkerson attended the deceased, Brock, after he was wounded, and testified that he died of concussion of the brain, caused, as he believed, by the wound he had received. He testified that after being wounded he had been twice removed from one place to another, and "that it was drizzling at the time he was moved." On cross-examination the doctor was asked two questions, substantially the same, namely: "If it was not possible that removing deceased, in his condition, about, in bad weather, over a rough country, caused his death." The second question was: "Might not the moving deceased in inclement weather over rough roads, deceased being exposed while he was in a condition of mental excitement resulting from the wound, have caused his death?" These questions were objected to by the prosecution, the objections sustained, and the defendant excepted. This exception raises in substance the same question as that considered above. The record contains no testimony that the removals of the deceased were over a "rough country," or over "rough roads." Without considering any other ground of objection to the questions, we are forced to hold the objections well taken, because one of the postulates on which the opinion of the physician was invoked had no testimony to support it. There is nothing in the other questions raised. Affirmed.

(94 Ala. 616)

LUCAS v. PITTMAN.

(*Supreme Court of Alabama.* Feb. 4, 1892.)

ACTION BY ADMINISTRATOR — CAPTION OF COMPLAINT—WORDS OF DESCRIPTION — AMENDMENT OF PARTIES—COMPLETED SALE—DETINUE—TITLE TO SUPPORT—GENERAL ISSUE.

1. The words "as administrator," following the plaintiff's name in the caption of a complaint, are sufficient to show that plaintiff sues in a representative capacity, though no allegation with reference thereto is made in the complaint. The word "administrator," following alone the plaintiff's name in the caption, is a mere word of description personal, but, if the body of the complaint following such a caption contains a sufficient statement to show that plaintiff sues in his representative capacity, the body of the complaint will govern the caption. Montgomery Co. v. Barber, 45 Ala. 237, overruled.

2. Under Code, § 2833, providing that during the progress of a cause the complaint may be amended by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant, where a defendant is sued in a representative character the complaint can be amended so as to make the action against him in his individual character. Christian v. Morris, 50 Ala. 586, and Taylor v. Taylor, 43 Ala. 649, overruled.

3. H. and L. executed a writing reciting, "Contract made this day between" H. and L. for two certain horses with harness and wagon, to be paid in work at $2.50 per day, L. agreeing to work for H. until the debt is paid, only reserving right to pay cash for balance at any time. "Such balance being paid by L., then H. has no further claim on said team." At the time, L. was the teamster of H., and the property was in his possession as such, and after the execution of the contract he remained in possession of the prop-

erty. *Held*, that the sale was complete, H. reserving only an equitable claim on the property for unpaid balance.

4. Such a claim is not sufficient title to authorize a recovery of the property in detinue.

5. In detinue the general issue is presented by a plea of "*non detinet.*"

Appeal from circuit court, Shelby county; LE ROY F. BOX, Judge.

Detinue by Lomax Pittman, as administrator *de bonis non* of J. W. Hardy, deceased, against Ransom L. Lucas. Judgment for plaintiff, and defendant appeals. Reversed.

The action was brought originally "by Minnie Hardy, as the administratrix of the estate of J. W. Hardy, deceased," against the appellant, R. L. Lucas, for the recovery of certain described personal property. Upon the resignation of Minnie Hardy as administratrix being suggested to the court, the cause was revived in the name of Lomax Pittman as the administrator *de bonis non*. The defendant pleaded "not guilty." The property so sued for originally belonged to the said J. W. Hardy, but the defendant claims that by the following contract, which was dated October 3, 1881, the said property was sold to him: "Contract made this day between J. W. Hardy and Ransom Lucas for two (2) horses, known as 'Lightning' and 'Old Joe,' one double harness, and double wagon, for three hundred dollars, same to be paid in work at two dollars and fifty cents per day. This means $2.50 per day for one man and the double team, Ransom Lucas agreeing to work for J. W. Hardy until said debt is paid, only reserving the right to pay cash for balance at any time. Such balance being paid by Ransom Lucas, then J. W. Hardy has no further claim on said team. Anything said Lucas may buy from J. W. Hardy is to be sold him cash price, with small allowance for hauling same from Calera." It was recited by an agreed statement of facts that, at the time of and before the execution of said contract, the defendant, Lucas, was employed by said Hardy as teamster, and had charge of the property mentioned in the said contract and which is here sued for, and that after the execution of said contract he continued in possession of said property. It was further shown that the defendant, after the execution of said contract, did hauling for the said J. W. Hardy between that time and the time of Hardy's death, and after Hardy's death the defendant did some hauling under the contract for Mrs. Minnie J. Hardy, widow of said Hardy, "but on many occasions refused to haul for Mrs. Hardy." The value of the property was shown. It was further shown that after being credited at the rate agreed on in the contract for all hauling done for Hardy and his administratrix, and having been charged for all goods purchased from the said Hardy at the prices named in the said contract, the defendant was indebted to said J. W. Hardy in the sum of nine cents. At the written request of the plaintiff, the court gave the general affirmative charge in his behalf, and to the giving of the general affirmative charge the defendant duly excepted.

W. S. Cary, for appellant. *Lomax Pittman*, for appellee.

COLEMAN, J. The suit is in detinue. The caption to the complaint, when filed, was, "Minnie Hardy, as the Administratrix of J. W. Hardy, Deceased, Plaintiff, v. Ransom L. Lucas, Defendant." The complaint itself is as follows: "The plaintiff claims of the defendant the following personal property, viz., [describing the property,] with the value of the hire or use thereof during the detention," etc. The proof shows that plaintiff relied upon the title of his intestate for a recovery. The court gave the general affirmative charge in favor of the plaintiff. The first question presented is to determine whether the complaint sets forth a cause of action in the name of Minnie Hardy individually, or in her representative capacity. In the case of Gibson v. Land, 27 Ala. 117, the plaintiff, Land, styled himself in the caption or commencement of the complaint "as trustee for his wife, Elizabeth Land," and it was held these words were mere descriptions personal, and the action was in his individual capacity. In the case of Crimm v. Crawford, 29 Ala. 623, the caption was, "Crawford, Admr. *de bonis non* of Nancy Cullens, v. Thomas Crimm." The complaint itself proceeded as follows: "The plaintiff, as administrator *de bonis non* of Nancy Cullens, deceased, claims," etc.; and the court held that the complaint sufficiently showed the action was by plaintiff in his representative character, and authorized plaintiff to recover on the title of his intestate. Referring to the case quoted above from 27 Ala., the court held that, since the adoption of the Code simplifying the pleadings, "all averments as to title are dispensed with." In Graham v. Gunn, 45 Ala. 577, in the caption the plaintiff styled himself "as admr. of Moses Green," and averred in the declaration that the note sued on was assets of the estate of his intestate. The court held that the suit was in his representative capacity. In the case of Montgomery Co. v. Barber, 45 Ala. 237, the caption was, "Robert Barber, as Sheriff of Montgomery County, v. Montgomery County," etc. The complaint itself proceeded as follows: "The plaintiff, as sheriff, claims of the defendant," etc. The court held that the words "as sheriff," in the caption and in the complaint both, were mere surplusage, and that plaintiff was entitled to recover upon proof of an indebtedness due him individually. In Wright v. Rice, 56 Ala. 44, the summons and complaint were in the name of John P. Rice, "who sues by the name and description of administrator of H. Pippen, deceased." The court held that John P. Rice individually was plaintiff, and all else mere surplusage; citing Agee v. Williams, 27 Ala. 644. There seems to be some confusion in the authorities as to what is necessary to distinguish when an action is brought in the name of the individual and when in his representative character. We hold the proper rule to be that when the plaintiff's name appears in the caption, followed by the words "administrator," "guardian," and there is no statement of

averment in the body of the complaint to indicate differently, the words "administrator," "guardian," are all mere words of description personal; that if the name of the plaintiff in the caption to the complaint is followed by the use of such words as "as administrator," or "as guardian," or "who sues as," or words of equivalent meaning, these words are sufficient to show that the plaintiff sues in a representative capacity when the complaint proceeds in the usual form, such as, "The plaintiff claims of the defendant," etc. In the latter case the words in the complaint, "The plaintiff," will be referred to the character of the plaintiff as expressed in the caption. We further hold that where the words in the caption are mere words of description, yet, if in the body of the complaint there is a sufficient statement or averment to show that the suit by plaintiff is in his representative character, the body of the complaint must govern the caption. Tate v. Shackelford, 24 Ala. 510; Watson v. Collins, 37 Ala. 588; Espalla v. Richard, (Ala.) 10 South. Rep. 137. From these conclusions it follows that the case of Montgomery Co. v. Barber, 45 Ala. 237, and authorities in that line, must be overruled. It may be regarded as settled that under the statute of amendments, when a complaint is filed in the name of one suing in his individual capacity, if the facts authorize it the complaint may be amended so as to make the suit stand in his representative capacity, and *vice versa*. Longmire v. Pilkington, 37 Ala. 296; Crimm v. Crawford, supra. There are some authorities which, while admitting the rule of amendments as thus stated to be applicable to plaintiff, deny that it applies to defendants, and hold that, if a defendant is sued in his representative character, the complaint cannot be amended so as to make the cause of action stand against him in his individual character. We perceive no just foundation for the distinction, and it finds no warrant in the statute itself. The statute is broad in its provisions, and applies equally and alike to plaintiffs and defendants. Code, § 2833. The case of Christian v. Morris, 50 Ala. 586, and Taylor v. Taylor, 43 Ala. 649, are contrary to the strict meaning of the statute, and must be overruled. The case of Kirkman v. Benham, 28 Ala. 501, cited, does not support the construction given to the statute, and the older cases cited in support of a contrary proposition were rendered before the adoption of the present act allowing amendments.

The plaintiff introduced in evidence an instrument in writing signed by his intestate and the defendant; and plaintiff's title and right to recover depend upon the construction to be given to this contract. It is exceedingly indefinite. Whether the parties intended the contract to be a sale of the property so as to pass the title, or whether a sale on condition was intended, the title not to pass until the payment of the purchase money, or a sale with a reserved lien, is indefinitely expressed and imperfectly manifested by its terms. There are certain rules of law applying to contracts for the sale of personal property to which the courts must resort to aid them in their construction of contracts of this character. The proof shows that at the date of the contract the property was then in the possession of the defendant, as a teamster in the employment of Hardy. No further actual delivery or change of possession could be made. It is evident, however, the possession of Lucas after the making of the contract was not that of an employe, but that of a purchaser. Nothing remained for the seller to do. The property was specified, and the price definitely fixed, and the manner of payment agreed upon, and possession delivered and the right of possession transferred to the purchaser. Mr. Justice CLIFFORD, in the case of Hatch v. Oil Co., 100 U. S. 131, states the law as follows: "Where the specific goods to which the contract is to attach are not specified, the ordinary conclusion is that the parties only contemplated an executory agreement. Reported cases illustrate and confirm that proposition, and many show that where the goods to be transferred are clearly specified, and the terms of sale, including the price, are explicitly given, the property, as between the parties, passes to the buyer without actual payment or delivery." After citing the authorities, he proceeds: "Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of the sale, the presumption is, if the thing to be sold is specified, and it is ready for the immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention. Well-founded doubt upon that subject cannot be entertained, if the terms of bargain and sale, including the price, are explicit. * * * In such case [he continues] there is no reason for imputing to the parties any intention to suspend the transfer, inasmuch as the thing to be sold and the price have been specified and agreed upon by mutual consent, and nothing remains to be done." To the same effect may be cited 1 Benj. Sales, § 309, and note. That the contract created a liability upon Lucas to pay Hardy $300 for the property sold and purchased is manifest from the contract itself. That this was the understanding of the parties themselves is equally clear, not only from the payments made and credited as such, but the demand upon the defendant that he complete the payment by further work and labor or in cash. There is but one clause in the contract from which any contention can arise, and that is this: "Such balance being paid by Ransom Lucas, then J. M. Hardy has no further claim on said team." Applying the general principles of law applicable to sales of personal property, we hold that the sale was complete, that the title passed to the purchaser, and all that plaintiff reserved was a mere equitable claim to or lien upon the property for any balance that might remain unpaid. There is no reservation of title by the seller under this contract, nor any terms or provisions, which show a conditional sale, by which the parties intended the title to pass at

some future time, or upon the payment of the purchase money. Under such circumstances there must be a clearly manifested intention by the agreement itself or attending circumstances that the parties did not intend a sale and transfer of title, to overcome all the presumptions of law which arise in cases of sales of personal property where the property is definitely specified, the price fixed and agreed upon, and delivery complete, and nothing remains to be done by the seller. A mere equitable title or claim will not authorize the plaintiff to recover in an action of detinue. The plea of defendant to present the general issue should have been "*non detinet.*" Reversed and remanded.

(94 Ala. 19)

JOLLY v. STATE.

(*Supreme Court of Alabama.* Feb. 4, 1892.)

CONSPIRACY—ACTS OF CONSPIRATORS—TIME OF FORMATION—EVIDENCE—INTENT—ASSAULT WITH INTENT TO KILL.

1. Where the evidence in a trial for assault with intent to murder shows that defendant conspired with two others to attack one P., and that defendant was present, aiding and abetting, or ready to aid and abet, in the execution of their design, defendant is guilty, though he struck no blow; Code 1886, § 3704, abolishing the distinction between principals of the first and second degrees, and between principals and accessories before the fact, and directing that all persons concerned in the commission of a felony be dealt with as principals.

2. Such conspiracy need not have been entered into previously to the assault.

3. It being shown that defendant was present as an accomplice to encourage or assist in the assault, no malice on his part against P. need be shown.

4. Where the evidence tended to show that defendant committed the assault in person, there was no need of proving conspiracy.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

James Jolly was convicted of an assault with intent to murder one Powell, and appeals. Affirmed.

The testimony for the state tended to show a conspiracy between defendant and his father and brother to make an attack on Powell. The only question reserved for consideration in this court arises upon charges given and refused. The court in its oral charge to the jury, among other things, charged them as follows: "That if they believed beyond a reasonable doubt that the defendant was present at the time of the difficulty, and was aiding and abetting the same, that he would be as guilty as the one who struck the blow, although they might believe that some one else engaged in the difficulty struck the blow; and that if he was concerned in the matter by previous agreement with the parties who engaged in the difficulty to have the same, and the difficulty was had in pursuance thereof, then the defendant would be as guilty as the party who struck the blow, although he was not present at the time the blow was struck. The law makes no distinction between accessories before the fact and principals; they are all regarded under the law as alike guilty, and are to be indicted, tried, and punished as principals." Defendant duly excepted to this portion of the oral charge of the court, and also excepted to the court's giving the following written charges at the request of the state: (3) "Unless the jury find from all the testimony that Jim Jolly, the defendant, assaulted Powell, with malice aforethought, with intent to murder him, he cannot be found guilty as charged in the indictment as an accomplice; unless the jury find beyond a reasonable doubt from the testimony that there had previously been a conspiracy between the defendant and others, they cannot find the defendant guilty." (7) "In this case the law requires the state to make out, by testimony from the stand by witnesses, every fact necessary to prove the guilt of the defendant beyond any and all reasonable doubt and, unless the state has made out by proof the facts charged, it is not necessary for the defendant to offer any testimony, and the jury under such a state of facts should find the defendant not guilty." (8) "Before the jury can find the defendant guilty as charged in the indictment they must find that he was an accomplice, and that the proof must show that there had been a previous conspiracy between them to commit the offense charged in the indictment." (11) "It is necessary, in order to convict the defendant, that the state must prove beyond all reasonable doubt each allegation in the indictment; and unless the state proves in this case that Jim Jolly had malice against Powell, and that this malice was in him before the difficulty or cutting, then the defendant cannot be found guilty as charged in the indictment." (12) "Before the jury is authorized to find the defendant guilty, they must find from all the testimony, beyond a reasonable doubt, that Jim Jolly had malice in his heart against Powell, and that the malice existed before Powell was cut." After the verdict of guilty, defendant made a motion for a new trial, which was overruled.

James H. Caldwell and *Savage & Coleman*, for appellant. *Wm. L. Martin*, Atty. Gen., *J. H. King*, and *John B. Knox*, for the State.

WALKER, J. There was evidence tending to show that the defendant conspired with his father and brother to attack James Powell, and that there was a concert of action between the three when the assault was made, though the evidence was conflicting as to whether the wound received by Powell was inflicted by the defendant or by his brother Joe Jolly. Even if Joe Jolly was the active perpetrator in the commission of the offense, the defendant is, in the eye of the law, equally guilty if he was present, encouraging, aiding, abetting, or assisting, or was ready to aid, abet, or assist in the execution of the unlawful design. If the three combined together to attack Powell, each of them would be criminally responsible for any act of the other which was a probable or natural consequence of the execution of their common purpose, though the particular act done was not expressly agreed to or contemplated in advance. Tanner v. State, 92 Ala. 1, 9 South. Rep. 613; Gibson v. State, 89 Ala. 121, 8 South. Rep. 98;

Williams v. State, 81 Ala. 1, 1 South. Rep. 179; Martin v. State, 89 Ala. 115, 8 South. Rep. 23. "The distinction between an accessory before the fact and a principal, and between principals in the first and second degrees, in cases of felony, is abolished, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, must * * * be indicted, tried, and punished as principals, as in the case of misdemeanors." Code 1886, § 3704. The portion of the oral charge of the court to which an exception was reserved, and charges 2 and 3 given at the instance of the state, were correct, under the rules above stated. Charge 1 given at the instance of the state is fully supported by the decision in the case of Walls v. State, 90 Ala. 618, 8 South. Rep. 680. It was contended for the defendant, as shown by a number of charges requested, that on an indictment charging him with an assault with intent to murder he could not be convicted on proof that he was a conspirator, and aided or abetted in the commission of the offense, but that it must be shown that he committed the assault in person. That this contention was not well founded is shown by the above statement of the law on the subject. Charges 1, 4, 9, 10, 13, and 15 involved the erroneous proposition just stated, and were properly refused. If the defendant was concerned in the commission of the felony, or aided or abetted his father and brother therein, either of them could be convicted, though the jury could not determine from the evidence which of the three inflicted the wound, if they were satisfied from the evidence that it was inflicted by one of the conspirators, in the execution of the common design. Charges 2, 5, 6, 14, 16, and 17 requested by the defendant were incorrect in predicating a right to an acquittal upon the existence of a doubt as to who did the cutting, without regard to the absence of doubt in the evidence that the cutting was done by one of the three persons who were acting in concert, with a common purpose to attack Powell. The defendant could be charged as a principal if the conspiracy to attack Powell was formed at the time of the difficulty, and the cutting was done in the execution of a plan to which the defendant then became a party. The conspiracy need not have been entered into previously. Tanner v. State, 92 Ala. 1, 9 South. Rep. 613. This consideration discloses a fault in charges 3 and 11 requested by the defendant. If Joe Jolly was the assailant, and the defendant knew that the assault was made with intent to murder, and was present as an accomplice to encourage, aid, or assist in its execution, it was not necessary to show that the defendant himself entertained the intent or malice against Powell. Tanner v. State, 92 Ala. 1, 9 South. Rep. 613. For this reason, charge 12 was properly refused. Charge 7 was calculated to convey the impression that it was necessary to prove that the defendant committed the assault in person. In view of the evidence tending to show a conspiracy, it had a tendency to mislead the jury. Charge 8 ignores the evidence which tended to show that the defendant did commit the assault in person. If that tendency of the evidence was believed, it was unnecessary to prove the conspiracy. The proceeding on the motion for a new trial was not properly made a part of the record. Besides, the action of the trial court on such an application is not revisable here. Walker v. State, 91 Ala. 76, 9 South. Rep. 87. The act of February 16, 1891, (Acts Ala. 1890-91, p. 779,) allowing appeals to this court from decisions granting or refusing to grant motions for new trials, applies only to civil cases at law. No error is discovered in the record. Affirmed.

(94 Ala. 557)

FERRIS *et al.* v. MONTGOMERY LAND & IMP. CO. *et al.*

(*Supreme Court of Alabama.* Jan. 26, 1892.)

PARTITION—IMPROVEMENTS BY A CO-TENANT—COMPENSATION—BONA FIDE PURCHASER—DEFECT OF PARTIES.

1. Where a tenant in common has been in sole possession, and has in good faith, and without any intention of embarrassing his co-tenants or hindering partition or gaining an advantage therein, improved the land, while his co-tenants have neglected their claim thereto, equity will, in partition proceedings, whenever possible, allot to such tenant the portion of the land improved by him, or, if this be impossible, require his co-tenants to reimburse him for such improvement.

2. Compensation for improvements will be allowed only when the co-tenant, at the time of making them, believed himself to be the sole owner of the land.

3. This rule does not apply to cases where the improved portion of the land can be allotted to the improving tenant, since the rights of his co-tenants are in no wise affected thereby.

4. Where a specified portion of the land has been purchased in good faith from such improving tenant by a stranger, equity will extend to the latter the same protection as it would have done to his grantor.

5. Where it is alleged and proven in partition proceedings that the United States has an interest in the land, there can be no partition unless the United States consents to become a party.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Bill in equity by the Montgomery Land & Improvement Company for a partition of land. Cross-bill by the Southern Cotton-Oil Company. Demurrer to bill and cross-bill, and plea filed by Catherine J. Ferris and others. From the judgment of the chancellor, all parties appeal. Reversed.

The demurrers involved substantially but four points: *First*, that, the Montgomery Land & Improvement Company having no interest in the lands owned by the Southern Cotton-Oil Company, the Southern Cotton-Oil Company was not a proper party to the bill filed by the land company for partition, and, *vice versa*, the land company was not a proper party to the bill filed by the Southern Cotton-Oil Company; *second*, that the Southern Cotton-Oil Company, having wrongfully dispossessed the respondents of their lands, and improved the same with notice of respondents' rights, had no right in equity to a partition so as to exclude the respondents from the benefits of the improvements; *third*, that the interest of each person in the lands sought to be di-

vided was not shown by the bill; *fourth*, that the bill did not seek a partition of the said lands to each of the parties in severalty, but asked that certain of them should receive their shares in common. In addition to these demurrers, a plea was filed, setting up that the United States claimed an undivided one-fourth interest in the said lands. It shows that the claim was denied, and that a suit was pending between the parties, involving the validity of that claim. Both causes were submitted to the chancellor on a motion to require a larger injunction bond, on the demurrers, and on the sufficiency of the plea. No evidence was introduced to support the motion requiring a larger injunction bond. The chancellor rendered a decree—*First*, sustaining the demurrers on the ground that the original complainant had no right to ask a partition of the property it had sold to the cross-complainant, and that cross-complainant had no right to ask that the Henshaw heirs be given their respective shares out of the lands remaining in the hands of the original complainant; *second*, the court sustained the motion to require a larger injunction bond; *third*, it overruled the other grounds of demurrer; and, *fourth*, it sustained the exceptions to the plea. The plea sets up the claim of the United States in bar of the partition proceedings, and asks that the bill be dismissed by reason of the facts set up therein. The original complainant assigns as error the first ruling of the court hereinabove set out. The cross-complainant assigns as error the ruling of the court sustaining the motion to increase the injunction bond, and the ruling assigned by the original complainant. The defendants to the original bill and cross-bill assign as error the other rulings of the court on the demurrer and its rulings on the plea.

Semple & Gunter, for appellants. *Tompkins & Troy*, for appellees.

WALKER, J. Josiah Morris, being seised in fee of a tract of land containing 79 acres, in June, 1873, by a deed in which his wife joined, conveyed an undivided one-half interest therein to Eugene Beebe and Ferrie Henshaw, who were partners doing business under the firm name of Beebe & Henshaw. Henshaw died intestate in 1879. In January, 1887, Morris conveyed his remaining undivided half interest in the land to the Montgomery Land & Improvement Company. At the same time, Beebe, claiming and representing that, as the surviving partner of Beebe & Henshaw, he was fully authorized and empowered by the heirs of Henshaw to sell and convey the entire half interest of himself and the deceased, Henshaw, executed to the same company a deed purporting to convey to it that undivided half interest in the land, and that company, relying upon Beebe's statements and declarations, received from him the conveyance undertaking to convey the undivided half interest of Beebe & Henshaw, and paid him therefor. Immediately after the execution of the deeds to it, the land and improvement company entered upon and took possession of the entire tract of land. That company, in September, 1887, undertook to sell and convey to the Southern Cotton-Oil Company a part of said tract. The part so attempted to be sold and conveyed was a lot containing about 10 acres. The oil company took possession of this lot in good faith, believing that the land and improvement company had a good title thereto, and had conveyed the same to it, and erected permanent improvements thereon of the value of $150,000. Thereafter it was discovered that Beebe had no right to convey the interest of his deceased partner, Henshaw, and the heirs of Henshaw have recovered a judgment at law against the oil company for their undivided interests in the lot upon which the improvements had been erected. The original bill in this case was filed by the land and improvement company against the oil company and the heirs of Henshaw for a partition of the whole tract above mentioned. The bill alleges that the tract can be equitably divided, so that the Henshaw heirs may have their respective interests allotted out of the unimproved portion of the tract which the complainant has not attempted to convey, and the complainant offers to allow them to receive, on the partition, their respective portions out of the unimproved part. The oil company, in its answer and cross-bill, admits the allegations of the original bill, and alleges that at the time of its purchase from the land and improvement company it had no notice or information that the Henshaw heirs, or any one other than its vendor, had any interest in or title to the land; that it took the land described in its deed in good faith, believing that it acquired a good title to the entire interest therein, and that, acting under such belief, it erected the valuable improvements before it had any knowledge or information of the interest or claim of the Henshaw heirs. The oil company accepts the offer of the original bill that the interest of the Henshaw heirs be allotted to them out of the unimproved land remaining in the possession of the land and improvement company. The cross-bill prays for a writ of injunction to restrain the issue and execution of writs of possession on the judgment at law in favor of the Henshaw heirs. Demurrers and a plea were interposed for the Henshaw heirs to the original bill and to the cross-bill. The plea and some of the grounds of demurrer to the original bill and to the cross-bill were overruled. Other grounds of demurrer were sustained. The appellants are the Henshaw heirs, who assign as errors the rulings adverse to them. There are also cross-assignments of errors by the complainant in the original bill and the complainant in the cross-bill, respectively.

When the land and improvement company took possession of the entire tract under the deeds from Morris and Beebe, though, in ignorance of the interests of the Henshaw heirs, it claimed the land as sole owner, yet, in reality, the extent of its right was that of a tenant in common with them. The interest which it had acquired gave it an equal right with them to occupy the premises. One tenant in

common cannot be deprived of the right to use and enjoy the common property because his co-tenants are willing to let the property lie idle, or fail or refuse to set up any claim to it; and while he is thus left in sole possession he may manage the common property in any way he pleases, provided he does not injure his co-tenants. Newbold v. Smart, 67 Ala. 326; Gayle v. Johnston, 80 Ala. 395. He may cultivate or improve the property, and the plain dictate of justice is that he be permitted to enjoy the fruits of his own labors unless that result involves some infringement upon the rights of the co-tenants who stand off and forbear to make any use of the property. The tenant out of possession may at any time assert his right to share in the possession, or he may have the property partitioned by a division among the co-tenants in severalty, each taking a distinct part according to the extent of his interest. He cannot complain of the mere possession of a co-tenant so long as he refrains from setting up any claim to share in that possession. And if in the partition the part of the property which he receives is as much as he would have been entitled to if his co-tenant had not been in possession at all, then, certainly, it cannot be said that his share in the property has been diminished by the fact that his co-tenant has improved the part which is allotted to him in the division. This court has not been unmindful of the equitable claim of a tenant in common who has in good faith expended his labor and capital in the improvement of property of which he has had sole possession, while his co-owners have abandoned or neglected it; but this equitable claim is not permitted to impair the right of the co-tenant out of possession, or to hinder or burden him in the partition of the property. Improvements which have been made by the tenant in possession either cover so much of the common property that the parts which the co-tenants out of possession are entitled to receive on a partition cannot be set off to them without including a portion of the improvements, or they cover no more than the part which may be allotted to the occupying tenant. In the former case the tenant who has made the improvements must suffer a loss as to part of them, unless his co-tenants are required to compensate or reimburse him therefor. In the latter case the co-tenants who have not been in possession may get their full shares of the property without any of the improvements. In the one case, if the tenant who has had nothing to do with making the improvements is required to contribute to the payment therefor, to this extent his right to a partition is burdened and incumbered as the result of the fact that improvements have been made. In the other case he may get his full share of the property, and he is no injured by the allotment to the occupying tenant of the part of the land which the latter has improved. There have been cases in this court involving the claim of one tenant in common to compensation from his co-tenants for improvements made by him on the common property, and also cases in which the claim of the improving tenant was merely to have the part of the property which he had improved allotted to him, so that his co-tenants, who had contributed nothing to the improvements, should receive their parts of the common property out of the unimproved portion thereof. In the former class of cases the claim to compensation for improvements made was not denied, but the amount of the compensation was not permitted to go beyond the amount of the rents charged against the improving tenant. Horton v. Sledge, 29 Ala. 478; Ormond v. Martin, 37 Ala. 598; Turnipseed v. Fitzpatrick, 75 Ala. 304. In the latter class of cases there has been a full recognition of the equitable rule that the court, if it is practicable, should so order the partition as to give the benefit of any improvements made on the premises to him who may have erected or made them, and this is done by assigning to such part owner the portion of the estate on which such improvements are situated. Donnor v. Quartermas, 90 Ala. 164, 8 South. Rep. 715; Wilkinson v. Stuart, 74 Ala. 198; Sanders v. Robertson, 57 Ala. 465. In each of the classes of cases the equitable claim of the one who has made the improvements is recognized and is enforced, so far as such enforcement does not involve an impairment of the rights of his co-tenants. There is a conflict in the authorities upon the question of allowing a co-tenant, in partition, to recover compensation for improvements made by him without the assent of his co-tenants; but, in cases where one co-tenant has improved only a parcel of the premises, which does not exceed his share of the whole tract, the generally, if not universally, recognized rule in courts of equity is to have allotted to him, in a partition, the parcel which has been enhanced in value by his expenditures and industry. Freem. Co-Ten. (2d Ed.) §§ 509-511; Robinson v. McDonald, 62 Amer. Dec. 480, and note; Nelson v. Clay, 23 Amer. Dec. 387; St. Felix v. Rankin, 3 Edw. Ch. 323. When the equitable claim of the improving tenant can be fully recognized and protected by awarding him the part which he has improved, the question of requiring the other co-tenants to make compensation for the improvements is not involved. They get their full shares of the property without any charge or burden upon them because of the improvements. The equity of a co-tenant to have the part of the common property which he has improved allotted to him on a partition is not founded upon the idea that he made the improvements with the consent, express or implied, of his co-tenants. In Donnor v. Quartermas, supra, and in Sanders v. Robertson, supra, the co-tenants in whose favor, respectively, this equity was recognized had made the improvements while claiming to be sole owners of the common property, and while in adverse possession thereof; and in Wilkinson v. Stuart, supra, the rule is so stated by the court as to cover the case of a tenant who makes improvements upon the common estate without the authority of his co-tenants. In Hen-

ton v. Sledge, supra, it was declared that the improving tenant was not entitled to compensation for improvements to the extent of the rents charged against him, unless he made the improvements at a time when he really and *bona fide* believed himself to be the true owner of the land, and unless he was induced to make those improvements by that belief, really entertained. The authorities generally, both in cases where compensation for improvements is allowed and in cases where the improved portion of the estate is allotted to the co-tenant who has expended his labor and capital thereon, treat the fact that the improvements were made by one who supposed himself to be legally entitled to the whole premises as an equitable consideration in his favor. 1 Story, Eq. Jur. § 655; Sedg. & W. Tr. Tit. Land, §§ 693, 694; Pitt v. Moore, (N. C.) 5 S. E. Rep. 389, 6 Amer. St. Rep. 495, note; Patrick v. Marshall, 4 Amer. Dec. 670; and authorities cited supra. Where it is practicable, without injury to the other co-tenants, to allot the improved portion to the one who made the improvements, the reason for making such allotment depend upon the existence of the fact that he believed himself to be the sole owner of the entire tract does not apply, as in cases where compensation for improvements is charged against the other co-tenants; for the allowance of compensation, though it is not permitted to go beyond the amount of the shares of the rents to which the other co-tenants would be entitled, is still a charge upon them to that extent, while, if they get their shares in full out of the unimproved portion, and are not required to make compensation in any way, the fact that improvements have been made does not affect their rights in the partition. The recognition in this way of the equitable claim of the tenant who has made improvements in no way impairs the rights of his co-tenants on a partition. A court of equity will not allow one man to deprive another of the fruits of his labors and expenditures if such an unconscionable result may be avoided consistently with the security to each of them of the full measure of all that he is entitled to claim. In such case we think that the true rule is expressed in the opinion in Hall v. Piddock, 21 N. J. Eq. 314, where it was said: "The only good faith required in such improvements is that they should be made honestly, for the purpose of improving the property, and not for embarrassing his co-tenants, or incumbering their estate, or hindering partition." The co-tenant, whether he supposes himself to be the sole owner, or knows that there are others who are owners in common with him, is entitled to occupy and use the property, though his co-tenants fail or refuse to share with him in the enjoyment thereof; and if, in the course of his use and occupation, he makes improvements on a part of the common property, in good faith, and without any intention of embarrassing or obstructing a partition, or gaining an advantage therein, there is no good reason why he should not be allowed to retain the part improved by him, if his improvements in fact do not constitute a hindrance or obstacle in the way of the other co-tenants getting their full shares on the division of the property. A court of equity will simply so order the partition as to secure the rights of all parties without visiting an unnecessary hardship upon any of them. In the present case, if the facts were just as they are disclosed by the original bill, except that the land and improvement company had made no conveyance of any of the land, but had erected the improvements on the parcel now held by the oil company, there could be no doubt of the propriety of allotting that parcel on a partition to the land and improvement company.

It is insisted, however, that the conveyance to the oil company cannot be allowed to have the effect of conferring upon that company an equity to have allotted to it, on a partition of the whole property, the parcel which it holds under a conveyance from only one of several tenants in common. So far as the grantor's co-tenants are concerned, the extent of the operation of his conveyance was to transfer to his grantee his undivided interest in the particular parcel therein described. Such a conveyance is ineffectual to prejudice or abridge the rights of the co-tenants who do not join in it; for each tenant in common has an undivided interest in the whole tract, and in every part of it, and the right of one of them in any part of the property cannot be impaired by the act of another. The conveyance does not, so far as the co-tenants who did not join in it are concerned, sever the special tract therein described from the general tract, to which the tenancy in common extends. They still have the same interest in the part of the property described in the conveyance as they had before it was executed. They are still entitled to a partition, and may have their shares in the property set off to them in severalty, just as if no conveyance had been made. Their rights are not increased or diminished. The grantee is simply clothed with the rights of his grantor in the special tract described in the conveyance. Ward v. Crobett, 72 Ala. 438. The tenants in common who did not join in the conveyance do not acquire, in consequence thereof, any greater rights in the common property or in any part of it than they had before. They have no more right to demand that the particular tract described in the conveyance, or any part of it, be allotted to them on a partition, than they would have had if the conveyance had not been made. We have seen that if one tenant in common deals in good faith with a part of the common property as if he were the sole owner thereof, by erecting improvements on his own account, he will be allowed, on a partition, to retain the improved part, if that does not involve any prejudice to the rights of his co-owners. If the improvements are made, not by the original tenant in common, but by his grantee, we can perceive no good reason why the latter should not have the benefit of the same measure of protection which a court of equity would have afforded to his

grantor if no conveyance had been made. There is abundant support in the best authorities for the rule that, in making the partition in such a case, if the part sold and conveyed by one tenant in common can be assigned to the purchaser as a part or the whole of the share of his grantor without prejudice to the grantor's co-tenants in the original tract, it will be so assigned. Young v. Edwards, (S. C.) 11 S. E. Rep. 1066; Gittings v. Worthington, 67 Md. 146, 9 Atl. Rep. 228; Boggess v. Meredith, 16 W. Va. 28, 29; Worthington v. Staunton, Id. 208; Teal v. Woodworth, 3 Paige, Ch. 472; St. Felix v. Rankin, 3 Edw. Ch. 323; Camoron v. Thurmond, 56 Tex. 22; 11 Amer. & Eng. Enc. Law, 1092, 1093; Freem. Co-Ten. §§ 199–205. Under this rule the grantee merely has the benefit of the equitable claim which would have been recognized in favor of his grantor if no conveyance had been made. The other tenants in common are not allowed to disregard the conveyance so far as it could prejudice their rights, and, at the same time, give it such effect as to secure to them an inequitable advantage, which they would not have had if the grantor had made no transfer, but had improved part of the property himself. "There can be no doubt that the grantee of the specified parcel will become seised thereof in severalty if, upon partition, it should be assigned to him or to his grantor, and that, if not so assigned, he will lose his entire interest. He is more deeply interested in the partition than are any of the tenants in common of the entire tract. It matters little to them where their respective purparties may be located. But with the grantee of a special location it is all-important that such a division may be made as will allow his deed to become operative. He is entitled to the consideration of the court, and will, whenever his claims are known to the court, be protected, as far as possible, without doing injustice to the co-tenants of the whole tract. He has therefore been regarded as a proper party defendant even in states where his conveyance has been spoken of as void against the co-tenant of his grantor." Freem. Co-Ten. (2d Ed.) § 465. Whether the partition is sought by the grantor, who retains an undivided interest in the remaining portion of the original tract, or by his co-tenants, who did not join in his conveyance, it is proper to make the grantee of a specific portion a party defendant, so as to afford him an opportunity to assert his derivative equitable claim, to the end that the rights of the co-tenants, who are still entitled to a partition of the entire tract, may, if practicable, and without prejudice to them, be satisfied by an allotment of their shares out of that part of the original tract which was not included in the conveyance. The equitable claim of the purchaser from one tenant in common, founded upon the fact that he has, in good faith and without any purpose of embarrassing a partition, undertaken to acquire, and has improved, the parcel of land described in his deed, is not to be defeated by denying him the right to be a party to the proceeding in which the claims of other parties to the property in question may be so adjusted as to afford him protection. This can be done effectually only in a suit for a partition of the original tract. The grantee in a conveyance of a part of that tract from one of the tenants in common is a proper party to such a suit because of his interest in having the partition so directed as to protect him, so far as that may be done without prejudice to the rights of the other tenants in common. Gates v. Salmon, 35 Cal. 588; Sutter v. San Francisco, 36 Cal. 115; Harlan v. Langham, 69 Pa. St. 235; Whitton v. Whitton, 38 N. H. 127; Batterton v. Chiles, 54 Amer. Dec. 539. The claim of such grantee constitutes an equity which is involved in a partition of the original tract, and may be recognized and brought to the attention of the court in an original bill filed by others interested in the partition of the common property, or the grantee may propound it in a cross-bill.

The averments of the bill show that the land and improvement company acquired Beebe's undivided one-fourth interest in the entire tract. The plea of the Henshaw heirs alleges that that interest belongs to the United States. This is merely a denial of a part of the title claimed by the complainant in the original bill and the complainant in the cross bill. "In suits for the partition of lands, if the defendant denies the title of the complainant, the chancellor need not dismiss the bill or delay the suit until a trial can be instituted and had at law, but may direct the issue as to the title of the complainant to be tried as other issues of fact are triable." Code Ala. § 3588; McMath v. De Bardelaben, 75 Ala. 68; McQueen v. Turner, 91 Ala. 273, 8 South. Rep. 863. If the denial of the plea is sustained by the proof, there can be no partition unless the United States becomes a party to the suit so as to be bound by the result thereof; for it is indispensable, in a suit for partition, that all co-tenants not uniting in the bill be made parties defendant. Freem. Co-Ten. (2d Ed.) § 466. The United States cannot be made a party defendant without its consent. If the denial of the plea is not supported by the proof, there will be no obstacle to the rendition of a final decree. If the proof sustains the averments of the plea, the complainant may desire to have the United States made a party to the cause. It will then be a question whether the bill should be summarily dismissed because of the inability of the complainant to bring a necessary party before the court, or should be retained, and the equities of the parties now before the court protected, until the absent party shall choose to submit itself to the jurisdiction of the court, or to assert its right to a partition in some other proceeding, in which the equities of all the parties in interest may be adjusted. As that question is not now presented, we will not undertake to decide it. The demurrers to the original bill and to the cross-bill should have been overruled. The plea of the Henshaw heirs is sufficient, and should have been sustained. The ruling on the motion to require the cross-complainants to give an additional bond will not be disturbed. As each of

the assignments of errors is sustained in part, the costs of the appeal will be equally divided between the three parties. Reversed and remanded.

CLOPTON, J., not sitting.

(29 Fla. 169)

WESTON *et al.* v. MOODY *et al.*

(*Supreme Court of Florida.* March 12, 1892.)

APPEAL—RECORD—DISMISSAL—FAILURE TO FILE PETITION.

1. A statement in a petition of appeal, that the trial court "admitted improper evidence," or "rejected proper evidence," is insufficient. The particular evidence admitted or rejected should be designated.

2. Where appellees move, at the term to which an appeal was taken, to dismiss the appeal on account of the failure of appellants to file a petition of appeal in the time prescribed by the rules, and pending such motion the appellants move for leave to file the petition, accompanying the motion with a petition which is too general in its designation of alleged errors, the court will, under the liberal practice obtaining in such cases, permit the petition to be filed on terms. Payment by appellants of the costs of both motions and filing a proper amended petition of appeal within a stated time, required as terms of allowance of appellants' motion; motion to dismiss denied; motion to file petition granted.

(*Syllabus by the Court.*)

Appeal from circuit court, Marion county.

Motion by S. D. Moody and others to dismiss an appeal taken by W. J. Weston and others from a judgment. Motion denied.

Bullock & Burford, for the motion. *L. N. Green*, opposed.

RANEY, C. J. Appellees moved to dismiss appeal taken to this term, on account of failure of appellants to file a petition of appeal within the time prescribed by rule 8. Appellants have presented a petition of appeal, and move to be permitted to file the same. The appellees object to the petition as being too general, in stating that the court below "admitted improper evidence," and "rejected proper evidence," without pointing out the particular evidence admitted or rejected. This objection to sufficiency of these statements of the errors complained of is well taken, yet we do not think it justifies a dismissal of the appeal. Pittman v. Myrick, 16 Fla. 401. We will, under the liberal practice obtaining in such cases, permit the appeal to stand upon the following terms: The costs of both motions will be taxed against appellants, and the appellants must within 10 days file an amended petition of appeal, designating such rulings, orders, and decrees as they claim to be erroneous. Should they fail to file such amended petition, the court will, of its own motion, dismiss the appeal. The motion of appellees will be denied, and that of the appellants granted, on the terms indicated as to each.

(29 Fla. 256)

ELLSWORTH v. HAILE *et al.*

(*Supreme Court of Florida.* Feb. 26, 1892.)

NOTICE OF APPEAL—SERVICE OF CITATION—ABANDONMENT.

1. Where 30 days do not intervene between the entry of an appeal and the next succeeding term of the supreme court, only 20 days' notice of the appeal is necessary; and, to enable the appellant to give the appellee this notice, the appeal may be made returnable to a day in term subsequent to the first day of the term. The practice does not, however, contemplate that the appellant may enter his appeal and use his own convenience as to the time of issuing and serving citation, nor that an appeal shall be brought to a term prior to which there has been no issue of citation.

2. Delinquency on the part of the clerk in preparing an appeal transcript is not an excuse for the failure of an appellant or his counsel to observe ordinary diligence in obtaining an appeal citation, and having it served.

3. An appeal was entered on the 2d day of a month, and the next term of the appellate court began on the 12th day of the month, and on the 5th day of the next succeeding month appellant filed the appeal transcript in the appellate court, and moved for a citation returnable to the same term. *Held*, that the appeal was abandoned.

(*Syllabus by the Court.*)

Appeal from circuit court, Alachua county.

Bill by E. S. Haile and others against E. S. Ellsworth. From an order overruling defendant's demurrer to the bill, he appeals. Appeal dismissed.

W. W. Hampton and *A. F. Odlin*, for appellant. *F. E. Hughes* and *Syd. L. Carter*, for appellees.

RANEY, C. J. An appeal was entered in this cause, on the 2d day of January of the present year, to the present term of the court, which term began on the 12th day of the same month. The appeal is from an order made on the 16th day of December last, overruling certain grounds of a demurrer to a bill in chancery. The transcript was not filed here till the 5th day of the present month, (February,) at which time a *præcipe* or application to the clerk, followed by a motion entered on the docket, was made for a citation returnable to the present term. We shall consider the motion as if it had been entered on the day the *præcipe* was filed.

Where 30 days do not intervene between the entry of an appeal and the succeeding term of this court, 25 days' notice of the appeal is not indispensable, but 20 days' notice is necessary; and, to enable the appellant to give the appellee 20 days' notice, he may make his appeal returnable to a day in the term subsequent to the first day thereof.

The purpose of this provision as to appeals between which and the next term of the court 30 days do not intervene is to avoid the delay incident to the appeal going over to the second succeeding term of this court; and to this end not only is the period of notice reduced to 20 days, but the time actually intervening between the appeal and the first day of the term is permitted to be supplemented by so many days of the term as will reasonably enable the appellant to give the appellee 20 days' notice. The statute, however, does not contemplate that the appellant may enter his appeal, and use his own convenience as to the time of issue and service of the citation, nor that any appeal shall be brought to a term prior to which there has been no issue of

the citation. The provision of chancery rule 95, that the appellant shall, at the time of entering his appeal, apply to the clerk of the circuit court to issue a citation, or that he shall apply to the clerk of this court upon filing the transcript here, was not intended to change the policy of the statute as to the time of the service of the citation. Appellant might have taken a citation from the clerk of the circuit court when he entered this appeal. Delinquency, if there was any, upon the part of the clerk, in not preparing the transcript until the 29th day of January, might excuse the mere failure to file the transcript in this court, but does not excuse counsel from the observance of ordinary diligence in obtaining citation and having it served, or change the policy of the law. By waiting till the twenty-fifth day of the term, and 34 days after entering his appeal, he has abandoned it, and it should be dismissed. The motion will be denied, and the appeal dismissed.

TAYLOR, J., did not sit in this case.

(29 Fla. 342)

RAY, County Treasurer, v. WILSON.

(*Supreme Court of Florida.* Feb. 1, 1892.)

COUNTY WARRANTS — VALIDITY — MANDAMUS TO COUNTY TREASURER — PLEADING — RETURN — REVIEW ON APPEAL.

1. Where a clerk of the circuit court is *ex officio* auditor of his county, and it is his official duty to audit all accounts against the county, in the manner prescribed by the statute, and to keep on file in his office the vouchers for all claims audited by him, and the law also provides that all accounts against a county shall be approved by the county commissioners before they are audited by the clerk, warrants or orders in favor of third parties, issued by the clerk under his seal of office, directed to the county treasurer, and expressed upon their face to be "chargeable under head of county expenditures," or to be payable "out of any money in the treasury appropriated for county purposes," are *prima facie* valid claims against the county.

2. *Mandamus* lies against a county treasurer to compel the payment of a valid warrant or order drawn on him as such treasurer, and for the payment of which he has the necessary funds applicable thereto.

3. Where an alternative writ of *mandamus*, brought to compel the payment, by a county treasurer, of county warrants, shows that warrants, regular upon their face, were issued by the proper officer, and for value received, and that the treasurer has the funds for their payment, it is not demurrable.

4. The fact that an ordinary action at law obtains against a county on a county warrant, does not constitute a specific and adequate remedy avoiding a *mandamus* for its payment in favor of the holder of such warrant against a county treasurer having the necessary funds for its payment.

5. A return to a sufficient alternative writ of *mandamus* must state all the facts relied upon by the respondent with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass upon the sufficiency of the return, and its statements cannot be supplemented by inference or intendment. A return that the warrants whose payment is sought are spurious, illegal, and void is, being a mere conclusion of law, insufficient, as likewise is a return that the warrants were issued and are held without valuable consideration; such statement being made, not as a positive averment of such fact, but as an inference or argument drawn from or based upon allegations which do not support the inference or argument.

6. Assuming that an order by a board of county commissioners, duly entered upon its records, authorizing the issue of county warrants, to be necessary to the validity of warrants of which payment out of the county treasury is sought by *mandamus*, a return stating that no such order appears upon the records of the board is insufficient. It is not incompatible with the fact that such an order was duly made and entered upon the records, nor tantamount to an allegation that no such order was ever passed and entered.

7. An order of a board of county commissioners requiring that county warrants previously issued shall be presented for re-examination by the board, and providing that all such scrip not presented by a stated day shall be of no effect, or "repudiated," is, though published according to the terms of the order, no defense to the payment of warrants not presented.

8. The statement of a return to an alternative writ of *mandamus* should be positive, and not on information and belief.

9. The delay of the relator in instituting proceedings by *mandamus* should be taken advantage of by proper pleading in the trial court. It cannot be urged primarily in the appellate court.

(*Syllabus by the Court.*)

Appeal from circuit court, Brevard county; JOHN D. BROOME, Judge.

Mandamus proceedings by Thomas E. Wilson against S. H. Ray, treasurer of Brevard county, to compel him to pay certain warrants. From a judgment for plaintiff, defendant appeals. Affirmed.

Minor S. Jones, for appellant. *Thos. E. Wilson, in pro. per.*

RANEY, C. J. This is an appeal from a judgment awarding a peremptory writ of *mandamus* requiring the appellant, the county treasurer of Brevard county, to pay certain county scrip or warrants.

The warrants consist of two pieces, each of the denomination of $10, dated October 26, 1876, and purporting to have been issued in the office of the clerk of Brevard county, at Lake View, by John M. Lee, clerk of the circuit court of that county, and *ex officio* auditor, and sealed with the official seal of such clerk, and in favor of William Shiver or order, and "chargeable under head of 'County Expenditures,'" and indorsed by Shiver; and of seven other pieces, six of which are for $20, and one for $10, drawn in favor of the relator, and dated May 2, 1876, at Lake View, in the above county, signed by John M. Lee, clerk of such court, and sealed as above indicated, and payable "out of any moneys in the treasury appropriated for county purposes." They are all drawn on the county treasurer, and numbered as indicated in the alternative writ. The alternative writ alleges that these warrants were regularly issued, for value received, and that the defendant has in his hands, as such county treasurer, the necessary funds to pay them, and that they have been presented to him, as such treasurer, for payment, but have never been paid, and that defendant is such treasurer.

By the constitution of 1868, as by the present revision thereof, the clerk of the circuit court was made clerk of the boards of county commissioners and *ex officio* auditor of the county. Section 19, art. 6,

Const. 1868, and section 15, art. 5, Const. 1885. The act of June 6, 1870, (section 31, p. 179, McClel. Dig.,) provides that the clerks of the different counties shall audit all accounts against their respective counties in the same manner as prescribed for the comptroller to audit accounts against the state, and that they shall require the same evidence of the legality of claims against counties as is required to establish claims against the state, and he shall keep on file in his office vouchers for all claims audited by him. By the act of February 16, 1872, (page 316, McClel. Dig.,) the county commissioners were given power to approve all accounts against the counties before the same should be audited by the clerk. The legislature of 1877, (sections 12, 13, pp. 317, 318, McClel. Dig.,) being subsequent to the issue of these warrants, need not be considered.

The alternative writ was demurred to on four grounds, one of which was that the relator had filed no cause of action; which ground was sustained and the others overruled; and, the relator filing the cause of action, the defendant answered as required.

The writ states, in our judgment, a *prima facie* case of pecuniary liability on the part of the county; or, in other words, sets up a sufficiently valid claim against the county to call for a defense.

Under the above constitutional provision and the legislation of 1870, it is clearly an official duty of the clerk of the circuit court to audit all claims against the county, and these warrants issued by him, under his hand and official seal, are the usual and proper evidence then given a creditor of the auditing of his claims against the county, the vouchers for which are presumed to have been duly required by the clerk or auditor, and to have been filed by him in his office. County and city orders issued by the proper officers are *prima facie* binding and legal. Such officers are presumed to have done their duty, and the orders constitute a *prima facie* cause of action, the impeachment of which must come from the defendant. Dill. Mun. Corp. § 502; Commissioners v. Day, 19 Ind. 450; Commissioners v. Keller, 6 Kan. 510; Clark v. City of Des Moines, 19 Iowa, 199, 211; Cheeney v. Town of Brookfield, 60 Mo. 53; City of Cornersville v Hydraulic Co., 86 Ind. 184. It is, in the absence of any showing to the contrary, to be presumed that the accounts upon which the warrants were issued were approved by the county commissioners under the act of 1872 before the clerk audited them and issued the warrants sued on. It was not necessary to specify the consideration of the warrant in the writ. Commissioners v. Day, supra. An alternative writ is not demurrable, if it states a *prima facie* case. State v. Mayor, etc., of Jacksonville, 22 Fla. 21. This writ shows that the scrip was issued by the proper officer, and for value received, and that the treasurer has funds to pay it; and the judgment must be affirmed, unless we find either that the relator has another specific and adequate remedy, or that the matters set up in the return are sufficient to bar a recovery in this proceeding. To these questions, in the order stated, we shall address ourselves.

In Com. v. Johnson, 2 Bin. 275, the decision was that *mandamus* lay to compel road supervisors to pay orders drawn on them in favor of surveyors by justices of the peace, under the provisions of a statute. "It is said," observes the opinion, "that the supervisors may be indicted for neglect of duty. But, if they were indicted and convicted, the orders might still be unpaid. It is said, also, that, if they withhold payment without just cause, they are liable to an action. Granting that they are, it must be brought against them in their private capacity, and there is no form of action against them which, being carried to judgment, will authorize an execution to be levied on the treasury of the Northern Liberties. Now it was to this treasury that the surveyors had a right to look when they acted under their commission from the governor." In Baker v. Johnson, 41 Me. 15, *mandamus* was granted to compel a county treasurer to pay the account of a sheriff for his services and those of his subordinates in attending court. His bills were audited and allowed by the presiding judge. Some objection was made that the judge did not, in terms, order the bills to be paid, yet it was conceded that they were allowed in the same manner as had ever been the practice in the county. In Potts v. State, 75 Ind. 336, a supervisor of highways had allowed a laborer for work done, and given him an order on the trustee of the township for its payment; but the trustee, on demand of payment, refused to pay the order out of the moneys in his hand applicable to its payment, and a peremptory *mandamus* was granted on relation of the supervisor. In State v. Gandy, 12 Neb. 232, 11 N. W. Rep. 296, the writ, after describing the warrants and their assignment to the relator, stated, in substance, that the warrants were legally issued by the board of county commissioners, duly presented to, and audited and allowed by, the board when in session, and that they had been presented for payment, and payment refused, and that there were, at the institution of the proceeding, sufficient funds in the treasury to pay the same after paying all prior warrants on that fund. These facts being conceded by the failure of the defendant to answer, a peremptory writ was awarded. See, also, Johnson v. Campbell, 39 Tex. 83; Hendricks v. Johnson, 45 Miss. 644; Clayton v. Williams, 49 Miss. 311; State v. Treasurer, 43 Mo. 228; People v. Edmonds, 15 Barb. 529, 19 Barb. 468; People v. Haws, 36 Barb. 59. In People v. Wendell, 71 N. Y. 171, there was an application, primarily, for a peremptory *mandamus* requiring a county treasurer to pay a claim of the relator which had been audited by the board of supervisors of the county. The papers used in opposing the motion showed quite clearly that a fraud had been perpetrated upon the board of supervisors in reference to a considerable portion of the claim, and it was also apparent that another portion of it was allowed without any authority or sanction of law. The order denying the

application was affirmed. Recognizing it as a settled principle that a remedy by peremptory *mandamus* cannot be invoked unless there is a clear and unquestioned legal right, (People v. Mott, 64 N. Y. 600,) it is yet observed by the court, subject, however, to the fact that in this case an alternative writ did not seem to be desired, that it is the duty of the court, in such cases, to see that the rights of the relator are fully protected, and it is authorized to direct the issuing of an alternative writ in cases where the facts relied upon by the relator are in dispute, or where the parties wish to review the case on appeal, or upon the suggestion of either party.

The above authorities hold that where the claim of the relator is one of a character whose payment the law imposes on the county or municipality, and it has been audited, and ordered to be paid by officers having the authority to audit it and order its payment, a county treasurer, or other paying officer, should not refuse to pay, if he has the money to pay it with, unless the claim is for some reason fraudulent. The duty to pay, where the paying officer has the funds to pay with, and the officers auditing and ordering payment have acted within the scope of their powers, and there is no fraud attached to the claim, is merely ministerial, and *mandamus* will lie to compel its payment. It is true the right to this remedy was doubted, though not decided, in People v. Lawrence, 6 Hill, 244, but such right is affirmed in the later New York cases. If the claim is not one of a character payable by the county or municipality, or if the board auditing it and ordering its payment had no authority to do so, or if there is fraud, (or, it may be, mistake,—Shirk v. Pulaski Co., 4 Dill. 209,) neither of which conditions is pretended to exist here, the paying officer should refuse to pay it. It is true that in some cases the right to the writ is put on the ground that an ordinary action at law will not lie against the county or municipality on the claim. We fail to see that such an action against the county is a sufficient remedy. If the claim is lawful, and has been audited and ordered paid by the proper authority, and the officer whose function it is to pay has been furnished with and has the public money for its payment, there is a palpable insufficiency in a remedy which would give him a personal judgment against the county or municipality, to be followed, it may be, by a *mandamus* to compel the levy of a tax to pay the same in case the money in the treasury should have been used, or there was not enough to pay the accrued interest, and all this, too, simply because an officer whose duty it is to pay lawful claims sees fit to refuse to do his duty. The holder of such a claim has an immediate right to the money provided and held for his payment, and a remedy which imposes any of the delay indicated, and its attendant expense, is entirely inadequate. A remedy which will avoid *mandamus* must be both specific and adequate. Baker v. Johnson, supra; Tapp. Mand. 18, 19; High, Extr. Rem. §§ 9, 15, 16, 17.

The contention that the relator has another sufficient legal remedy is answered by the authorities and observations set out above. This case is of course clearly distinguishable from those holding that a *mandamus* will not issue to compel the levy of a tax to pay a warrant or order of this character without putting it in judgment. State v. Clay Co., 46 Mo. 231; State v. Justices, 48 Mo. 475; State v. Trustees, 61 Mo. 155; Coy v. City Council, 17 Iowa, 1; Chase v. Morrison, 40 Iowa, 620. We are not called upon to notice the distinction made between cases where a warrant is payable expressly out of a particular fund and those where it is not.

The return "charges" that the scrip is spurious, illegal, and void, and was issued and is held by relator without valuable consideration; such charge being made upon the basis of an allegation that "no order or resolution appears upon the records ordering or authorizing the clerk to issue or sign said scrip to relator;" and of another allegation that on the first Monday in January, 1880, the board of county commissioners passed an order "that all Brevard county scrip issued between January 1, 1870, and January 1, 1880, be called in, and handed to the clerk of the board for the purpose of being examined by the board, and that all scrip found to be good should be restamped, and that all scrip not in or before the board by the first Monday of March, A. D. 1880, would be repudiated; and that such order should be published, up to March 1, 1880, in the Orange County Reporter, and also be posted at the several voting precincts of Brevard county." The cause of the adoption of this order is stated by the respondent, upon information and belief, to be that, prior to the year 1880, a large amount of spurious scrip or orders upon the treasurer of Brevard county had been placed in circulation, and had been and was being circulated and transferred by mere delivery; "that is to say, it appeared that scrip to a large amount had been issued without the sanction or order of the board of county commissioners of Brevard county; that this fact appears from the records of said county, the records of said county showing that no accounts for said scrip are filed, and no account is filed, and no account for said scrip was acted upon or approved by the board of county commissioners for said county; and that no such accounts were audited by the auditor of said board of county commissioners, and that said board of county commissioners never issued said scrip, or authorized the same to be issued;" and the purpose of the order is charged to have been "to protect the county from being defranded by the payment of such fraudulent, spurious, and illegal scrip."

The charge that the scrip is spurious, illegal, and void is a mere conclusion of law, and insufficient as a return, (High, Extr. Rem. § 472;) and the charge that it was issued and is held without valuable consideration is also insufficient in law, it being made, not as an independent or positive averment of such fact, but as an inference, argument, or conclusion of law drawn from or based upon allegations

which, as appears in the preceding paragraph of this opinion, in no wise support the inference, argument, or conclusion; and for this reason the charge or averment is insufficient. Id. 472. Unwarrantable inferences do not constitute of themselves a defense, whether the facts from which they are drawn be a defense or not. It is of course altogether immaterial that the relator may not hold these warrants for a valuable consideration, if it be that they were issued for one, and are otherwise legal. It is not properly denied that they were so issued, nor that they are so held.

The allegation that no order or resolution appears upon the records, meaning, of course, the records of the board of county commissioners, ordering or authorizing the clerk to issue or sign this scrip, "to relator," is an entirely insufficient defense to a recovery on the scrip issued to the relator directly, as it is to that issued to Shiver, if we may ignore the words quoted, which confine the averment to that issued to the relator individually. If, before the issue of the scrip, the county commissioners, by an order or resolution duly entered upon their records, if such entry was necessary, (Johnson v. Wakulla Co., 28 Fla. —, 9 South. Rep. 690,) or otherwise, (if the entry was unnecessary,) duly approved the accounts upon which it was issued, the fact that no such order or resolution appeared at the time of the application for the writ of *mandamus*, or at the time of the signing or filing of the return, is not fatal to the validity of the scrip. Its averment is not incompatible with the fact that such an order or resolution was legally passed and duly entered upon the records, nor is it tantamount to an allegation that no such order was ever passed or entered. The facts necessary to make it so should have been stated in the return. The rules governing returns in *mandamus* do not permit us to supplement their statements by either inference, intendment, or otherwise. All of the facts relied upon by the respondent must be stated with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass upon the sufficiency of the return. Commissioners v. Johnson, 21 Fla. 578; State v. Mayor, 22 Fla. 21; High, Extr. Rem. §§ 470, 472, 474.

An order or resolution like that passed by the board of county commissioners in January, 1880, is not a defense to the payment of an obligation of a county, nor will its publication, in accordance with directions contained in it, render it so. It is to be observed, however, that neither the return nor the entire record informs us that there was any publication of the order, or even that the relator had notice of it. County commissioners cannot impose on the holders of prior claims of this character against a county the presentation thereof for the mere purpose of examination and indorsement, nor make it a condition of their validity or recognition. Their non-presentation under the resolution is of itself no bar to their recovery, nor to the proceedings now before us, and this, too, no matter how much other scrip may have been issued during the same period without being duly audited, or without the order, sanction, or approval of the board of county commissioners or of other legal authority, and had been, and was being, circulated in the manner alleged, nor that the fact of such unauthorized issue appears from the records of the county. The statement made in the return of the causes leading to the adoption of the resolution in question fails to show that the particular scrip now sued upon was issued in the manner stated, and this scrip is consequently not affected by such statement. The infirmities of any other warrants or claims, whatever such infirmities may be, or however great is the quantity of such warrants or claims, cannot be extended by argument, inference, or intendment to these.

The return also charges, upon information and belief, that the scrip is not shown by the records of the county of Brevard to be genuine, and issued in accordance with law, and for a full and valuable consideration inuring to the county, and that hence it is spurious and fraudulent, and issued in total disregard of law, and without valuable consideration. What has been said above, upon practically similar allegations of this return is, upon the authorities there cited, applicable to this attempted defense, and conclusive of its insufficiency.

Certain charges or allegations of the return are made on information and belief. We do not think this the proper form of averments in such pleadings, (State v. Commissioners, 22 Fla. 1;) but, as in the case just cited, do not hold the return insufficient merely on that ground.

The point as to delay in instituting this proceeding should have been made by the pleadings in the lower court. It, if apparently good, might have been satisfactorily answered there had this course been pursued. Logan v. Slade, (Fla.) 10 South. Rep. 25.

The peremptory writ commands the payment of the warrants, identifying them, and stating their aggregate amount, $150, as it is stated in the alternative writ. A reference to a master was neither necessary nor proper.

The judgment is affirmed.

(44 La. Ann. 264)

VONDERBANK v. SCHMIDT. (No. 10,853.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La Ann.)[1]

GOOD-WILL—WHAT CONSTITUTES—ASSIGNMENT—TRADE-NAME.

1. Good-will is the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage, and to resort to the old place.

2. It may be said to consist of those intangible advantages or incidents which are impersonal so far as the vendor is concerned, and attach to the thing conveyed. When it consists in the advantage of location it follows an assignment of the lease of the location; and, if not assigned, it passes to the lessee of the property at the termination of the lease.

3. A trade-mark has no separate existence,

[1] Rehearing denied, March 8, 1892.

but owes its existence to the fact that it is actually affixed to a vendible commodity, whereas a trade-name or a fictitious name may be considered as a *quasi* trade-mark,—a mere property which is somewhat allied to good-will.

4. The only restraint the grant of good-will imposes upon the grantor is to prevent his subsequent employment of his own name so as to deceive and mislead the public.

5. A surname may become impersonal when attached to an article of manufacture, and becomes the name by which such article is known in the market, and, in case of sale of the right to manufacture, the same passes also, though it does not pass as good-will, but as a trade-mark.

6. By giving a particular name to a building as a sign of the hotel business, a tenant does not thereby make the name a fixture to the building, and the property of the landlord upon the expiration of the lease.

7. One may consent to the employment of his own name as that of a place of refreshment, but, if such consent be purely gratuitous he may withdraw it at pleasure; particularly if such name be his surname, it being personal to the proprietor, and not an element of good-will of the business.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FRANCIS A. MONROE, Judge.

Suit by Matthieu Vonderbank against John Schmidt to enjoin the unlawful use of plaintiff's name in operating an hotel. Judgment for defendant. Plaintiff appeals. Reversed, and judgment entered for plaintiff. Rehearing refused.

Buck, Dinkelspiel & Hart, for appellant. *Bernard McCloskey*, for appellee.

WATKINS, J. For many years the plaintiff in this suit was engaged in the conduct and management of an hotel, which was kept in a rented building, situated on Magazine street, in the city of New Orleans. It was kept upon what is popularly known as the "European Plan," *i. e.*, rooms and lodging without board. While thus conducted, this hotel was customarily styled and denominated the "Hotel Vonderbank" or "Vonderbank Hotel." While thus conducting said hotel, the plaintiff was also engaged in a business on Common street, in said city, between Camp and St. Charles streets, under the name and style of "Cafe Restaurant Vonderbank," which consisted of a bar-room, or saloon, and restaurant, and a few rooms for lodgers. Plaintiff represents that the theory upon which he conducted the two businesses was that his hotel on Magazine street was to be a boarding-place for the patrons of his restaurant, the two being conducted co-operatively That in April, 1889, he made a sale of the hotel to Charles Dormitzer, who carried on the business for some time thereafter, though unsuccessfully, and assigned it to his creditors. An arrangement was made whereby it was conveyed to the defendant. Under the administrations of Dormitzer and Schmidt, the hotel was operated as it had been by the plaintiff, under the name "Hotel Vonderbank" or "Vonderbank Hotel;" and he complains that was done in plain violation of his rights, and much to the detriment and injury of his business as a *restaurateur*. Denying that defendant acquired or has the right to enjoy that privilege, petitioner enjoined his further use of his name, claiming damages, and from an adverse judgment he prosecutes this appeal.

The ground on which the defendant resists the plaintiff's demands is that by his purchase from Dormitzer he acquired all the right, title, and interest of said vendor in and to the Hotel Vonderbank, or Vonderbank Hotel, situated on Magazine street, including the good-will of the business and establishment, and particularly such good-will as said vendor acquired from the plaintiff, including the name or style of said hotel, which he, as purchaser, is of right entitled to use and enjoy. Plaintiff admits that he sold to Dormitzer "the shelving, counters, tables, crockery, beds and bedding, and all other movable effects in the building known as the 'Vonderbank Hotel' (or 'Hotel Vonderbank') situated on Magazine street, * * * and used in connection with his business, now the property of said Vonderbank, together with the good-will of said Vonderbank in and to said business." The business of which the plaintiff is now the proprietor, as he was at the time of his sale of the hotel, is styled and advertised as "Matthieu Vonderbank, Proprietor of Vonderbank's Cafe and Restaurant," situated at Nos. 126, 128, and 130 Common street. It is further admitted and conceded that at the date of these transactions the hotel was a going concern, in full operation as the "Vonderbank Hotel" or "Hotel Vonderbank," and that it is so now. It is of an interference with his restaurant business that plaintiff complains, on account of defendant's improper and unlawful use of his name in the style of his hotel. Neither in the sale of plaintiff to Dormitzer, nor in that of the latter to the defendant, is there any mention of the name "Hotel Vonderbank" as a factor in the contract, it appearing from the two acts of sale that there was conveyed all the movable property belonging to the hotel situated in the building known as the "Hotel Vonderbank," on Magazine street, together with the good-will of said Vonderbank, and subsequently of Dormitzer, in and to said premises.

On this state of facts the only question raised is whether, under Dormitzer's purchase from Vonderbank and his sale to Schmidt, including specifically the good-will of the hotel establishment, the latter acquired and is entitled to use the name "Hotel Vonderbank" or "Vonderbank Hotel" as the style of his hotel. This must be determined by the true meaning of the term "good-will," as it is employed in commercial transactions. We have been referred to only three cases in our own reports in which the subject has been discussed, but in neither of which was the particular question we have here discussed, *i. e.*, what passes by the term "good-will" in an act of sale? The cases referred to are the following, viz.: Wintz v. Vogt, 3 La. Ann. 16; Succession of Journe, 21 La. Ann. 391; Bergamini v. Bastian, 35 La. Ann. 60. In treating of the good-will of a market-stall, the court said in the second case that it is "understood [to be] the run of custom which the transferrer had obtained by the patronage of the friends resorting to his stand to purchase,

and, generally, from the reputation his stand had acquired as one at which good and wholesome meats were sold, and where customers were accommodated and fairly dealt with." This definition appears to have been paraphrased from that of Judge Story, which is frequently quoted by judges and authors. Story, Partn. § 99; 8 Amer. & Eng. Enc. Law, p. 1366, in which brief quotations from English adjudications are found. The third of the three cases above referred to treated of an act of sale of an eating-house at No. 21 Royal street, city of New Orleans, which contained no stipulation of good-will having been conveyed; the plaintiff's complaint being that his vendor had soon afterwards begun a similar business at No. 18 Royal street, in violation of his contract. But the court substantially held that, inasmuch as there was no stipulation in the contract that the vendor should not resume business in his own name, the injunction should be dissolved. We have referred to those decisions for the sole purpose of showing that our own jurisprudence affords no light on the present controversy, and of illustrating the necessity of looking into the decisions of other courts, and the opinions of text-writers, for its correct solution; and we make the following quotations as conveying a clear idea of what good-will is. For instance, the Michigan court say, in Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. Rep. 526: "Good-will has been defined by this court to be the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage;" or, as stated by Lord ELDON in Cruttwell v. Lye, 17 Ves. 335, say the court, "the probability that old customers will resort to the old place." The same court say, in Williams v. Farrand, 50 N. W. Rep. 446: "Good-will may be said to be those intangible advantages or incidents which are impersonal so far as the grantor is concerned, and attach to the thing conveyed. When it consists in the advantage of location, it follows an assignment of the lease of the location." Or, as previously said by that court in the Chittenden Case: "Good-will attaches to the property, and, in case of a lease, it belongs to the lessee, only during its continuation. * * * The claim to an interest in the good-will is inseparable from the claim to an interest in the lease, and, when one fails, the other falls with it." To a like effect is the opinion of the same court as expressed in Myers v. Buggy Co., 54 Mich. 215, 19 N. W. Rep. 961, and 20 N. W. Rep. 545. A standard author, in his treatise on trade-marks, discusses and defines good-will as an analogous right, and quotes with approval the expressions of various English judges on the subject. Thus from Wedderburn v. Wedderburn, 22 Beav. 84, viz.: "There is considerable difficulty in defining accurately what is included under the term 'good-will.' It seems to be that species of connection in trade which induces customers to deal with a particular firm." From England v. Downs, 6 Beav. 269, viz.: "It is the chance or probability that custom will be had at a certain place of business, in consequence of the way in which that business has been previously carried on." From Story on Partnership, viz.: "It may be described to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity," etc. Section 90. Browne, Trade-Marks, (2d Ed.) §§ 522, 523. In further illustration of this principle, we have selected the following paragraph from Williams v. Farrand as giving a careful analysis, from a commercial point of view, of what passes by an act of sale containing no stipulations of good-will, viz.: "A retiring partner conveys without stipulating good-will, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success; the new an experiment. The old is a going business, and produces its accustomed profits on the day after its transfer. It is capital already invested and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and, in all probability, the first year's business will show loss instead of profit. For a time, at least, it is capital awaiting investment, or invested earning nothing. The retiring partner takes these chances or advantages. He does not agree that the benefit derived from his *connection* with the business shall continue. He does not agree that the *old business shall continue to have the benefit of his name, reputation, or service, nor does he guaranty the continuance of that patronage which may have been attached by his name or reputation.* He does not pledge a continuation of conditions. *He takes out of the business an element that he contributed to the success of the business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor.* He sells only so much of the custom *as will continue in spite of his retirement and activity.* He sells probabilities, and not assurances." Page 449. (Italics ours.) As a corollary of the foregoing opinion, an extract may be properly selected from that of the Connecticut court in Cottrell v. Manufacturing Co., 54 Conn. 138, 6 Atl. Rep. 791, in reference to what passed by a bill of sale of goods, etc., accompanied by a transfer of the good-will merely, viz.: "By purchasing the good-will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that the old customers would continue to go there. If he desired more he should have procured it by positive agreement. The matter of good-will was in his mind. Presumably he obtained all that he desired. At any rate, *the express contract is the measure of his right; and since that conveys a good-will*

in terms, but says, no more, the court will not, upon inference, deny to the vendor the possibility of successful competition, by all lawful means, with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, the vendor might lawfully establish a similar business at the next door," etc. (Italics ours.)

From the foregoing it appears that good-will is an advantage or benefit which is acquired by a business establishment beyond the mere intrinsic value of the capital stock; that it is the general public patronage and encouragement which a business receives from its customers on account of its local position; that it is the subject of value and price, and of bargain and sale, though intangible, but, in order to be conveyed, mention must be made of it in the act of sale. The discussion of the rights of a vendee of good-will more frequently arises in the course of liquidation of corporations and sales in partnership than elsewhere; but, as the principle involved is the same as in cases of bargain and sale between individuals, decisions involving such transactions may be examined, along with others, in ascertaining to what extent, and in what class of cases, such sales involve the assignment to the vendee of the right to use the name of the vendor. In Williams v. Farrand it was held that a retiring partner could not "use his own name * * * in such a way as to lead the public to suppose that he is continuing the old business," etc. In Myers v. Buggy Co., 54 Mich. 215, 19 N. W. Rep. 961, and 20 N. W. Rep. 545, three partners retired from the Kalamazoo Wagon Company, and thereafter organized and put into operation the defendant company. They were enjoined from prosecuting that business on the ground that they were guilty of an act of piracy, as they "were not using their own names," but an assumed name, calculated to deceive the public. Like cases are stated in Burgess v. Burgess, 3 De Gex, M. &. G. 896, and in Lee v. Haly, L. R. 5 Ch. App. 155. In the Williams Case the court stated "that when an express contract has been made * * * for the use by a purchaser of a fictitious name, or a trade-name, or a trade-mark, courts will enjoin the continued violation of such an agreement." Citing Grow v. Seligman, 47 Mich. 607, 11 N. W. Rep. 404; Beal v. Chase, 31 Mich. 490; Burckhardt v. Burckhardt, 36 Ohio St. 261; Tode v. Gross, (N. Y. App.) 28 N. E. Rep. 469. But the court further stated that such a stipulation need not have been made in the act of sale, because "an assignment of all the stock, property, and effects of a business * * * carries with it the exclusive right to use a fictitious name in which such business is carried on, and such trade-names and trade-marks as have been in use in such business. These incidents attach to the business * * * and pass with it. Courts have frequently held that a trade-mark has no separate existence; that there is no property in words, as detached from the thing to which they are applied; and that the conveyance of the thing to which it is attached carries with it the name." Citing Derringer v. Plate, 29 Cal. 292; Gage v. Publishing Co., 11 Ont. App. 402; Hoxie v. Chaney, 143 Mass. 592, 10 N. E. Rep. 713. In this last case it is stated that a bill of sale conveying "all the right, title, and interest in and to all and singular the partnership property belonging to the firm" was held to convey the company's trade-marks for the manufacture of certain soaps pursuant to the formulas of Hoxie, though not mentioned, but not to convey the good-will preventing Hoxie from manufacturing soaps otherwise than by such formulas. Bassett v. Percival, 5 Allen, 345; Cottrell v. Manufacturing Co., 54 Conn. 122, 6 Atl. Rep. 791. The same proposition is stated more clearly in Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. Rep. 304, the court holding that it was legitimate for one to sell "the use of his name as a trade-mark," *i. e.*, "as a description or designation of a manufactured article, so as to deprive himself of the right to use it as such, and confer the right upon another." Thus: "One who has carried on a business under a trade-mark name, and sold a particular article in such a manner, by the use of his name as a trade-mark or a trade-name, as to cause the business or article to become known or established in favor under such name, may sell or assign such trade-name or trade-mark when he sells the business or manufacture, and by such sale or assignment conclude himself from the use of it in a similar way." McLean v. Fleming, 96 U. S. 245; Shaver v. Shaver, 54 Iowa, 208, 6 N. W. Rep. 188; Frazier v. Lubricator Co., (Ill. Sup.) 13 N. E. Rep. 639. Many of these cases are brought forward in the Williams Case, and, after recapitulating these different propositions, the court say: "These propositions are sustained by a long line of authorities, but in none of those cases does the question hinge upon a grant of good-will. Complainants insist, however, that a grant of good-will * * * imposes certain restrictions upon the vendors, and *inter alios* is the use that may be made of their own names;" but the court examined that question fully, and placed the proper limitation upon that contention by stating that its sole effect was to prevent the vendor's subsequent employment of his name so as to impair the good-will he had conveyed to the vendee. The court in the Williams Case then furnishes the following appropriate illustration of the rule, viz.: "A partnership name may become impersonal after the death of the partners, and it is then likened to a fictitious or corporate name. A surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may, in consequence, follow a grant of the right to manufacture the article, or a sale of the business of manufacturing such article; and, when the right to manufacture is exclusive, the right to the use of the name, as applied to that article, becomes likewise exclusive." This is followed by this conclusive statement, viz.: "The rule that upon the dissolution of a firm nei-

ther party has the right to use the firm name, as well as the other rule, that a retiring partner has no right to use the old name, are both subject to the exception that a person has the right to use his own name unless he has expressly contracted otherwise. * * * The right to continue the use of a firm name, as well as a restriction upon the use by a retiring partner of his own name, are proper subjects of bargain, sale, and agreement." Hence the defendants, as retiring partners, without any restrictions having been placed upon them in the act of sale of their interest in the copartnership business, were recognized to "have the right to use their own names, or any collocation of their own names."

We cannot better illustrate the principle that is involved in the foregoing decisions than by citing the case of Meneely v. Meneely, 62 N. Y. 431, wherein an injunction restrained the defendant from in any way using the name and designation of "'Meneely' in the business of bell-founding in the city of Troy. The name of the defendant is Meneely, and he is engaged in the business mentioned. The necessary consequence of the injunction was to compel the defendant, Meneely, either to discontinue the business of bell-founding in Troy, or procure it to be done in the name of some other person. He was absolutely prohibited from the use of his own name in his own business, in any way." But the court ruled that "every man has the absolute right to his own name in his own business, even though he may interfere with or injure the business of another bearing the same name, providing he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any thing calculated to mislead." Thus the right of one to the free and unrestricted use of his own name in a business enterprise is so strong that his right is not impaired, even if it operate an infringement of a trade-mark, so that no artifice be resorted to for the purpose of deceiving the public, notwithstanding the "owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it." Derringer v. Plate, 29 Cal. 293; Sohier v. Johnson, 111 Mass. 238; Holmes v. Manufacturing Co., 37 Conn. 278. In Browne's Law of Trade-Marks, (2d Ed.) in the course of his treatment of good-will, he says: "Courts of equity will protect a party in the use of a name of an inn, hotel, or other place of business, when the sign is simulated. * * * If a man creates a reputation for his business, it is as the keeper of some particular house at a known location, and it is piracy to draw off the custom of his friends or customers who have identified him with the name of his house. It is a personal right. By giving a particular name to a building, as a sign of the hotel business, a tenant does not thereby make the name a fixture to the building, and the property of the landlord upon the expiration of the lease." Sections 528, 529. Clearly, such name or appellation of an hotel is not an incident of good-will, as good-will exclusively appertains to a given and designated locality and becomes a fixture of the leased premises, and, at the expiration of the lease, it passes to the landlord. This is conclusively shown by the author's subsequent observations, viz.: "One may consent to the employment of his name as that of a place of refreshment; but if such consent be purely gratuitous, or unless there is some valid agreement, binding upon the party who gives his consent, he may withdraw it at pleasure, and enjoin its further use." But the argument in favor of such a withdrawal of a business name is strengthened by the fact that the author only had in contemplation trade-names, or fictitious names, such as St. Charles, St. James, and Hotel Royal, which any one is free to use; for such a name might pass with a sale of the hotel business, and be changed at the caprice of the purchaser. This distinction makes it clear that the employment of one's own name to designate his place of business cannot be considered as an element of good-will; for, if so, following the principles just announced, it would necessarily result in its loss to the person possessing it, as at the termination of the business it would pass to the proprietor of the leased premises. Having conveyed it to a successor,—and we have ascertained that the disposition of good-will is matter of contract,—he could not thereafter come in competition with his vendee without violating his obligation of warranty. Therefore we conclude, with Mr. Browne, that while the employment of one's own name to designate his place of business may be transferred in like manner as good-will, yet if it be done by a purely gratuitous contract—in the absence of any valid and enforceable agreement for a consideration—he may withdraw it at pleasure. The conclusion is that such an employment of his own name in business forms no part of the good-will, but, on the contrary, it partakes of characteristics of a trade-mark, and may be classed as a *quasi* trade-mark, of which Mr. Browne says: "It should be borne in mind that a trade-mark carries the idea of a man's personality, like his ordinary autograph, and therefore preserves its essential characteristics, wherever it may go. This is not so with *quasi* trade-marks, as the name of an hotel or shop of trade." Id. § 90. The distinction between trade-names and trade-marks is stated as follows, viz.: "A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity, [sections 52, 382, 384,] whereas a trade name is more properly allied to the good-will of the business, [section 91.]" In Woodward v. Lazar, 21 Cal. 449, defendants were restrained from using the name "What Cheer House" as the name of an hotel in the city of San Francisco. Woodward, plaintiff, first erected an hotel building on a leased premises, and gave it that name. During his occupancy as tenant he purchased and built on the adjoining lot another hotel edifice, and occupied it also. Afterwards he surrendered the leased premises, and occupied the second, and continued to conduct an hotel business on his own premises under the name and

style of "What Cheer House." Subsequently the defendants purchased the premises first described, and conducted thereon an hotel under the original name, "What Cheer House." In that case the contention of the plaintiff in injunction was that the name belonged to him as the proprietor of the hotel last established, and which he both owned and occupied, and which he had theretofore used continuously while proprietor of the hotel he had leased, and up to the date of its surrender, it being a trade-name. On the other hand, the contention of the defendant was that the name was a mere designation of the building in which the business, as first established, was conducted, and that it attached to the building at the termination of the plaintiff's lease, and passed to him by his purchase thereof from the plaintiff's lessor, it constituting a part of the good-will of said property and establishment.

Denying the latter proposition, the court said: "A person may have a right, interest, or property in a particular name which he has given to a particular house, and for which house, under the name given to it, a reputation and good-will may have been acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign to the business done at that place, does not thereby make the name a fixture to the building and transfer it irrevocably to the landlord." Thus a clear distinction was taken by the California court between the reputation a name or appellation gives to a certain business locality, and which adheres to it, without any reference to the proprietor of the establishment personally, and the designation of a name for a locality at which a certain business is carried on, and which is not impersonal, and does not attach to the property, but remains subject to the control of the proprietor. The court, in treating of this distinction, said: "Defendant's claim to protection, so far as his right results from the good-will acquired for the name while it was applied exclusively to the leased premises, may not be maintainable, [yet plaintiff] is entitled to protection in the exclusive use of the name as proprietor of the new house." Had the name of that establishment formed an element of the good-will of the hotel business while it was being conducted on the leased premises by the plaintiff, it would, under all of the authorities, have passed to the landlord at the termination of plaintiff's lease, and by his conveyance to the defendant; but, as it was rather a personal perquisite of the proprietor while lessee, and not an impersonal ingredient of his business, it did not pass to the landlord, but remained subject to the control of the lessee at the termination of the lease.

Our conclusion is that on reason and authority the case is with the plaintiff; that the name given to a building in which an hotel is kept, which contains the name of the proprietor, does not constitute an element of good-will, though it may tend to enhance the business reputation of the place or *situs* of the business establishment, which is an ingredient of good-will; that while, under the authorities, such a name is a marketable article, and a proper subject of sale, yet it must be expressly understood in the act of sale, and, if no consideration be paid, same may be subsequently recalled. Such transactions, being esteemed to be in restraint of trade, are disfavored in commercial dealings. In this case there is some proof of injury sustained by the plaintiff on account of the defendant's improper use of his name; yet we are disinclined to rest a judgment upon it, because we are satisfied the defendant acted fairly and honestly, and under a mistaken belief that he had acquired a right to employ the plaintiff's name as he did. But we are clearly of the opinion that plaintiff's injunction should be maintained and perpetuated. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that there be judgment in plaintiff's favor, and against the defendant, perpetually enjoining and restraining the latter from using or employing the name "Hotel Vonderbank" or "Vonderbank Hotel" as the name or style of an hotel or restaurant, at the former site of such establishment as that kept and operated by the plaintiff. It is further ordered and decreed that plaintiff's demands for damages be rejected *in toto*, and the defendant be taxed with the costs of both courts.

BREAUX, J., having a personal interest in the question, recuses himself.

(44 La. Ann. 165)

STATE v. FRUGE. (No. 10,949.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

CRIMINAL LAW — IMPEACHING STATE'S WITNESS — EVIDENCE IN REBUTTAL.

State may offer evidence of the good reputation for truthfulness of its own witness, in case his veracity is attacked by defendant's counsel in course of his cross-interrogation.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; E. T. LEWIS, Judge.

Prosecution of Joseph Z. Fruge for larceny. Defendant was convicted, and appeals. Affirmed.

Thos. H. Lewis, L. Dupre, and *E. P. Veazie,* for appellant. *W. H. Rogers,* Atty. Gen., for the State.

WATKINS, J. From a conviction of grand larceny, and sentence to six months' imprisonment at hard labor, the defendant appeals. In this court he has made no appearance by counsel, or otherwise, and we find in the transcript but one bill of exceptions which requires notice, and it appertains to the ruling of the judge below, permitting the state to introduce proof confirmatory of the reputation for truthfulness of the single witness offered by and relied upon by the state to establish the guilt of the accused; defendant's objection being that the veracity of a witness offered cannot be supported and strengthened by proof of good reputation for truthfulness until his veracity has been assailed.

Conceding the correctness of the rule invoked, the trial judge held that this case was an exceptional one in this, that while the single witness for the state was under cross-examination by defendant's counsel, an effort was made to impair, if not destroy, the witness' credibility by interrogating him with reference to his having been theretofore prosecuted for a similar offense, and admitted the testimony over objection. In so doing, we are of opinion that the ruling was correct, and the testimony properly admitted, because the case for the state might otherwise have been left in a crippled condition at its submission, without a further opportunity to repair it. This ruling is strictly in keeping with that we approved of in State v. Boyd, 38 La. Ann. 374, and it was based on 1 Greenl. Ev. § 469. Judgment affirmed.

(44 La. Ann. 120)

ADAMS, President of Police Jury, *et al.*, v. FORSYTHE *et al.*, Enumerators. (No. 10,871.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

CREATING NEW PARISH—CONSTITUTIONALITY OF ACT.

Act 107 of 1890, purporting to create a new parish called "Troy," is illegal and unconstitutional, because it increases representation in the house of representatives beyond the maximum number fixed in the sixteenth article of the constitution.

(*Syllabus by the Court.*)

Appeal from district court, parish of Catahoula; CAREY J. ELLIS, Judge.

Suit by Isaac R. Adams, president of the police jury of the parish of Catahoula, and others, against A. A. Forsythe and E. S. Robertson, enumerators, to declare illegal and unconstitutional Act 107 of 1890, creating the new parish of Troy, and for an injunction. Decree for defendants. Plaintiffs appeal. Reversed.

F. P. Poche, J. F. Ellis, H. B. Tallaferro, and *D. N. Thompson,* for appellants. *Luce & Lemle,* for appellees.

WATKINS, J. Suit was commenced on August 13, 1890, by the police jury of Catahoula parish, duly authorized by ordinance, joined by sundry tax-payers thereof, alleging the illegality and unconstitutionality of Act 107 of 1890, creating the new parish of Troy, and providing for the organization thereof; averring that said act provides for an enumeration of the inhabitants of said parish,—that portion of which the new parish is to be formed, and that portion, also, that will remain after its formation, — in order to ascertain whether there is the constitutional number in each, and designates three persons, who are specially authorized to make said enumeration, and return to the secretary of state the result thereof; and further averring the refusal and declination of one of said enumerators to act in the premises, and the apprehended illegality and nullity of any action that might be taken by the two remaining. Petitioners prayed for and obtained an injunction restraining further proceedings by them, *pendente lite.* On rule taken by the defendants, *in limine,* the lower judge quashed the writ, on the ground that it had been prematurely and improvidently granted, and from that interlocutory decree the plaintiffs appealed suspensively. On the trial of the merits, there was judgment in plaintiffs' favor, and the defendants likewise appealed. Therefore the case is practically consolidated,—the two appeals being presented under a single number and title,—and stands before us precisely in the same attitude it occupied originally in the court *a qua.*

The defendants prefaced their answer with several exceptions, the chief of which are (1) that the plaintiffs are without capacity or interest to stand in judgment; (2) that the subject-matter of this suit lies outside of the domain of judicial power; (3) the defendants are incompetent to stand in judgment for the determination of the constitutionality of the act; but, as it is apparent that these questions were decided and definitely settled in litigation, to which the defendants were parties, and settled adversely to present contention, there need be no further mention made of them. State v. Judge, 42 La. Ann. 1104, 8 South. Rep. 305. The same may be said of the prematurity and improvidence of the injunction, for, while not deciding the question, the logic and purport of our opinion in that case are conclusively against the ruling of the judge *a qua;* for it proceeds upon the theory that the enumeration contemplated by the statute was the first and fundamental step to be taken in the formation of the new parish, and a condition precedent to its consummation. Had plaintiffs awaited the completion of the enumeration and return made to the secretary of state, an injunction would have been, manifestly, too late. It is our opinion that the injunction was timely and provident, and quashing it was error. It is therefore plain that the injunction should be reinstated at appellees' costs in both courts, without reference to our decision on the merits.

There are several grounds assigned by petitioners for the unconstitutionality of the legislative act creating the new parish of Troy, but we deem it only necessary to take notice of one, and that is the fifth, which is as follows, viz.: That the act is in violation of, and in conflict with, the provisions of article 16 of the constitution in this: that said article fixes the total number of representatives in the general assembly at "not more than ninety-eight (98) nor less than seventy (70;)" and said act provides that the new parish of Troy shall have one representative, thus increasing the total number to 99, in excess of that limitation. There is, in our opinion, no escape from the conclusion that the act is unconstitutional on that ground. It appears from the terms of the act that the territory of which the new parish is proposed to be formed is to be taken from the existing parish of Catahoula, exclusively; and as it has but one representative, under the constitutional apportionment of 1880, by the formation of a new parish from part of its territory, which is entitled to one representative, also, the necessary result is to increase the total number of representatives by one,

thus giving to the next general assembly 99 instead of 98 members, in violation of the constitution. The language of the constitution is imperative: "Each parish shall have at least one representative." "The number of representatives shall not be more than ninety-eight nor less than seventy." Article 16. In article 17 all the parishes of the state are designated by name, and to each is apportioned the representation in the general assembly; the total number aggregating 98, the maximum that is allowed by the preceding article. Hence, if the new parish of Troy is given one representative, the number will be increased to 99, thus violating one of those constitutional requirements; and if the new parish be disallowed representation altogether, the other will be violated. For it would not do for us to say that a new parish could be formed by an act of the legislature without a representative being provided for, in the face of the constitutional declaration that it shall have one. A further provision of article 17 is that "this apportionment," *i. e.*, the apportionment that is made in that article, "shall not be changed or altered in any manner until after the enumeration shall have been taken by the state in 1890, in accordance with the provisions of articles 16 and 17." Looking to article 16 to ascertain the manner in which an enumeration is to be made, we find the declaration that it "shall be made in 1890, and subsequent enumerations every tenth year thereafter, in such manner as shall be prescribed by law," etc.

Now it is an admitted fact that an enumeration was made in the year 1890, in the manner required, but that no apportionment of representation was made by the general assembly; it is therefore clear that, until some future general assembly shall make an apportionment different from that designated in article 17, it must remain in force. But article 16 further declares that, "at its first session after each enumeration, the general assembly shall apportion the representation among the several parishes," etc., thus clearly indicating, in the most emphatic language, the duty of the general assembly to take prompt and immediate action in making an apportionment. We need not say that this precept is mandatory, and that an apportionment could not be legally made at a subsequent session of the general assembly; it is quite sufficient for us to say that the general assembly was fully authorized, and at least directed, to make an apportionment at its first session after the completion of an enumeration, and failed to do it. The consequence is that the general assembly of 1892-94 will remain just as that of 1888-90 was composed; and, if the plaintiffs' case fails, and the act creating the new parish of Troy is held to be constitutional, his representative cannot be permitted to take his seat in the house of representatives at the next session of the general assembly without violating the plain and unambiguous terms of the sixteenth article of the constitution, as he would evidently be the ninety-ninth representative. It appears, to our minds, self-evident that the legislature is powerless to increase the representation fixed in the constitution, and equally as much so to create a new parish which would be entitled to representation, but whose representative could not take any part in legislative proceedings as such. Under the express terms of the sixteenth article of the constitution declaring that "the number of representatives shall not be more than ninety-eight," etc., it would seem to be impossible for the legislature to increase that number, and to be clear that the only way in which new parishes, such as Troy, can be created, is by reducing the total number of representatives under a new apportionment, and thus leave a margin for their formation. But those are contingencies that must be provided for in the future, and the instant case must be determined by the state of facts existing at the time the law under consideration was enacted. For if it was at the time of its passage an unconstitutional law, circumstances subsequently arising could not rehabilitate it, and make it constitutional. A parish created without representation would be an anomaly. The constitution declares that "representation in the house of representatives shall be equal and uniform, and shall be regulated and ascertained by the total population." Article 16. The new parish of Troy would be quite as much entitled to share in the representation as any other parish in the state, quite as much as the parish of Catahoula. It is quite as impossible to conceive of a parish without representation as of one without the pale of any judiciary system. A parish is a complete political entity, possessed of judicial, political, and ministerial functions; and no act of the legislature creating a new parish can receive sanction, as constitutional, which does not guaranty the right of representation. The guaranty of the act in question is nugatory, because it is repugnant to the constitution. That guaranty being read out of the act, the new parish would be emasculated of all political power, the existence of which is essential to its existence. The act in question is null and void. It is therefore ordered and decreed that the interlocutory decree quashing plaintiffs' injunction be annulled, and that said injunction be reinstated, at defendants' cost in both courts; and it is further ordered that the judgment pronounced upon the merits be affirmed.

(44 La. Ann. 108)

HYMAN *et al.* v. SCHLENKER *et al.* (No. 10,869.)

SCHLENKER v. ROBB, Sheriff, *et al.* (No. 10,869.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

HUSBAND AND WIFE — DATION EN PAIEMENT — CHANGE OF DOMICILE — PROPERTY RIGHTS.

1. A *dation en paiement* between husband and wife can only be made by authentic act, and, when the consideration is explicitly stated in the act, the parties are bound thereby, and cannot make proof of other and additional consideration, unless upon allegation and clear proof of error in the confection of the act by the notary.

2. The same tests are applied in establishing change of domicile from this to another state as from one parish to another. These tests are (1)

actual residence in the new place; (2) the intention to fix there the principal establishment. These tests, applied to the facts, establish Schlenker's domicile at Natchez, Miss., since 1888.

3. Marriage creates a civil *status*, which is governed and controlled by the law of the domicile of the parties.

4. The statutes regulating the privileges and disabilities attaching to the *status* of married women are purely domiciliary in their character, and, unless otherwise expressly declared, do not affect married women domiciled in another state.

5. Personal property has no locality, and, as to the rights of husband and wife therein, is governed by the law of their domicile. Moneys of the wife domiciled in Mississippi, though received in Louisiana, belong to her as a citizen of Mississippi, and do not acquire the character or incidents of paraphernal funds under Louisiana law. If converted by her husband, she has no mortgage on his property in this state for their restitution, nor can she receive from him a *dation en paiement* to the prejudice of attaching creditors, citizens of this state.

6. The returning to the domicile where her marriage was contracted, which authorizes a non-resident wife to sue her husband for separation of property under article 2437, Civil Code, means a return for the purpose of living there under the protection of its laws.

7. In such action, in any case, the relief would only extend to the rights of the parties as they stood at the date of return.

(*Syllabus by the Court.*)

Appeal from district court, parish of Catahoula; CAREY J. ELLIS, Judge.

Attachment suit by Hyman, Lichtenstein & Co. against Schlenker & Hirsch. Mrs. C. Schlenker, the wife of defendant Schlenker, claimed the property attached. Judgment for intervener. Plaintiffs appeal. Modified.

J. N. Luce, Gus Lemle, D. N. Thompson, and *Farrar, Jonas & Kruttschnitt*, for appellants. *Percy Roberts* and *J. L. Dagg*, for appellee.

FENNER, J. This appeal presents for our determination a contest between the attaching creditors of a non-resident debtor and the non-resident wife of the debtor, who claims the property attached by virtue of a *dation en paiement* made to her by her husband while they were both non-residents of Louisiana, and domiciled in the state of Mississippi. The dominant facts are the following: Isaac Schlenker and his wife, Mrs. C. Schlenker, were married at their domicile in Trinity, La., in 1859. Between the years 1866 and 1874, while they were still domiciled in Louisiana, Mrs. Schlenker claims to have received from her uncle and from her mother certain paraphernal gifts of money and goods, amounting to about $7,600, which her husband took possession of, and converted to his own use. In 1878 her husband executed a *dation en paiement* in her favor, by which he conveyed to her various pieces of landed property, including (1) a tract of land known as the "Elba" or "Zenor" tract; and (2) sundry lots and buildings situated in the towns of Troyville and Trinity. The attaching creditors attack the consideration of this *dation*, and, if proof thereof were required, that found in the record is certainly not as conclusive as it should be; but we think the creditors, having become such long after the *dation*, have no right to attack it. Lewis v. Peterkin, 39 La. Ann. 780, 2 South. Rep. 577. Subsequently Mrs. Schlenker alienated several of these properties, and the sums are claimed to have been appropriated by her husband to the payment of his debts. These alienations were as follows, viz.: (1) In June, 1878, she conveyed the Zenor tract for the price of $3,500. (2) In March, 1881, she conveyed the Cates or Rawlings lots in Troyville, on which the price actually realized was $350. (3) In 1888 she sold a store-house and lots in Troyville, and a residence and lots in Trinity, for $2,500. She also claims to have sold another lot in Trinity to McCabe for $100, but the deed is not produced. In December, 1890, Isaac Schlenker made a second *dation en paiement* to his wife, from which we make the following extract: "Before me, J. F. Ellis, a notary public in and for Catahoula parish, Louisiana, personally appeared Isaac Schlenker, who declared to me, notary, that he is justly and legally indebted to his wife, Mrs. Charlotte Schlenker, in the sum of seven thousand two hundred and fifty dollars. * * * The said above amount of money being the proceeds of sale of one store-house and lots in Jonesville, (or Troyville,) Louisiana, the Cates or Rawlings house and lots in Jonesville, Louisiana, and dwelling-house and lots in Trinity, La. * * *" It thus appears that the only paraphernal debts expressed in the act as intended to be extinguished are those arising from the appropriation by the husband of "the proceeds of sale" of the particular pieces of paraphernal property therein mentioned. As we have seen, these "proceeds of sale," according to the wife's own showing, did not exceed the sum of $2,950, while the *dation* conveyed to the wife property estimated in the act itself at $6,560, and claimed by the creditors to be worth much more.

On the trial of the case counsel for the wife undertook to eke out the consideration by parol proof that the *dation* was intended to satisfy other paraphernal claims of the wife besides those expressed in the deed, including the sum of $3,500, received as the price of the Zenor plantation, $1,100 collected as rents of paraphernal property, and a balance due on the original claim, unsatisfied by the first *dation*, of $621.93. To such evidence objection was made on the following grounds, viz.: "Parol evidence cannot be admitted against or beyond what is contained in the alleged *dation en paiement* of intervener's husband to her; nor as to what may have been said or done before, at the time of, or since making said act; nor to vary, contradict, explain, or modify the written terms, considerations, or recitals of said act; nor to show source or origin of the consideration different from that expressed in the instrument; that such evidence, if otherwise admissible, could not be introduced by intervener, who has claimed under such act; that it is not admissible under the pleadings, there being no averments of such fact, and cannot be introduced to affect plaintiffs, who are third persons, and can only be bound by the record." The judge overruled these objections, and admitted and gave effect to the evidence.

In this we are bound to hold that the judge was in error. A *dation en paiement* by a husband to his wife cannot be made otherwise than by authentic act. The extraordinary and highly exceptional effects given by the law to this contract, exempting it from the revocatory action, and maintaining it as a preference over creditors, though made while the husband was insolvent, emphasize the necessity of holding the parties bound by the recitals contained in the act, and not permitting them to enlarge or extend its provisions by parol proof. The creditors, when they took out their attachment, had no notice of, and were not affected by, any *dation* between the debtor and his wife, except that evidenced by the authentic act extant upon the records of the parish, and could not be bound by any agreements or understandings between the parties not embodied in that act. Moreover, the wife herself, in her intervention, propounded that act as her title, and made no allegation of any error therein. The act specifically recites, as the only paraphernal claims satisfied by the *dation*, the moneys due by the husband for the price of the particular properties therein stated. To hold that other and different paraphernal claims entered into the consideration, and were satisfied by the *dation*, on mere parol proof, would be, to that extent, to give effect to a *dation* by parol. Even if proof of error were admissible, the proof found in this record is insufficient to establish it.

We dislike to speak with confidence touching the contents of this enormous transcript, which we have been left to eviscerate, with hardly any references to pages by the counsel; but, if there is any other evidence as to this error except the statement of Mrs. Schlenker herself, it has failed to attract our attention. She says that the intention of Mr. Schlenker and herself was to have the sale made in satisfaction of all her paraphernal claims, and, on the subject of the deed, she says: "I do not know if the deed properly recites the consideration, not having the same before me; but, if it does not, there must have been some error in drawing it up." Of course, we have nothing from the husband on the subject, because he was incompetent to testify. There is nothing to show that the notary who drew the act did not conform to the instructions given him, or that the parties who signed it did not read and know its contents, nor is any reason given why the alleged error escaped attention. Surely it would be a dangerous precedent to allow the recitals of such an act to be varied by the unsupported declarations of error by a single party thereto. As the deed stood, undoubtedly the paraphernal claims, outside of those mentioned therein, remained unaffected by the *dation*, and in after years might have formed a consideration for a third *dation*, when the interest of the parties required it; in which case the statement of the wife as to her intentions might have not been accessible.

We consider the case fully covered by a former decision, where, the *dation* having been made in satisfaction of a particular named paraphernal claim, which the court found to be invalid, the parties sought to sustain it by proof of other valid paraphernal claims, but we held them bound by the consideration stated in the deed. Chaffe v. Scheen, 34 La. Ann. 688.

Having thus defined the meaning and extent of the act as embracing for its consideration only the paraphernal claims therein recited, we will next consider the important questions arising from the domicile of the parties. The attaching creditors are citizens and residents of Louisiana. It is conceded that at the date of the *dation* Mr. and Mrs. Schlenker were domiciled in the state of Mississippi. It is claimed, however, on behalf of the wife, that the Mississippi domicile was only acquired in 1889, after the transactions here involved took place, and that prior thereto their domicile continued to be in Louisiana. No doubt the presumption of law is in favor of the continuance of a domicile once established, and that the party who asserts that it has been changed carries the burden of proof. The evidence of Mrs. Schlenker herself, which is candid and unequivocal, establishes that in 1882 her husband, with his family and the whole of his household effects, removed from their former domicile in Trinity, La., to New Orleans, La., discontinuing the mercantile business which he had theretofore conducted in Trinity, and establishing his residence in New Orleans, where he kept house for a year. In 1883 Schlenker moved with his family to Natchez, Miss., carrying all his household effects, established his residence there, went into mercantile business there, has resided and kept house and transacted business there ever since, and has had no other residence. He has reared his children and married two of them in Natchez. There has been his home. It was not only his principal, but his only, domestic establishment. It appears that in 1881 or 1882 he commenced a mercantile business in Troyville, La., and that he was in the habit of frequently visiting that place to look after his affairs; but he never had a domicile in Troyville, and kept no establishment there of any kind. His former residence in Trinity, La., was at first rented, and subsequently sold. There is proof that he voted at least once in Louisiana, while living in Natchez, and also that he was accepted as a surety on the bond of the sheriff of Catahoula parish. His wife and partner state that he continued to consider Catahoula parish as his home, but there is no evidence that he ever entertained the intention of returning or resuming his residence there. The law is chiefly concerned with persons as the subjects of obligations, and with the view of giving efficacy to their actions. One of its first tasks is to locate each person,—to fix a place at which the person shall be considered as always present, actually or constructively, and where the law can reach him when it has occasion to deal with him; in other words, to establish his domicile. The provisions of our Code on the subject are clear and direct. "Art. 38. The domicile of each citi-

zen is in the parish wherein he has his principal establishment. The principal establishment is that in which he makes his habitual residence." "Art. 41. A change of domicile from one parish to another is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there." "Art. 46. Domicile once acquired shall not be forfeited by absence on business, but a voluntary absence of two years from the state, or the acquisition of residence in any other state of this Union, or elsewhere, shall forfeit a domicile within this state." Applying these provisions of law to the facts of this case, we cannot doubt that, from the date of removal in 1883, Natchez, Miss., has been the legal domicile of Schlenker and his wife. Under a literal construction of the words of article 46, that "the acquisition of a residence in any other state of this Union shall forfeit a domicile within this state," the case would be too clear for discussion, since no one could doubt that Schlenker acquired a residence in Natchez. But we think the article should not be so strictly construed, and that the legislature meant the acquisition of such a residence as is mentioned in the prior article, (41,) *i. e.*, one which combines "the act of residing" with "the intention of making one's principal establishment there." In other words, article 46 subjects the change of domicile from this state to another to the same tests which article 41 applies to change of domicile from one parish to another.

These tests require two elements, viz.: (1) Actual residence in the new place; (2) the intention to fix there his principal establishment. The French law applies the same tests. Code Nap. art. 103. Says Laurent: "The principle that a mere transient cause, which has induced a person to establish a temporary residence elsewhere, does not give him a new domicile, must not be extended so far as to hold that one who establishes himself in a new place, with the intention of returning to the old, preserves, by that fact alone, his former domicile. It is the nature of the establishment that decides the question. It must be the principal establishment in order to fix a new domicile. But if it be the principal establishment, that operates the translation of domicile, even though there be an intention of returning." 2 Laurent, No. 79; 1 Mourlon, Nos. 325, 326, 327. The French Code does not define the words "principal establishment." Our Code expressly declares: "The principal establishment is that in which he makes his habitual residence." Said this court: "The law which fixes the domicile of each citizen at the place where his principal establishment is situated means the principal domestic establishment." Succession of Franklin, 7 La. Ann. 400. Again: "It is there he sleeps, takes his meals, has established his household, and surrounded himself with his family and the comforts of domestic life. His dwelling-house there is emphatically his permanent home." Hill v. Spangenberg, 4 La. Ann. 554.

The evidence in this case, as we have stated it, establishes beyond a doubt that Schlenker fixed, and intended to fix, his principal establishment, his habitual residence, his home, in Natchez; not for any transient purpose of health or convenience, but in permanence, as indicated by his entering commercial business there, and by his whole conduct. He had, in fact, already abandoned his domicile in Catahoula parish when he removed to New Orleans with his family and household effects, and established himself there. There is no pretense that he ever intended to return to New Orleans, his last domicile in this state. There is none really that he intended to return to Catahoula; but, if he did, he would have had to establish a new domicile there, which could not be done without an actual residence. This is not a case like Steele's Case, where the party preserved two establishments, and where the purposes for which he placed his family in Natchez were clearly shown, and the intention to preserve his domicile at the establishment which he kept in Tensas parish is fully proved. We then said: "We do not wish to be understood as saying that, in order to have a domicile at a particular place, it is unnecessary there to have a residence, actual or constructive, with a representative living therein, at which and on whom, in case of absence therefrom, legal process can be served. However that may be, it is established that the defendant had such a residence in the parish of Tensas, at which service could have been legally made." State v. Steele, 33 La. Ann. 912.

The rules which govern the change of domicile from this state to another are the same which apply to such a change from one parish to another, and we think no one could doubt that, if Schlenker had established a home in another parish similar to that adopted in Natchez, it would be held to establish a new domicile. It thus appears that at the time when the *dation* was made, and also at the time when he received and converted to his use much the larger portion of the personal funds of his wife, which form the consideration thereof, both husband and wife were residents and citizens of the state of Mississippi, and not of the state of Louisiana; and the question is whether such a *dation*, made on such a consideration, is protected by the law of Louisiana, especially when conflicting with the rights of resident creditors. Marriage creates a civil *status*. Each state attaches to this *status* such privileges and disabilities as it deems wise and proper; but these laws are purely domiciliary in their operation, and apply only, as a general rule, and when not otherwise expressly provided, to citizens of the state, or to acts done while they are citizens. When married persons remove to a different state, their married *status* is governed and controlled by the laws of the new domicile. The law of Louisiana attributes to the *status* of marriage certain peculiar privileges and restraints,—it establishes a community of acquests and gains between the spouses; it gives to the separate property of the wife the character of dotal or paraphernal property; it protects such property from

depredation by the husband, by giving the wife a mortgage and privilege on all the property of the husband for the restitution of her dotal effects converted by him, and a mortgage for the restitution of the paraphernal effects so converted; it authorizes the wife, in certain cases, to bring suit against her husband for a separation of property, wherein she may not only obtain a dissolution of the community, and a protection of her future separate earnings, but may recover judgment for her paraphernal or dotal funds appropriated by him, which may be executed against all his property; and it authorizes the wife, with or without such judgment, to receive from the husband a *dation en paiement* in satisfaction of her paraphernal or dotal rights, which is valid against creditors even though, when made, the husband was utterly insolvent. There is no greater reason why this exceptional privilege of *dation* should be enforced in favor of non-resident married women than there is to recognize their rights of mortgage and privilege, which are not more exceptional. Yet, in dealing with the question whether there existed a legal mortgage for paraphernal funds on the husband's property in this state, this court, after quoting the provisions of law, said: "These, and other provisions of the Code on the same subject, clearly apply only to persons residing in the state. They repel the idea that the law-giver ever intended to extend the same extreme favor to non-residents, wives, and minors, whose rights would ever remain a mystery to our citizens. The removal of opponent, with her husband, into this state, placed her under the protection of our law for the future. It entitles her to a tacit mortgage for all moneys her husband may have received since for her account; but to extend back this mortgage so as to recover funds received by the insolvent in 1822, when he resided in Campeche, would be to declare at once that a tacit mortgage exists, even though the husband, the wife, the tutor, or the ward never were in Louisiana. Such a mortgage we cannot recognize, nor do we believe it was ever contemplated by our laws." Prats v. Creditors, 2 Rob. (La.) 501. In considering the same question in a subsequent case, the court said: "But every law must be construed, not only with reference to the policy which dictated it, but in connection with similar legislation on the same subject. In imposing such incumbrances upon real estate as that which necessarily results from legal and tacit mortgages, the legislature evidently contemplated the protection of a class of persons who were unable to protect themselves, and whom they were therefore bound to protect. For this reason they have subjected the rights of their own citizens to incumbrances which, though of doubtful policy, it cannot be supposed were intended to operate in favor of those whom it was no part of their duty to protect. It is the duty of the state to protect its own widows and orphans, and those of its own people who are laboring under legal incapacities." Continuing, the court said: "But, from a review of the various articles of the Code on the subject of legal mortgages, it appears to us they point conclusively, not only to the supposed residence in the state of the party whose property is sought to be subjected to their operation, but to the security of a debt originating in the state. The whole tenor of our legislation on this subject appears to us to repel the idea that it was in contemplation of the legislature to extend the operation of our system of mortgages to cases where the debt itself originated out of the state, at a time when the debtor was also a non-resident." Stewart v. Creditors, 12 La. Ann. 89. Moreover, the right of the wife to enter into such a contract with her husband as this *dation* is confined to the case where it is made for the restitution of her dotal or paraphernal effects alienated by him; and it cannot be said that the consideration in this case was of that character. The consideration is for personal funds of the wife, received and converted by the husband while he and his wife were residents of Mississippi. That these funds were personal property does not admit of question, and it is a well-settled rule that personal property has no locality, and is governed exclusively by the law of the owner's domicile as to its character, transfer, alienation, etc. 3 Amer. & Eng. Enc. Law, pp. 574, 575, and authorities cited. *Mobilia ossibus inhærent et personam sequuntur.* These funds, though accruing to the wife in Louisiana, were received by her as a citizen of Mississippi, and her rights thereto were governed by the law of Mississippi. They never acquired the character of paraphernality under the laws of Louisiana, and the husband's conversion of them subjected him only to the liability imposed by the law of the domicile.

It is urged, however, by the learned counsel for the wife, that these general principles are controlled by the special provisions of article 2437 of our Civil Code, which is as follows: "Whenever a marriage shall have been contracted in this state, and the husband after said marriage shall remove, or shall have removed, to a foreign country with his wife, if the husband shall have behaved towards his wife in such foreign country in such a manner as would entitle her, under our laws, to demand a separation of property, it shall be lawful for her, on returning to the domicile where her marriage was contracted, to institute a suit there against her husband, for the purpose above mentioned, in the same manner as if they were still domiciled in said place. In said case, an attorney shall be appointed by the court to represent the absent defendant, the plaintiff shall be entitled to all the remedies and conservatory remedies granted by the law to married women, and the judgment shall have force and effect in the same manner as if the parties had never left the state."

We are of the opinion that this article is inapplicable for two reasons: (1) The wife here has not returned "to the domicile where her marriage was contracted," within any reasonable intendment of the law. It is true she came to Louisiana

and accepted this *dation*, and returned immediately to her domicile in Mississippi. The law obviously means a return to the domicile for the purpose of living there under the protection of its laws, and was intended only to dissolve the community, which articles 2399 and 2400, Civil Code, extend in favor of non-residents, and to protect her property and her future earnings from control or interference by her husband. This is rendered more clear by reference to the origin of the article. It is taken from Act No. 9 of 1855, which is as follows: "That, whenever a marriage shall have been contracted in this state, and the husband, after such marriage, shall remove, or shall have removed, to a foreign country with his said wife, and shall behave, or have behaved, towards his wife in said foreign country in such a manner as would entitle her, under our laws, to demand separation from bed and board, or a separation of property, it shall be lawful for her, on returning to the domicile where her marriage was contracted, to institute a suit there against her husband for the purposes above-mentioned, in the same manner as if they were still domiciliated in said place," etc. The compilers of the Code of 1870, in distributing these provisions to their appropriate headings, separated the provisions relating to separation from bed and board and those relating to a separation of property into two distinct articles, viz., the above article 2437 and article 142. But these articles must still be construed together, and it is apparent that the same kind of removal to the former domicile is required to support an action for separation of property as to support one for separation from bed and board, and consequent divorce. It would hardly be supposed that a married woman domiciled in Mississippi could run over into the state of Louisiana for a day, without any intention of remaining here, or resuming her residence, institute an action for a separation from bed and board leading to divorce, return instantly to her Mississippi domicile, and claim a decree in such a case that any court in christendom would grant or respect. We had occasion recently to consider the rights of a married woman in such a case, and the limitations upon her right to invoke the jurisdiction of her original matrimonial domicile. Smith v. Smith, 43 La. Ann. —, 10 South. Rep. 248. No such case was contemplated by the law, which only intended to extend its protection to women married here, whose husbands, domiciled in another country, had so mistreated them as to justify them in leaving the matrimonial domicile, and in returning to their former homes, to live under and to receive the protection of its laws.

Even if the return to the domicile were sufficient, the statute would not cover this case. It is confined to an action for separation of property, and in such action the relief could only extend to the rights of the parties as they stood at the date of the return. It could not authorize a judgment against the husband for paraphernal funds based on claims for personal property converted by him while husband and wife were both domiciled in Mississippi, and which therefore acquired no paraphernal character. It could not recognize a mortgage for such claims, nor would it support a *dation* in satisfaction thereof, to the prejudice of creditors. The only proper pertinency of this statute is to demonstrate that, outside of its exceptional provisions, the views we have herein expressed are correct, and that non-resident married women, though their marriage took place in this state, had not, independently of the statute, the right to bring an action for separation of property in this state, or to avail of similar relief extended by our laws in the protection of our own married women.

It is therefore adjudged and decreed that the judgment appealed from be amended by rejecting the demand of Mrs. C. Schlenker, and dismissing her intervention, and by maintaining the attachment of the plaintiffs, and recognizing their privilege on the property attached for the amount of the judgment in their favor, and that as thus amended the same be now affirmed, appellees to pay costs of appeal.

(44 La. Ann. 289)

HERLISH v. LOUISVILLE, N. O. & T. R. CO.

(No. 10,729.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)[1]

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

On approaching a street crossing of a railway track, it is the duty of a traveler to exercise his senses of sight and hearing, and look and listen for an approaching train. His failure so to do is negligence, which, in case of collision, will prevent his recovery of damages for injuries sustained.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Action by Herman Herlish against the Louisville, New Orleans & Texas Railroad Company for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

Farrar, Jonas & Kruttschnitt, for appellant. *Henry L. Lazarus* and *Lionel Adams*, for appellee.

WATKINS, J. This is an action in damages for serious and permanent injuries sustained by the plaintiff by reason of his having been struck by one of defendant's locomotives, through the gross and culpable fault and neglect of its servants and employes. The occurrence is alleged to have happened on the evening of the 20th of August, 1889, at the intersection of Clara and Poydras streets, in the city of New Orleans, as the plaintiff was crossing the former, the said locomotive moving westward from the company's depot at the time. Petitioner charges that, from the injuries inflicted, he suffered great pain in mind and body, and has thereby been rendered unable to perform any labor, or earn the means necessary to support himself and family, since the occurrence. He further charges that the injuries he sustained were the direct result of the gross

[1] Rehearing denied, March 7, 1892.

and culpable negligence of defendant's employes in failing to observe the requirements of law,—to properly flag the crossing, to ring the bell, or to blow the whistle on the approach of the locomotive; also, in failing to have a gate, or adjustable bar, or other device, to warn pedestrians of the approach of a train, and prevent their crossing the company's track when same is approaching. He further specially charges that "the engineer was grossly and willfully negligent in driving said engine, * * * and was reckless in handling same, in utter disregard of the obligations imposed upon him, both in humanity and law." The amount demanded of the defendant, as compensation for injuries thus received by the plaintiff, is $30,000. Defendant's answer is that the plaintiff was injured by and through his own gross fault and negligence, and not by or through the fault and negligence of its servants or employes, plaintiff being a trespasser on its track at the time of the accident. The case was submitted to and tried by a jury, who rendered a verdict in favor of the plaintiff for $5,000; but upon rule taken for a new trial the court awarded the defendant a new trial, and, thereupon, the jury found for the plaintiff a verdict of $10,000. Upon this verdict, defendant failing to obtain a new trial, a judgment was accordingly entered up, and it has appealed.

Our only province, therefore, is to determine, between the parties, the question of negligence *vel non*, there seeming to be, from the general purport of the answer, but little doubt of the plaintiff having suffered injury, and none of the happening of the accident. And in the determination of the question of the defendant's negligence, as well as that of the plaintiff's contributory negligence *vel non*, the principal and much-mooted fact is that of the precise location of the plaintiff when he was overtaken by the defendant's train; the plaintiff's contention being that he was immediately on the crossing, or intersection of Clara and Poydras streets, while that of the defendant is that he was in its yard, which is situated between Magnolia and Clara streets, between the tracks numbered 4 and 5, near the north side of the yard, and a distance of about 65 feet from the crossing of Clara and Poydras streets. On this contention of the defendant it is claimed that the plaintiff was a mere trespasser, and therefore at fault, primarily, and guilty of negligence *per se*, because the whole of the property situated between North and South Poydras streets, adjacent to Clara street, is its private property, acquired by purchase and expropriation, it having been at one time filled with buildings, since demolished and replaced, and overlaid with its tracks and their switch connections, uniting them with its various yards and squares of ground and depots. To these are superadded others of minor importance which need no particular mention now.

From the record we glean the following salient facts, viz.: On the evening of August 20, 1889, the plaintiff started from his place of business on Front street, near the corner of Lafayette street, at 6 o'clock, or a little later, to go to his place of residence, No. 437½ Lafayette street, between Prieur and Johnson streets, west of Claiborne avenue, in the city of New Orleans; and, *en route*, he reached the defendant's depot, which is situated between North and South Poydras streets, at the intersection of Poydras and Howard streets. When he had arrived at this place, he found the banquettes were flooded with water from a recent heavy shower of rain, and, the waiting-rooms of the depot being closed, he passed on the outside, and under the shed which extends west from the depot to the intersection of Freret and Poydras streets, and continued his walk down the North side of the neutral ground between North and South Poydras streets, and had either reached or neared the crossing or intersection of Clara and Poydras streets, a distance of three blocks from the end of the shed. At this point the defendant had in use, on the space intervening between North and South Poydras streets, which is its private property, four parallel tracks, numbered, respectively, 1, 2, 3, and 4; and, also, another track, which extends transversely across the other four, whereby switch connections are formed by the various engines and trains of the company, with the several depot-yards adjacent to the depot. While the plaintiff was thus proceeding,—he being crippled of one foot, slightly, and the night being dark,—a switch-engine of the defendant shifted its position from the straight track No. 4 to the diagonal cut-off track, and struck him on the left side of his back, inflicting a severe blow at the base of the spine, and upon his hip, whereby he sustained serious injuries. The reason assigned by the plaintiff for his being in that situation was that he was, at the time, a sufferer from a sore heel, as above stated, and sought to escape the water on the flooded banquettes by resorting to the dry ground of defendant's location and property, over which he had just walked to the intersection of Clara street, when he was thus overtaken. To this statement both parties substantially agree.

On the disputed question—*i. e.*, the exact point on the defendant's track at which Herlish had arrived when he was overtaken by its engine, and violently knocked down—there is a very great disparity of statement on the part of the witnesses *pro et con;* those of the plaintiff emphatically asserting that he was, manifestly, overtaken on the crossing, while those of the defendant are just as emphatic in asserting that the accident happened at a distance of 90 feet from the crossing, on the river side of Clara street. As a witness, plaintiff states that while he was in the act of crossing Clara street, at its intersection with Poydras street, endeavoring to pass obliquely from the north to the south side of Poydras, in order to reach a dry banquette on that side and having just reached track No. 3 on the south side, he was struck by the locomotive, and thrown about 10 feet, into the south-side roadway. By the blow received, and the accompanying fall, he was stunned and severely injured, and rendered unable to arise and walk, and he there re-

mained until assistance arrived. That afterwards a man came running from the engine, which had passed beyond him about 25 feet, to where he lay; and this man was followed by another, whom he took to be the engineer, who approached him, and cursed him, and said he was drunk, and went off again. Another man, who was standing at the corner grocery opposite, came across, and assisted the man first named to carry him over there; and, presently, an ambulance was summoned, and he was carried to his residence.

A careful examination of all the testimony has fully satisfied us of the correctness of his statement, in the main; and it further satisfies us that the defendant's employes were neglectful of their duties, under the general principles of law, as well as under the ordiances of the municipality, in reference to keeping a flagman at the street crossing, the exhibition of a red light, etc.; and the evidence renders it exceedingly doubtful that a bell was rung, or whistle sounded. Taken all in all, however, the evidence fairly makes out a case of negligence on the part of the company. They were evidently unmindful of the rights of pedestrians, who had equal right to use this crossing, as they had to pass their trains over it. But while this is perfectly true, we are quite as thoroughly satisfied that the plaintiff was himself guilty of negligence which directly caused or contributed to the accident by which his injuries were inflicted. He fails to state any precautions taken by himself to avoid a collision with the defendant's locomotive, or that he either looked listened for its approach, although the proof is clear and uncontradicted that the locomotive head-light was burning; and that, although the night was dark and rainy, there was an electric light at the street-corner on either side. There is some statement made to the effect that there were, adjacent to the crossing, some box-cars which may have impeded the plaintiff's view, but in his testimony no reference is made to such an impediment. The rule is a fair and reasonable one which requires of travelers who resort to thoroughfares of a city, over which railroad companies possess a right of way, to exercise the greatest possible care to avoid collisions with their trains. This we take to be a settled rule of law, notwithstanding a like obligation is imposed on railroad companies. In Artz v. Railroad Co., 34 Iowa, 160,—which is a leading case, and cited by many text-writers as standard authority,—the court expressed this view, viz.: "Ordinarily the fact that the train neglected to make statutory and customary warnings does not relieve a person approaching an open crossing from the duty of lookout on approaching the road. When a person knowingly about to cross a railroad track may have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury from it, he cannot, as matter of law, recover, although the railroad company may have, also, been negligent, or have neglected to perform a statutory requirement." See Whart. Neg. § 384. Another author, in treating of the same subject says: "If a traveler, [at a railroad crossing of a public thoroughfare,] by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by the collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is negligence *per se.*" Beach, Contrib. Neg. § 63. That author further says: "Statutes and municipal ordinances, in every jurisdiction, prescribed specifically the duty of railway corporations in respect to railway crossings, but no failure on the part of the railroad company to do its duty will excuse any one from using the senses of sight and hearing upon approaching a railway crossing; and whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of negligence, without any reference to the railroad's failure to perform its duty." Id. p. 195, § 64. But Mr. Wharton says: "If there are obstructions at the [street] crossing such as to make it impossible for a person approaching to see the train, and impossible or very difficult to hear it, in such and similar cases it would be the clear duty of the railroad company to ring the bell, or to sound the whistle, so as to warn persons of the approach of the train; and an omission to do so, even in the absence of any statute requiring it, would be negligence, if so found by the jury, rendering the company liable for any injury resulting therefrom." Section 804, 886; Beach, Contrib. Neg. § 86, p. 293; Artz v. Railroad Co., 34 Iowa, 160. But while the existence of obstacles, or obstructions of any kind, at or near a railway crossing of a public street, under the rules thus formulated, impose additional precautions as to prudence and care on the part of railroad companies, yet Mr. Beach states that "at an obstructed crossing it is the duty of the traveler to exercise a greater degree of care and caution than is incumbent upon him usually." Beach, Contrib. Neg. p. 203, § 65. Another author summarizes the duties of railroad companies and travelers, respectively, in respect to public crossings at the intersection of public streets, of a city and a railroad track, thus: "At the place of intersection there are concurrent rights. Neither the traveler on the common highway, nor the railroad company, has an exclusive right of passage. Even on a common road travelers must look out for the approach of other vehicles passing; and this is the more necessary at a railroad crossing because movement on such a road is more speedy, and because the consequences of such a collision are, usually, so disastrous. Precaution—looking out for danger—is, therefore, a duty." 1 Thomp. Neg. p. 403. See, also, Railroad Co. v. Heileman, 49 Pa. St. 60. The instant case is quite similar in many respects to the case of White v. Railroad Co., 42 La. Ann. 990, 8 South. Rep. 475, wherein the plaintiff sought to recover of the company for injuries inflicted upon her by coming in collision with one of their trains while crossing a public thoroughfare of the city of Shreveport, under circumstances *far* more aggravated than

those apparently surrounding Herlish. In that case we said: "She was unquestionably bound to look and listen, and to exercise care and caution, to avoid the possible danger suggested by the very fact of the crossing." *Vide* Brown v. Railroad Co., 42 La. Ann. 350, 7 South. Rep. 682, also.

Plaintiff's counsel claim that the case of Curley v. Railroad Co., 40 La. Ann. 810, 6 South. Rep. 103, is strictly applicable, and should govern our decision. The facts of that case were quite different; for it appears that the train had just passed the street crossing going west, and the court say: "He had, we think, reason to believe that the track was clear,—that the train had passed on,—and that he could cross with safety; and he had no knowledge of its again returning on the main track. There was no light to give warning of the approach of the train. * * * The engine was not in front of the train." At pages 815, 816, 40 La. Ann., and page 105, 6 South. Rep. That case is exceptional, and is grounded on the facts recited, which take it out of the operation of the rule of law announced by the authors quoted from. Our conclusion is that plaintiff was primarily guilty of negligence, and is not entitled to recover, and that the judgment must be reversed. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is now ordered and decreed that the demands of the plaintiff be rejected, at his cost, in both courts.

STEIN *et al.* v. GORDON *et al.*

(*Supreme Court of Alabama.* Feb. 25, 1892.)

ADMINISTRATION—REMOVAL TO COURT OF EQUITY—SETTLEMENT—PLEADING.

1. Where a bill is filed by devisees under a will to remove the administration into a court of equity, and compel a settlement by the executor, a plea by the executor setting up the pendency of a suit to prevent interference with certain water-works, in which the estate was largely interested, and alleging that a sale of the property pending the litigation would result in a sacrifice, and would be prejudicial to the interests of the owners, does not disclose a valid objection to the maintenance of the suit, since the court will only require such a settlement, whether partial or final, as the condition of the estate would have rendered proper, had the administration remained in the probate court.

2. Where the only matter in the bill that could be construed into a prayer for the sale of the said water-works was that the court would, if necessary, order the property of the estate to be sold, and the plea alleged merely that the interest of the estate in the water-works was an undivided part interest, but not that it was necessary for a settlement of the estate that the entire water-works property should be sold, or that the interest of the estate could not be sold by itself, or that the owners of the other interests were in any way concerned in the sale of the interest belonging to the estate, the plea did not disclose any right of the said owners to be made parties to the settlement.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Chancellor.

Bill by Emma Gordon and others against Louis Stein and others to have the administration of an estate, of which the said Louis Stein was executor, removed into a court of equity. From an order overruling certain pleas to the bill, defendants appeal. Affirmed.

L. H. Faith, for appellants. *Fredk. G. Bromberg*, for appellees.

WALKER, J. The bill in this case was filed by devisees under the will of Albert Stein, deceased, and its purpose was to have the court of chancery take jurisdiction of the administration of the estate and of the settlement thereof. The bill shows that Albert Stein died testate in July, 1874; that the defendant Louis Stein qualified as executor under his will in August, 1874, and has since that time been in possession and control of the property of the estate, and has made no accounting of his trust as executor since November, 1887, more than two years before the bill was filed. It is alleged that the estate is now ready for distribution. When the case was in this court at the last term, the will of the decedent was construed. Stein v. Gordon, (Ala.) 9 South. Rep. 741. The matter now presented for review is the ruling of the chancery court on three pleas interposed by the defendants.

The substance of the matter set up by the first plea is the pendency of a suit brought by the defendant Louis Stein, as executor, in the circuit court of the United States for the southern district of Alabama, to prevent an interference with or infringement of alleged rights and franchises of the Mobile city water-works, an interest in which is alleged to be the most valuable portion of the estate of his testator. The plea charges that a sale of the Mobile city water-works property pending the suit mentioned would result in a sacrifice of the property, and would not be to the interest of the owners thereof. The pendency of that suit is pleaded as a good and sufficient reason why the water-works property should not be sold before the termination of that suit, and why the estate of Albert Stein, deceased, is not now in a condition for a final settlement and distribution thereof. This plea does not disclose a valid objection to the maintenance of the present suit. The statutes which have conferred upon courts of probate large powers in reference to the estates of decedents have not divested the chancery court of the original equitable jurisdiction to enforce the trusts of an administration. Before the jurisdiction of the court of probate has been put in exercise for the purpose of making a final settlement, a devisee or an heir, a legatee or a distributee, may as a matter of right, and without assigning any special cause for equitable interposition, have the administration removed into a court of equity for a settlement. The court of equity, proceeding according to its own practice, is governed by and applies the law controlling the settlement of administrations, the distribution of assets, or the partition or division of property, which prevails in the court of probate. Bragg v. Beers, 71 Ala. 151; Teague v. Corbitt, 57 Ala. 529; McNeill v. McNeill, 36 Ala. 109; 3 Brick. Ala. Dig. p. 334, §§ 61-63. It is the duty of an executor to make annual settlements of his administration. He may, when necessary for the

interests of the estate, he required to make a settlement at any time; and a final settlement may be made at any time after 18 months from the grant of letters, if the debts are all paid, and the condition of the estate, in other respects, will admit of it. Code, §§ 2133, 2134. When the administration is removed into the chancery court, that court may require such settlement, whether partial or final, as the condition of the estate would have rendered proper if the administration had remained in the probate court. A legatee or devisee cannot coerce a settlement until after the expiration of 18 months from the grant of letters, and a bill for such a purpose within that time is premature. Jackson v. Rowell, 87 Ala. 685, 6 South. Rep. 95. The bill cannot be regarded as premature if, at the time it was filed, the complainant was entitled to demand a settlement. The bill in the present case was filed more than 15 years after the grant of letters, and more than 2 years after the last settlement by the executor. The complainants were entitled to demand that the executor make a settlement; a partial one, at any rate. Alexander v. Steele, 84 Ala. 332, 4 South. Rep. 281. It is not necessary to the maintenance of the bill that, at the time it was filed, the estate was ready for an immediate final settlement. The court may take jurisdiction of the administration, though the condition of the estate does not admit of a final settlement at once. The plea under consideration suggests no reason at all why the executor should not be coerced to a partial settlement. The pendency of the suit referred to is, at most, a matter for the consideration of the court in determining whether the best interests of the estate require that a final settlement thereof be postponed until that litigation shall be disposed of. That suit presents no obstacle in the way of the exercise of the jurisdiction of the chancery court to have the estate administered under its orders.

As has been already stated, the bill was filed for the removal of the administration into the chancery court, and for the settlement of the estate. There is no prayer for the sale of the water-works property. The only prayer for the sale, if anything, is "that your honor will, if necessary, make a decree ordering the property of said estate to be sold for division." Of course, no decree could be made in the case for the sale or division of any property not belonging to the estate of the testator. It is averred in the second plea that the interest of the estate in the water-works property is an undivided sixty-two and a half hundredths share or part therein, and that the remaining shares therein are owned by other persons, who are named. It is not shown either by the bill or by the plea that it is necessary for a settlement of the estate of Albert Stein, deceased, that the entire water-works property be sold. It is not suggested that the interest of his estate in that property cannot be sold by itself, or that it cannot be equitably divided among the devisees. It is not shown that the owners of the other shares in that property are in any way concerned in the sale or division of the share belonging to Albert Stein's estate. The second plea does not disclose any right or interest of strangers to the estate to be made parties to a proceeding for its settlement, or for the sale or division of the property thereof.

The third plea is "to so much of said bill as seeks a sale of the Mobile water-works property." This plea strikes in the air, as it is aimed at a prayer not found in the bill. It refers to a contract between the city of Mobile and Albert Stein, deceased, in regard to the water-works property. Whatever rights the city of Mobile may have under that contract will not be impaired by the settlement of Albert Stein's estate. There is nothing in the contract to intercept the rights of the devisees to the interest of the testator in the water-works property. The contract presents no obstacle to a sale or division of that interest. Its existence does not require the indefinite extension of the executor's control over the property. Neither of the pleas presents a defense to the bill. The decree to this effect will be affirmed.

(94 Ala. 360)

WILLIAMS v. SEARCY *et al.*

(*Supreme Court of Alabama.* Nov. 26, 1891.)

PAROL EVIDENCE TO VARY CONTRACT.

Where a contract for the sale of land provides that $7,000 of the purchase price is to be paid in "original ground floor or treasury stock" of a corporation into which the land is to be put by the purchaser, parol evidence is inadmissible in a suit by the seller on the contract to show that it was agreed that the land should be put in at a certain price, and that if it was put in at a greater price the seller was to receive a greater amount of stock than $7,000.

Appeal from circuit court, Tuscaloosa county; JAMES B. HEAD, Judge.

Action by Mrs. Peninah E. Williams against George A. Searcy, W. C. Jemmison, and W. H. Peck to recover $10,000 for breach of contract to purchase land. Plaintiffs offered evidence explaining the meaning of certain terms used in said contract, and the intention of the parties. The court excluded this evidence, and thereupon plaintiff took a nonsuit and appeals. Affirmed.

Foster & Jones and *Frank S. Moody*, for appellant. *Wood & Wood*, for appellee.

WALKER, J. The written contract between the parties was for the sale of certain land at the price of $21,000. Seven thousand dollars of the purchase money was made payable in cash, $7,000 in the stock of a proposed corporation, and for the balance the purchasers were to give their three notes, which were to be secured by a mortgage on the land. The complaint alleges a non-compliance with the contract only as to the provision for the payment which was to be made in stock. By the evidence which was excluded the plaintiff undertook to prove that she had not received as much stock as was due to her under the contract. The proposition was to prove the meaning of the term "original ground floor or treasury stock," so as to show that the amount of stock which was to be paid

was dependent upon the price at which the land purchased by the defendants was put into the corporation when organized. As stated in the first count of the complaint, the claim was that "the plaintiff was to receive as part payment of said land seven thousand dollars of the stock of said company, provided said land was put into said company at the rate of one hundred and fifty dollars per acre. But, if said land should be put into said company at a greater rate per acre than one hundred and fifty dollars per acre, then in that event the plaintiff, by the terms of the contract, was to receive such an amount of said stock as would bear the same ratio to seven thousand dollars as the amount per acre at which the land was actually put into said company bore to one hundred and fifty dollars per acre." The complaint alleges that the land was put into the company by the defendants at $300 per acre, and that the plaintiff has been paid $7,000 of the stock of the company. Evidently, her claim is that she should have been paid $14,000 of the stock, and the evidence was introduced for the purpose of showing that she was entitled, by the terms of the contract, to more than $7,000 of the stock. The question presented by the offer to make such proof is whether it was permissible to show by parol that the amount of stock which the defendants were bound to deliver was different from the amount mentioned in the contract. The stock which was to be paid is mentioned only twice in the written instrument. In the clause providing for the payment of the purchase price the defendants undertook to deliver "seven thousand dollars in original ground floor or treasury stock of the proposed Tuscaloosa Coal, Iron and Land Company." The only other mention of the stock is the following provision: "It is understood herein that $7,000.00 of paid-up certificates of treasury stock shall be delivered to parties of the first part on the 15th day of February, 1887, as aforesaid, if said certificates are ready to be issued, and, if not ready, written guaranty of the management of said company that they shall be delivered as soon as ready will be sufficient."

It appears from these quotations that the amount of stock to be paid by the defendants was definitely and certainly ascertained, and that such amount was not to be diminished or enlarged by any contingency. It was not proposed to be proved that the word "thousand," when used in connection with land company stock, meant more or less than 1,000. Giving to that word, as found in this contract, its ordinary and generally accepted meaning, and the plain result is that the writing shows that the defendants undertook to pay $7,000 in stock. That amount is absolutely fixed. There is no hint in the contract that the amount should be greater or less in any event. Certificates for only $7,000 of stock could be demanded under the provision on that subject. Parol proof that the parties meant that a larger or a smaller amount of stock should be paid in certain contingencies necessarily involves a contradiction of the terms of the written contract. If the stock as actually issued by the corporation, when formed, was not such as was stipulated for, the plaintiff should have declined to receive it, and she would then have had her action for a breach of the contract. Instead of pursuing this course, she accepted $7,000 of the stock as issued. She retains that stock, and does not now complain that it is not the kind contracted for, but her claim is that she is entitled to more than $7,000 of it. The only kind of corporate stock authorized by our law is such as is issued for money, labor done, or money or property actually received. Section 6, art. 14, of the constitution of Alabama; Elyton Land Co. v. Elevator Co., (Ala.) 9 South. Rep. 129. Where the law thus requires that the stock of corporations shall represent actual values received by it, it would be as anomalous to admit parol evidence to show that a written contract for the absolute payment of a named amount of stock was in certain contingencies, not mentioned in the writing, intended to mean another and wholly different amount, as it would be to admit such evidence to vary or contradict, as to the amount, a written obligation, without conditions, to pay a certain sum of money. No action would lie on the contract in reference to the stock if the stipulation on that subject meant that the payment should be made in stock issued in violation of law. Williams v. Evans, 87 Ala. 725, 6 South. Rep. 702. It is claimed for the appellant that the contract cannot be regarded as providing for the payment of any but lawfully issued stock. Conceding that meaning to the provision in question, and the result of the unequivocal language of the contract is to provide absolutely and unconditionally for the payment of a specified amount of a certain described thing. A simple promise to pay $7,000 of lawfully issued stock cannot also mean a promise to pay some wholly different amount of the same kind of stock. The evidence which was offered to show that the parties intended that, under certain contingencies, there should be paid an amount different from that mentioned, was in direct contradiction of the express terms of the written contract; and it was properly excluded, because parol evidence was inadmissible to alter, vary, or contradict the writing. Wilkinson v. Williamson, 76 Ala. 163; Bulwinkle v. Cramer, (S. C.) 3 S. E. Rep. 776; Smith v. Clews, (N. Y. App.) 21 N. E. Rep. 160, 11 Amer. St. Rep. 627, and note; 3 Brick. Dig. pp. 291, 417. It was not competent to prove by parol that the $7,000 in stock mentioned in the contract meant more or less than that amount. The evidence having been offered for the purpose of supporting a contradiction of the terms of the written instrument, it was properly rejected. Affirmed.

Rehearing denied.

THORINGTON v. CITY COUNCIL OF MONTGOMERY.

(*Supreme Court of Alabama.* Dec. 16, 1891.)

CONTINUANCE IN EQUITY—SALE FOR TAXES—COLLUSIVE PURCHASE—CHANGE OF OWNERSHIP.

1. It is discretionary with the chancellor to refuse an application for continuance, made after the submission of an equity suit, and pending its trial, and his ruling is not revisable.

2. Where property is sold for taxes, and is purchased for 1 per cent. of its value by the husband and trustee of the owner, in the name of their daughter, but the trustee continues for five years to control the property and collect the rents, a decree that the original owner is still the real owner is proper in a suit by the daughter to enjoin the sale of the property for older taxes assessed against it.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Bill in equity, filed by Sallie G. Thorington against the city council of Montgomery to have the city council enjoined from selling certain property, alleged to have been purchased by her at a tax-sale, for further taxes that might be due. Decree dismissing the bill. Complainant appeals. Affirmed.

Arrington & Graham, T. H. Watts, and *J. S. Winter,* for appellant. *J. M. Falkner* and *W. A. Gunter,* for appellee.

STONE, C. J. The present suit was instituted in January, 1886. It has been twice before in this court. 82 Ala. 591, 2 South. Rep. 513; 88 Ala. 548, 7 South. Rep. 363. It grew out of the suit of Winter v. City Council of Montgomery, reported in 79 Ala. 481. At the spring term, 1890, of the chancery court a motion was filed by complainant for an order to compel the respondent to produce in court the testimony of J. S. Winter and others, alleged to have been taken by respondent; "and, if that may not be consistently and legally done, that reasonable opportunity be given complainant to further fortify her case herein, by allowing complainant reasonable opportunity to establish the said testimony as taken for use in complainant's behalf in this cause." This motion was accompanied by an affidavit of J. S. Winter, in which he set forth that the deposition of Sallie G. Thorington had been taken for respondent on interrogatories filed and crossed, and that in said deposition she had testified that the lots in controversy in this suit were purchased with her money, at her request, and in good faith. The affidavit further stated "that complainant, assuming that due return would be or had been made of the testimony so taken as aforesaid, leaned upon it to show the true *status* of the facts, and has not, therefore, taken, or caused to be taken, any testimony whatever; and, as counsel for complainant, he, the said affiant, cannot and does not advise going to trial in the cause without proof, directly made in terms, of the *bona fides* of the said purchase by the said complainant, of the property concerned as aforesaid, of the payment of the purchase money through a duly-authorized agent in that behalf; and that the money so paid was in fact and in truth hers, is a matter within the actual knowledge of this affiant. And affiant further says that the matters and facts so suggested are susceptible of proof, and, if allowed the opportunity, affiant expects to and will have due proof made of the same within reasonable time," etc. This motion and the accompanying affidavit were, by the register, marked, "Filed April 14, 1890." The case was not tried at that term, but no entry was made of record showing that the cause was continued. Neither is it shown that any action was taken on the motion, or that the attention of the court was called to it.

The next orders in this cause, shown by the record, were made at the October term, 1890. The first was an order of publication. Then follows an order of submission, with a note of the testimony. These are dated October 15, 1890. On October 16, 1890, a motion was made by complainant, accompanied by an affidavit of J. S. Winter, to set aside the submission, and grant to her further time to take testimony, by which she proposed to prove the purchase of the lots in good faith, and with her money. This affidavit sets forth the long protracted illness of affiant, one of the plaintiff's counsel, which disabled him to prepare the case for trial. Two other solicitors, it appears, had prepared and filed the bill. It was signed alone by them, and they join in the assignment of errors. The affidavit sets forth no reason why the testimony had not been procured by the other solicitors. The only excuse looking in this direction is the clause in the affidavit which asserts that J. S. Winter, the affiant, "has, in point of fact, looked after the details more, perhaps, than any other of the complainant's counsel herein, and accordingly was, perhaps, better informed as to these details." The chancellor responded to this motion and affidavit as follows: "The complainant, after the argument of this cause had progressed to the last speech to be made by J. S. Winter, the counsel and father of complainant, and the submission of the cause had been made, said J. S. Winter interposed for complainant an application that the submission be set aside in order that he might submit a motion, made at the last term of the court, which was filed by the register, but was not submitted to the court. This motion, which was filed by the register at the April term of the court, and which was never submitted to the court, or acted upon, was that the court should instruct the commissioner, Horace Stringfellow, to return into court how he had taken or acted under a commission issued to him to take the deposition of Mrs. Mary E. Winter and of complainant, at the instance of defendant, upon interrogatories filed by defendant, and to return the deposition of such witnesses, or either of them, which he had taken. Upon examination of the facts in this cause I find that, at a former term, said J. S. Winter had asked the court to instruct the commissioner to return said deposition of M. E. Winter to him, and to return the commission to the court, as having been improperly issued. Upon a hearing of the application of J. S. Winter, the court directed the commissioner to take whatever

action in the matter he might choose, either to destroy said deposition or retain it, but in no event to permit either party to this suit to examine it. It was held that the deposition had been taken improperly, because no commission had been properly issued; and that, as Mr. Stringfellow had acted without legal authority in taking the deposition, it was the right of Mr. Winter, representing the complainant, to ask the court that the deposition should not be subjected to the scrutiny of defendant's counsel. The order which I made was verbal, and was made at Mr. Winter's suggestion, but was a little different from his request. His request was that I direct the commissioner to return the deposition of the witness or to himself, but I made the order that he keep the deposition secret from all parties to the suit or destroy it as he desired. If this deposition was now before the court, it could not be used for any purpose, unless in the mean time the deposition of the witness had subsequently been taken, and the deposition taken by Mr. Stringfellow should be offered to contradict any of the statements made therein. But I append hereto a statement of Mr. Stringfellow that the deposition had been destroyed. It could therefore do no good to any person now to take any action therein at this time. It cannot be disputed that, if any one desired to take action in the matter to get the deposition of either of these witnesses, there has been ample time to have done so. The submission in this cause was made without any application for a continuance in order to get the deposition of these witnesses, one of whom is the complainant. The complainant has never taken any steps during the time this case has been continued from year to year to get her own or her mother's deposition in the case. Under these circumstances, the motion to set aside the submission on that ground is denied."

It is manifest there is nothing in the foregoing which we can review. No ruling is shown to have been had, or even asked, on the motion of April, 1890, further than the indisputable fact that the cause was continued at that term. On what ground the continuance was granted is not shown. And the application made October 16, 1890, made, as it was, pending the trial, was addressed to the court's discretion, and we cannot revise it. In fact, motions for a continuance are never revisable. 3 Brick. Dig. p. 404, § 1 et seq. It is but just to appellant's counsel that we should state the question we have been considering is neither discussed nor claimed in his brief. We have considered it proper, however, that we should notice it, in view of the remaining points to be considered. The uncontradicted testimony is that, when the lots were sold for one year's assessment of city taxes, they were bid off by J. S. Winter, husband and trustee of Mary E. Winter, the owner, against whom the assessment had been made. The price was the amount of the one year's taxes, a sum less than 1 per cent. of the proven value of the property, and much less than one-tenth of the annual rental value. When asked who was the purchaser, he answered, "Sallie G. Thorington." Sallie G. Thorington is the daughter of J. S. Winter and Mary E. Winter. It is fully proven that for years preceding the tax-sale J. S. Winter superintended the renting, taking rent-notes, payable to himself, as trustee; and that he collected the rents. The proof is full also that since the tax sale there has been no change. He has continued to superintend the renting, still taking the rent-notes payable to himself as trustee, and still collecting the rent, as before. If there has been any change in the possession or control of the property or the rentals, there is no proof of it. It was clearly competent to prove this continued control of the property and its rents by J. S. Winter, the trustee of Mary E. Winter. The absence of visible change in the control and possession was and is a circumstance to be weighed in determining whether there was a real change in the ownership of the property. It is certainly unusual for real purchasers of property at public sale to permit it to remain, without change, in the hands of the original owner for nearly five years, with no offer of proof explanatory of so wide a departure from business methods. Grouping the whole facts,—the relationship of the parties, the insignificant sum for which such valuable property was sacrificed, and no offer or attempt made to redeem it, the continued possession and control of the property by the trustee of the original owner, the absence of proof even that Mrs. Thorington furnished the money with which the purchase was made,—we hold that a strong presumption is raised that the title to the property was collusively placed in Mrs. Thorington, in secret trust for Mary E. Winter, her mother, and that there is no real change in the beneficial ownership. There is no proof to overturn or weaken this presumption. It is contended that the chancellor erred in not ordering the three lots not claimed by Mrs. Thorington to be first sold. If that were shown to be an error in this case, we would correct it in this court. It being shown, however, that there has been no change in the ownership of the property, but that all the lots, so far as the testimony informs us, still belong to the taxpayer, there is neither duty nor propriety in directing which lot or lots shall be first sold. Nothing is shown in the record bearing on the question of priority of burden. Affirmed.

CLOPTON, J., not sitting.

Rehearing denied.

(95 Ala. 551)

JONES *et al.* v. WOODSTOCK IRON CO. *et al.*

(*Supreme Court of Alabama.* Jan. 5, 1892.)

SALE OF DECEDENT'S LAND—ESTOPPEL—PETITION—AMENDMENT—MINOR HEIRS.

1. Under Code, § 2105, authorizing "lands of an estate" to be sold by order of the probate court, when the same cannot be equitably divided among the heirs, the probate court has no jurisdiction to order the sale of land, the title to which intestate did not have at the time of his death, but which was taken after his death, in the name of the heirs, by the administrator,

who paid the balance of the purchase price out of the funds of the estate.

2. Where in such case the administrator petitions the probate court for an order for sale of the land, in order to divide it, and issues citations to the adult heirs, who with knowledge of the facts permit the sale to be made, reported, and confirmed, they are estopped from questioning its validity seven years afterwards, and after the purchasers have put valuable improvements on the land.

3 Where the petition for the order of sale recites that the sale is necessary for an equitable division of the land, and the citation to the heirs so states, the order itself, reciting that the lands are ordered to be sold to "pay debts," may be corrected by a *nunc pro tunc* amendment to conform to the petition.

4. Such sale is invalid as to minor heirs, though they were represented in the proceedings by a guardian *ad litem*.

5. It is competent for a court of equity to invest the legal title by its decree.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Alice Jones and others, heirs of James M. Jones, deceased, brought ejectment against the Woodstock Iron Company and others. Defendants then filed a bill in equity against plaintiffs, seeking to enjoin them from prosecuting the ejectment suit, and to have the title to the land in dispute invested in defendants in the ejectment suit. Alice Jones and the other heirs demurred to the bill, and the demurrer was overruled. Then Alice Jones and the other heirs filed an answer and cross-bill. A demurrer to the cross-bill was sustained, and plaintiffs in the cross-bill appeal. Affirmed in part and reversed in part.

The land in dispute was in the possession of James M. Jones at the time of his death intestate, but the entire purchase price had not been paid, and Jones did not have the legal title. After the death of Jones, his administrator paid the balance of the purchase price, and took a deed to Jones' heirs. Subsequent to this the administrator filed a petition in the probate court, praying for an order of sale of the land for the purpose of dividing it among the heirs. An order of sale was made, and the sale duly made, reported, and confirmed. A guardian *ad litem* was appointed for the minor heirs Alice Jones and Walter Jones, and citations were issued to the adult heirs. The order of sale recited that the lands "should be sold for the purpose of paying debts," but this was corrected by an amendment *nunc pro tunc*, ordering the sale to be made for distribution.

Parsons & Darby, *Gordon McDonald*, and *Kelly & Smith*, for appellants. *Knox & Bowie* and *Caldwell & Johnston*, for appellees.

COLEMAN, J. The bill was filed to enjoin suits in ejectment, commenced by the heirs of James M. Jones, to recover certain lands which were sold under an order of the probate court, and also to have the legal title to the lands sued for divested out of said heirs, and invested in complainants. The facts sufficiently appear in the statement of the facts of the case and in the further progress of the opinion. The petition to the probate court of Calhoun county in its allegations for the sale of the lands for distribution sufficiently complied with the statute to give jurisdiction to the court. Code 1886, § 2106; Code 1876, §§ 2449, 2450. Citations to the parties in interest regularly issued, and a guardian *ad litem*, who accepted the appointment to represent the minor heirs, appeared and represented them in the proceedings in the probate court to have the lands sold for distribution.

Even though a petition be subject to demurrer, or a judgment on the demurrer be reversible for error on appeal, yet, if the petition sufficiently alleges all the necessary jurisdictional facts, and final judgment is rendered thereon, from which no appeal is taken, such irregularities or reversible errors cannot avail when the judgment is collaterally assailed. Whitlow v. Echols, 78 Ala. 208; Pollard v. Hanrick, 74 Ala. 337; 3 Brick. Dig. p. 467, §§ 182, 183, 185. The probate court has jurisdiction to sell for division lands in which the decedent held only an equitable interest. Pettit v. Pettit, 32 Ala. 288; Vaughan v. Holmes, 22 Ala. 595; Rice v. Drennan, 75 Ala. 338; Jennings v. Jenkins, 9 Ala. 285; Duval v. McLoskey, 1 Ala. 708. The statute which authorizes the probate court to sell land for division is as follows, (Code, § 2105:) "Lands of an estate may be sold by order of the probate court having jurisdiction of the estate, when the same cannot be equitably divided among the heirs or devisees." A difficulty arises as to what constitutes "lands of an estate," within the meaning of the statute. The preceding section, in regard to the sale of lands for the payment of debts, uses the same broad term, "land." As we have seen, the statute includes a mere equity in lands; and in the case of Vaughan v. Holmes, 22 Ala., supra, it was held that a purchaser of lands, who died before paying the entire purchase money, had such inchoate interest or equity as was subject to sale under the statute by decree of the probate court.

When a sale of lands for distribution has been made in pursuance of an order of the court having jurisdiction of the question, and on proof taken as required by the statutes, and the sale and payment of the purchase money regularly reported to the court and confirmed by a decree of the court, and a conveyance of the title is executed to the purchaser in pursuance to an order of the court to that effect, no fraud being alleged, the validity of the sale and the title of the purchaser cannot be collaterally assailed by showing that the purchase money was not paid as reported, or that the sale in fact was not made as directed by the court. These questions are judicially ascertained and adjudicated by the judgment of confirmation. It makes no difference that the probate court is of limited jurisdiction. After it has properly acquired jurisdiction, its judgments have the same extent, and are as conclusive *quoad rem* and the parties properly before it, as judgments of courts of general jurisdiction. A purchaser at such sale is only bound to see that the court had jurisdiction. Wyman v Campbell, 6 Ala. 219; Whitlow v. Echols 78 Ala. 210; Farley v. Dunklin, 76 Ala. 530;

Kellam v. Richards, 56 Ala. 240; Stevenson v. Murray, 87 Ala. 442, 6 South. Rep. 301; Cantelou v. Whitley, 85 Ala. 248, 4 South. Rep. 610; Goodwin v. Sims, 86 Ala. 102, 5 South. Rep. 587; Morgan v. Farned, 83 Ala. 367, 3 South. Rep. 798.

These general propositions of law are subject to the qualifications that the statute which confers the power on the probate court to sell lands for distribution extends only to the title or estate as it descended, and not to an after-acquired title or interest, different and distinct from that which the intestate had at the time of his death. In support of this qualification of the general principle the following authorities are cited: Johnson v. Collins, 12 Ala. 336; Pettit v. Pettit, 32 Ala. 288, 305; Burns v. Hamilton, 33 Ala. 213; Cothran v. McCoy, Id. 65; Bishop v. Blair, 36 Ala. 80; McCain v. McCain, 12 Ala. 510; McKay v. Broad, 70 Ala. 380; Whorton v. Moragne, 62 Ala. 207; Mounger v. Burks, 17 Ala. 50; Rice v. Drennen, 75 Ala. 338. The citations from 36 Ala., 33 Ala., 32 Ala., and Johnson v. Collins, 12 Ala. 336, are not directly in point, though often quoted to the proposition. In the case of Pettit v. Pettit, 32 Ala., supra, the conclusion of the court rested upon the fact that the contract of the intestate for the purchase of the land was void as contravening public policy, and in violation of a statute of the United States, and this defect was apparent upon the petition to the probate court for the sale of the lands. In the case of Johnson v. Collins, 12 Ala 336, the conclusion of the court was that the intestate had no inheritable or devisable interest in the lands, either legal or equitable, and consequently there was nothing upon which the order of the court could operate; that under the pre-emption law the heir, by virtue of the statute, was entitled to perfect the inchoate pre-emption right of the settler, and not the administrator of the intestate. The other case cited from 33 Ala. merely reaffirms the same ruling. The proposition, however, is broadly stated and declared in McCain v. McCain, 12 Ala. 510. In this case the intestate had purchased the land, and died without making payment of the purchase money, and before receiving the title. His administrator paid the unpaid balance of the purchase money, and titles were made to the heirs of the decedent. The court held the power to sell lands for distribution "is only given when the land remains in the same condition, as to the title, as it was at the decease of the intestate, but has no power when the title of the ancestor has been divested and made to the heirs." The facts in the case of Bishop v. Blair show that Mrs. Bishop, with funds of her husband's estate, entered certain lands. Under a petition by her, as executrix, to the probate court, these lands were represented as belonging to the estate of her deceased husband, and as such were decreed to be sold for division. It was held that the court had no jurisdiction to sell the lands for distribution, and the order of the court for this purpose was null and void. The rule has been recognized without a single departure, to the present time, since it was first declared in McCain v. McCain, 12 Ala., supra. Whatever hardships may arise, it is now a rule of property too firmly fixed to be departed from, without legislation.

So far as the adult heirs are concerned, we are fairly convinced they are estopped from asserting any claim hostile to that of the purchasers. These adult heirs, with a full knowledge of all the facts, permitted the sale of the lands to be reported to the court, and the sale confirmed by the decree of the court. They were parties to the settlement by the administrator, in which he charges himself with the proceeds of the sale of the land, and decrees were rendered against him for their proportionate share of the purchase money. The principle is not unlike that which was applied in the case of Bell v. Craig, 52 Ala. 216, in which it was held that, although the sale of the lands was void, the settlement by the administrator, and decree against him, estopped the heirs from questioning the validity of the order under which the sale was made. See, also, Whitehead v. Jones, 56 Ala. 156; Bland v. Bowie, 53 Ala. 161; Pickens v. Yarborough, 30 Ala. 416, Robertson v. Bradford, 73 Ala. 118; Bishop v. Blair, 36 Ala. 83; Rice v. Drennen, 75 Ala. 338; Nunn v. Norris, 58 Ala. 202.

The decree of the court, ordering the sale of the land, was rendered in the year 1879, the sale was made in June, 1881, reported and regularly confirmed in September, 1881; and the purchasers have been in possession ever since, have erected valuable improvements thereon, and their title never questioned until January, 1888, when suit in ejectment was instituted by the two minor heirs to recover the land. It cannot be tolerated, in a court of equity, that the adult heirs can at this late day repudiate the sale and recover back the land. Their claim constitutes a cloud upon the title of the complainants, which entitles them to relief in a court of equity. Although the minor heirs, Alice and Walter Jones, waited several years after attaining their majority before commencing legal proceedings in ejectment to recover their interest, it does not appear from the record or in proof that personal knowledge of the proceedings in the probate court, for the sale of the land, and of the final settlement by the administrator, and the decree in their favor against him for the purchase money, was brought home to them, or that they have ratified the settlement or done any act which would estop them from asserting their claim. Complainants seem to have acted in good faith in their purchase and in making improvements thereon, and the equities of the parties as to rents, or in case of partition, if such proceedings should be instituted, can be fully adjusted upon proper pleadings in a court of equity. The answer, cross-bill, and demurrers of the minor heirs are filed jointly with the adult heirs, who are not entitled to relief. The pleadings should be amended, if desired, so as to separate the rights and interest of the minor heirs from the adult heirs.

If the decree of the court, upon the petition of the administrator for the sale of the lands, was not otherwise invalid, the

amendment *nunc pro tunc* was properly made. The petition to the probate court sought to have the lands sold for an equitable division. The citation to the heirs so stated. Proof was taken by deposition to show that the lands could not be divided without a sale, and which depositions were ordered to be filed as a part of the record of the proceedings. The decree itself provides that the petition be granted. It is perfectly evident that the recital in the judgment that the lands be sold for the purpose of paying the debts was a mere clerical mistake, capable of correction *nunc pro tunc*, if, indeed, when considered in connection with all the *quasi* record memoranda and the record proper, it did not correct itself. The proceedings being *in rem*, as between the administrator and heirs, notice to the heirs of the motion to amend *nunc pro tunc* was not necessary. Farley v. Dunklin, 76 Ala. 532; Goodwin v. Sims, 86 Ala. 102, 5 South. Rep. 587; Nabers v. Meredith, 67 Ala. 333; Whorley v. Railroad Co., 72 Ala. 22. The record nowhere shows how the rights of A. H. Jones are involved in this case, and it does not appear upon what grounds the injunction was issued and made perpetual as against him.

It is insisted that the decree of the equity court is erroneous in that it undertook to "invest the legal title" in the complainants. The case of Prewitt v. Ashford, 90 Ala. 300, 7 South. Rep. 831, supports the contention. We would correct the decree in this respect, if we deemed it necessary. A deed made in pursuance of a decree of a court of equity, executed by any other person than the legal owner, *proprio vigore*, would not convey the legal title. Such an instrument derives its entire strength from the decree. It is the decree at last, and not the instrument itself, which makes it effectual to convey or invest the legal title. Courts of equity, in this state, have long pursued the practice of investing the legal title by their decrees. This practice was not only sanctioned, but expressly authorized, by the decision of the supreme court of this state. As far back as Brewer v. Brewer, 19 Ala. 481, 490, DARGAN, C. J., proceeding to render "such decree as the court below should have rendered, ordered, adjudged, and decreed that Thos. J. Brewer be invested with the legal title," etc. This early decision has become a rule of property, and to hold otherwise now would upset a great many legal titles. We adhere to the old rule; and so far as Prewitt v. Ashford, supra, conflicts with it, the latter is hereby qualified. Either cause would be efficient to invest a legal title. That no injustice may be done to litigants who, under the influence of the decision made in the case of Prewitt v. Ashford, 90 Ala., 7 South. Rep., supra, have instituted proceedings to procure the legal title, we declare and hold that as to such cases the case of Prewitt v. Ashford operates as a rule of property. Farrior v. Security Co., 92 Ala. 176, 9 South. Rep. 532.

The decree of the city court is affirmed so far as it granted relief to complainants against the adult heirs of James M. Jones, and reversed so far as relief was granted against Walter Jones and Alice Jones, who were minor heirs at the time of the sale and settlement, and against A. H. Jones. The judgment of this court reversing the decree rendered against the minor heirs and A. H. Jones is not to be construed as dissolving the temporary injunction enjoining the prosecution of the ejectment suits, but as to such matter the question is left open for the consideration of the lower court, if the pleadings should be amended and other proof offered in the further progress of the cause. One-half of the costs of the appeal must be paid by the adult heirs of James M. Jones, and the other half by the appellees. Affirmed in part and reversed in part.

Rehearing denied.

(95 Ala. 463)

TOMPKINS v. DRENNAN.

(*Supreme Court of Alabama.* Jan. 7, 1892.)

MORTGAGES—SALE UNDER POWER—ATTORNEY'S FEES.

Where a mortgage containing a power of sale stipulates that the proceeds of the sale shall be applied, first, to paying the expenses, "and all attorney's or solicitor's fees," and the notes secured by the mortgage provide that, in case they are not paid at maturity, the mortgagor shall pay not less than 10 per cent. for collecting them, the mortgagee cannot retain 10 per cent. out of the proceeds of the sale under the power, but is entitled to a reasonable attorney's fee only, since the stipulations in the notes and the mortgage in relation to attorney's fees are independent, and applicable to different contingencies,—one to the sale under the mortgage, the other to collection of the notes by suit.

Appeal from circuit court, Jefferson county; JAMES B. HEAD, Judge.

Action by D. M. Drennan against H. B. Tompkins for $3,000, being the amount realized by defendant from a sale of property under mortgage, in excess of the mortgage debt and expenses. Judgment for plaintiff. Defendant appeals. Affirmed.

Roquemore, White & McKenzie, R. H. Pearson, and *Jackson E. Long*, for appellant. *Gillespy & Smyer* and *Webb & Tillman*, for appellee.

WALKER, J. The appellant, who was the defendant below, sold certain land in the city of Birmingham under a power of sale in a mortgage which had been made to secure two promissory notes payable to himself. The principal and interest due on the notes at the date of the sale amounted to $29,013.31. The mortgaged property was sold for the sum of $32,000. Out of this sum the defendant retained the amount of the principal and accrued interest on the notes, the amounts of the advertising and auction fees, and also the sum of $2,901.33 as attorney's fees. The claim of the plaintiff is based upon his alleged right to the sum retained by the defendant as attorney's fees. The uncontroverted evidence shows that, before the advertisement and sale by the defendant under the power in the mortgage, the mortgagors had sold the property covered by the mortgage, and all their interest therein, to the plaintiff, and had executed a deed to him. The plaintiff, as the grantee of the mortgagors, and as the owner of the equity of redemption in the mortgaged

[1] Publication delayed pending rehearing, which was denied.

property, is entitled to recover, in an action for money had and received, the surplus of the proceeds of sale remaining in the hands of the mortgagee, after deducting the amounts which, by the terms of the power of sale, were authorized to be applied to the payment of the secured debt and interest thereon, and of such expenses and charges incident to the execution of the power as are provided for therein. Webster v. Singley, 53 Ala. 208; Cook v. Basley, 123 Mass. 396; Buttrick v. Wentworth, 6 Allen, 79; 2 Jones, Mortg. § 1940. The question, then, is as to the right of the defendant to the sum retained by him as attorney's fees.

There is one provision in the mortgage itself for the payment of attorney's fees, and another and different provision on the same subject in the notes which were secured by the mortgage. The mortgage confers upon the mortgagee a power to sell the property for cash, and to devote the proceeds of the sale "to the paying, first, the expenses of advertising and selling and all attorney's or solicitor's fees." This is the extent of the provision in the mortgage on the subject. A clause in the following words is found in each of the notes: "It is further agreed that the undersigned shall pay all costs for collecting the above, not less than ten per cent., on failure to pay at maturity." The two provisions are separate and distinct, without any reference in the one to the other. There is an independent field of operation for each of them. A creditor whose demand is evidenced by the debtor's personal obligation, which is secured by a mortgage upon land, has the choice of foreclosing the mortgage upon the breach of the condition thereof, or of proceeding against the debtor without regard to the mortgage security. If either of the two resources may be exhausted without satisfying the demand, resort may be had to the other. Until the demand is satisfied, the creditor may seek at the same time, but by separate and independent proceedings, both the enforcement of the personal liability of the debtor, and the foreclosure of the mortgage security. The power of sale in the mortgage affords a means of enforcing the security alone. In making a sale under the power, the creditor avails himself of a special provision for subjecting to the satisfaction of his demand only the property covered by the mortgage. The exercise of the power may involve the expense of attorney's or solicitor's fees. In the present case the payment of such fees out of the proceeds of the sale is authorized by the terms of the power itself. This provision covers only such fees as are incident to the exercise of the power, and does not cover expenses incurred for fees for the prosecution of an action at law on the notes, or of a bill in chancery for the foreclosure of the mortgage. Bedell v. Security Co., 91 Ala. 325, 8 South. Rep. 494; Lehman, Durr & Co. v. Comer, 89 Ala. 579, 8 South. Rep. 241; Bynum v. Frederick, 81 Ala. 489, 8 South. Rep. 198. There is nothing, either in the mortgage or in the notes, to show that it was the intention of the parties that the provisions in the notes on the subject of attorney's fees should apply in the case of a sale under the power; and as the provision in the mortgage itself fully covers that contingency, and there are other and different contingencies in which the provisions in the notes as to the attorney's fees would be applicable, our conclusion is that those provisions do not cover the case of a sale under the power. The effect of the provision in the mortgage was to authorize the mortgagee to pay, out of the proceeds of the sale, a reasonable compensation for the services of an attorney or solicitor rendered in and about the sale made under the power. The plaintiff conceded that the defendant was entitled to retain the amount of such reasonable compensation. The evidence showed, without conflict, that $700 was a reasonable fee, and the defendant was allowed a credit for this amount. The court properly rendered judgment for the balance of the sum which had been retained by the defendant as attorney's fees. It seems that the result would have been the same if the provisions in the notes could be regarded as applying to a sale under the power contained in the mortgage. In reference to the same provision in a note, this court has said: "Stipulations to pay a given per cent. for the services of attorneys are held to import a liability for reasonable compensation for legal services rendered in that behalf, not in excess of the amount limited. We do not think that the stipulation here is for more than this." Montgomery v. Crossthwait, 90 Ala. 553-575, 8 South. Rep. 498. Similar provisions have been given a like effect in other cases. Munter v. Linn, 61 Ala. 492; Camp v. Randle, 81 Ala. 240, 2 South. Rep. 287. Contracts for the payment of attorney's fees are recognized as legitimate when their operation is to provide for the reimbursement of the creditor who, in consequence of the debtor's default, has been put to the expense of employing an attorney to render services in the enforcement of his demand. Such stipulations must become convenient cloaks for usury whenever they are allowed to serve other purposes than the indemnity of the creditor for the expenses so incurred; and when, under the guise of a fee which the creditor has neither paid nor become liable to pay, he may really secure to himself compensation beyond legal interest for the withholding of the amount due to him. The defendant in this case is a lawyer, and rendered the legal services incident to the sale, except that his partner prepared the advertisement notice. The defendant retained the 10 per cent. himself, and it is not shown that any other attorney claims or is entitled to any part of it. Affirmed.

Rehearing denied.

(95 Ala. 589)

THORNTON *et al.* v. TYSON *et al.*

(*Supreme Court of Alabama.* Feb. 4, 1892.)

DECREE OF DISTRIBUTION—PERSONAL JUDGMENT AGAINST ADMINISTRATOR — JURISDICTIONAL AMOUNT.

1. In a suit by a part of the distributees and heirs at law of an intestate against his administrator, the court has power, after determining the fund due from the administrator, to decree the

separate sums due from such fund to the several distributees of the estate, though many of such distributees were not named as complainants in the bill.

2. Every such individual decree is a personal judgment against the administrator in the suit, irrespective of whether or not the person in whose favor it is rendered was named as a party complainant.

3. Whether or not the amount involved in such case was sufficient to give jurisdiction to the United States circuit court should be determined by the amount of the fund in the hands of the administrator for distribution, and not by the separate sums decreed to the several distributees.

Appeal from chancery court, Jefferson county; THOMAS COBBS, Chancellor.

Bill by Martha L. Agee and Elizabeth Tyson against R. J. Thornton and others to set aside certain conveyances made by defendants, and to have the property so sought to be conveyed sold, and its proceeds distributed among plaintiffs, and such others of the distributees of the estate of John Shackelford, deceased, as might join in the bill. Plaintiffs filed an amended bill, to which defendants demurred. Demurrer overruled. Defendants appeal. Affirmed.

It was alleged in the amended bill that Martha L. Agee and others, who were citizens of the states of California and Arkansas, filed a bill in the circuit court of the United States, as distributees and heirs at law of John Shackelford, against R. H. Abercrombie, a citizen of Alabama, as administrator *de bonis non*, and R. J. Thornton, a citizen of the state of Alabama, as surety on the administration bond, to compel a settlement and distribution of the estate of said John Shackelford, deceased. The process was duly issued, and the defendant appeared, and, after reference to the register, there was a final decree that there was due from the defendants a sum over $17,000, and from this fund there was decreed separate sums in favor of the several distributees of the estate, whose names were ascertained by the register, and set forth in the decree, which was made an exhibit to the bill in the present case. The bill in this case was filed by Martha L. Agee and Elizabeth Tyson, who sue on behalf of themselves and such others of the distributees of the estate of John Shackelford as should come in and make themselves parties to the said suit. The defendant demurred to the bill as amended, on the grounds that the decree as set out as an exhibit to the bill was rendered in favor of the parties complainant who were not parties to the suit in the federal court, that because of the amount of the decree as alleged in the bill the federal court had no jurisdiction as to these claims, and because all the complainants had not shown themselves to be judgment creditors.

Hewitt, Walker & Porter, Smith & Lowe, and *M. J. Gregg*, for appellants. *A. T. London* and *Tompkins & Troy*, for appellees.

STONE, C. J. It has been long and well settled that a part, less than the whole, of the beneficiaries in a trust fund, may maintain a bill to bring the trustee to a settlement. And the same rule prevails when creditors have the right to proceed in equity to subject to their demands effects of their debtor held by an equitable title, or fraudulently attempted to be placed beyond the reach of his debts. In such cases it is not necessary that all the beneficiaries or creditors shall be made complainants. A part may proceed to coerce a settlement of the trust, or the utilization of the fund or effects in the liquidation of his or their demands; and in the one case must, while in the other he or they may, so frame the bill and proceedings as that the entire litigation and the entire administration may be had and accomplished in one suit. This, because in the settlement of a trust, in which there are many beneficiaries, the courts will not, as a rule, administer partial relief, but will take the entire account and distribute the entire fund. For this purpose the suit, in legal effect, is instituted. It results that, in many cases, decrees for their respective distributive shares are rendered in favor of many persons who are not named as complainants in the bill. And the same thing frequently occurs in what are known as "creditors' bills." Brown v. Bates, 10 Ala. 432; 3 Brick. Dig. p. 340, § 136; Bank v. St. John, 25 Ala. 566; Story, Eq. Pl. §§ 97, 99, 100, 104, 105; Lehman v. Meyer, 67 Ala. 396; Payne v. Hook, 7 Wall. 425.

When a suit is instituted, and rightly instituted, in either of the categories stated above, there can be no question that any decree rendered within the purview of the bill, although in favor of a person not named as a party complainant, is a binding personal judgment in the particular case. And we do not hesitate to hold that in the suit in the circuit court of the United States every individual decree rendered, irrespective of its amount, and irrespective of the fact that the person in whose favor it was rendered was or was not a party complainant in that suit, has all the elements of a personal judgment against the defendants in that cause. Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. Rep. 619. In the said suit of Agee et al. v. Abercrombie, Adm'r, et al., in the United States circuit court, the sum ascertained to be in the hands of the administrator *de bonis non* for distribution was in excess of $17,000. That was the amount in controversy in that suit, and not the separate sums decreed to the several distributees. That litigation was a single suit, not a multiplicity of suits between the several next of kin and the administrator *de bonis non*. Handley v. Stutz, 137 U. S. 366, 11 Sup. Ct. Rep. 117.

Affirmed.

(99 Ala. 100)

HOWELL v. BOWMAN *et al.*

(*Supreme Court of Alabama.* Feb. 4, 1892.)

ACTION TO SET ASIDE TRUST-DEED — EVIDENCE — BURDEN OF PROOF — EXAMINATION OF WITNESS — INTENT OF GRANTEE.

1. In an action in which a deed of trust is attacked by a creditor of the grantor, the deed of trust, and the note which it purports to secure, are admissible in evidence, where independent evidence of the existence of a valuable

consideration to support such instruments is subsequently introduced.

2. It was competent for the grantee of the deed of trust given to secure a note held by such grantee to testify concerning other notes he had held against the grantor, without producing them, as their existence was a collateral matter.

3. It was not error to admit the testimony of the grantee that he had paid claims against the grantor at his request, and that the money so paid constituted a part of the consideration for the note and deed of trust.

4. Where a deed of trust is attacked as fraudulent against the grantor's creditors, an inquiry as to the value of the property conveyed is material on the question of the good faith of the transaction.

5. It is error to permit a witness, against the objection of the adverse party, to refresh his memory by the use of a memorandum made some time before the trial, but long after the date of the transaction to which it referred.

6. Where it does not appear from the face of the instrument that it was made in trust for the use of the grantor, or with the intent to hinder, delay, or defraud his creditors, the court cannot declare it invalid as to such creditors.

7. Where a deed of trust, given to secure a debt of the grantor, is attacked as fraudulent against the grantor's creditors, and the attacking creditor proves the existence of his debt at the time the deed was executed, the *onus* shifts to the grantee to prove that the debt which the deed purports to secure was justly due at the time of its execution; but, if the attacking creditor goes further to show that the deed was made with intent to hinder, delay, or defraud the grantor's creditors, the burden of proof, as to such intent, rests on the attacking creditor.

8. Though a provision of a deed of trust permitted the grantor to retain possession of the property, though the effect of the transaction was to hinder, delay, or defraud the grantor's creditors, and though the grantor executed the instrument with that intent, the deed could not be pronounced invalid if the grantee did not participate in the intent of the grantor, but accepted the deed for the sole purpose of securing a *bona fide* debt of the amount named in the instrument.

9. On an inquiry as to whether a deed of trust was given in good faith, and solely for the security of a just debt, or was vitiated by a purpose to benefit the grantor at the expense of his other creditors, it is competent to show that the grantee had notice that there were other creditors; that the deed covered substantially all of the grantor's property, and more than enough to secure the grantee's debt; that by the arrangement the grantee unreasonably postponed the collection of his debt; that the grantor was allowed to retain and use the property; and that the property so retained and used was either perishable, or of such a character as to be profitable in its use; and the deed of trust cannot be pronounced invalid unless the jury find from such facts that it was made either in trust for the use of the grantor, or with an intent, participated in by the grantee, to hinder, delay, or defraud the grantor's creditors.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge.

Action by James H. Howell against James W. Bowman. Judgment for plaintiff. An execution was levied on certain personal property in the possession of defendant, and a claim to the property levied on was interposed by H. W. Cardon, as trustee under a deed of trust executed by defendant to secure the payment of his promissory note to R. T. Ewing. Judgment for claimant. Plaintiff appeals. Reversed.

On November 15, 1884, previous to the claim of the present suit by the plaintiff, the defendant, James W. Bowman, executed a deed of trust to the claimant, H. W. Cardon, for the benefit of one R. T. Ewing, to whom said Bowman was indebted; the consideration named in the deed being $482. The testimony of the claimant tended to show that the consideration of said trust-deed was a past indebtedness due by the said Bowman to Ewing, and that the said indebtedness consisted of various transactions between the said Ewing and Bowman. Some of the items were notes given by said Bowman to one Mrs. Tate, the mother-in-law of Ewing, and transferred by her to Ewing. On these Tate notes a greater rate of interest than 8 per cent. was charged by Mrs. Tate, but in all the demands and debts due Ewing by said Bowman only 8 per cent. interest was charged. It was further shown for the claimant that, at the time of the execution of said trust-deed for the benefit of said Ewing, he did not know of the existence of the plaintiff's debt against said Bowman. The plaintiff objected and duly excepted to the court's allowing the claimant to introduce in evidence the trust-deed and the note made by said Bowman to said Ewing on November 15, 1884, which evidenced Bowman's indebtedness to Ewing. Upon the examination of said R. T. Ewing, he was allowed, against the plaintiff's objection and exception, to refresh his memory by reference to two memoranda,—one made shortly after the transactions which resulted in the execution of the trust-deed, and the other just a short time before the trial of the present suit, which took place in 1890. This witness further testified, against the objection and exception of the plaintiff, that there had been various transactions between him and said Bowman, and that there were other notes given by said Bowman to him, witnessing his prior indebtedness.

The court, among other things, charged the jury as follows: "The burden is first upon the plaintiff to make out his case. If the evidence satisfies you that the sheriff's deputy, having an execution issued by the justice of the peace on a judgment in favor of plaintiff against the defendant, found the property in controversy in the possession of the defendant, and he levied that execution upon such property, then, *prima facie*, that property would be liable to satisfy such execution. This would make out plaintiff's case. The burden would then be shifted upon the claimant to show a better claim to such property. If, upon considering the trust-deed under which claimant claims title to the property, in connection with the evidence offered with it, you find the same was given to secure a debt justly due from the defendant, then you would be authorized to find that the property, without more evidence, belongs to the claimant. Here the question of fraud in the execution of said trust-deed presents itself. The plaintiff insists that upon the whole evidence such conveyance is fraudulent and void. The burden of proving it is upon him. Upon proving a valuable consideration in the form of a just debt due from Bowman to Ewing, and the execution of the instrument to se-

cure the same, the law presumes it was done in good faith, without further evidence, and the burden is cast upon the plaintiff to prove the fraud,—to prove a state of facts which will warrant you in drawing the conclusion that it was in bad faith, or done for the purpose of hindering, delaying, or defrauding creditors of Bowman." The plaintiff excepted to this portion of the general charge of the court, and separately excepted to the court's refusal to give each of the following charges requested by him in writing:

(1) "If the jury find, from the evidence, that, at the time of the execution of the deed of trust under which Capt. Ewing claims the property that was levied upon by the execution in favor of Howell, Howell was a creditor of Bowman, and Ewing knew it, and Ewing knew that Bowman was in failing circumstances, and took the deed of trust upon all of Bowman's visible and tangible property, stipulating in said trust-deed for a postponement of foreclosure of said trust-deed for a period of twelve months, and permitted Bowman to retain the possession of the personal property mortgaged, and Howell's execution was levied upon the property described in the officer's return on said execution, Ewing is not entitled to recover in this action." (2) "If the jury find from the evidence that the property in controversy was of a perishable nature, and it, with other property included in the deed of trust, was all the visible property that Bowman had, and he was permitted to remain in possession of the property, and use it for his own benefit, by the trustee or Capt. Ewing, and Capt. Ewing knew at the time of the execution of the deed of trust that Bowman had other creditors, who would be hindered or delayed in the collection of their debts, the trust is void as to the property levied on, and, if it was in possession of Bowman at the time of the levy of the execution, that the plaintiff is entitled to recover in this action." (3) "That unless the jury find, from the evidence, that the notes in evidence, claimed by Ewing to have been paid off by him, were based on a valuable consideration, then they are no part of the consideration of his debt claimed by him to support the claim suit. The mere fact that he paid them off at the request of Bowman does not raise any consideration in favor of the claimant." (4) "If the jury find, from the evidence, that, at the time of the execution of the deed of trust upon which the claimant relies in this case, (to-wit, the trust-deed executed on the 15th November, 1884,) Bowman was in failing circumstances, and Ewing knew it, and knew that Bowman had other creditors, who would be hindered or delayed in the collection of their debts against Bowman, and Ewing knew that the property conveyed by said trust-deed was all, or almost the whole, of the visible and tangible property that Bowman owned, and that the property conveyed by the deed of trust was equal in value to fifty per cent. more than the debt secured by it, and that Ewing gave Bowman twelve months' time within which to pay the debt secured by the mortgage or trust-deed, then the deed of trust is void, and the claimant can't recover in this action." (5) "That if Bowman executed the deed of trust to hinder, delay, or defraud creditors, then if any fact or circumstance which, if followed up by Ewing, would have led him to discover the fraudulent intent of Bowman, had come to Ewing's knowledge previous to the execution of said deed of trust, in that event Ewing would be held in law as being a party to the fraud, and the deed of trust void as to plaintiff." (6) "If the jury find, from the evidence, that Bowman executed the deed of trust for the purpose of hindering or delaying his other creditors, (if they find he had other creditors,) and Ewing knew it, or knew facts that were sufficient to excite suspicion in the mind of a reasonable man as to the good faith of Bowman in executing the deed of trust, which, if followed up, would have led to a discovery of his bad faith, then Ewing is chargeable with knowledge of the bad faith of Bowman in executing said trust-deed, and the claimant cannot recover in this action." (9) "Every man is presumed to intend the necessary consequence of his acts; and if an act necessarily delays, hinders, or defrauds creditors, then the law presumes that it is done with the intent to delay, hinder, or defraud them." (11) "If the jury, from the evidence in this cause, believe that, at the time the execution in favor of Howell was levied upon the property in controversy, the property was in possession of Bowman; that the plaintiff thereby established a *prima facie* case, and it then became incumbent upon the claimant to establish his right to the property, and in order to do so he must show not only the existence of a debt, but that it is a valid debt, and that the conveyance was executed in good faith to secure that debt, and for no other purpose, before the claimant is entitled to recover; and if the jury find, from the evidence, that the deed of trust was executed and accepted for the purpose of hindering or delaying other creditors of Bowman; if they find that Bowman had other creditors, or, for the purpose of tying up the property of Bowman from his other creditors, Bowman was permitted to retain the possession of the property mortgaged,—then the claimant is not entitled to recover." (14) "That unless the jury find, from the evidence, that the deed of trust introduced in this case was executed for a valuable consideration and in good faith, they must find for the plaintiff." (17) "That if the plaintiff has made out a *prima facie* case in this action under the charge of the court, then it devolves on the claimant to show, by proof to a reasonable certainty, that his claim suit is based on a claim for valuable consideration, and that his deed of trust was executed in good faith." (20) "The law does not permit a person in failing circumstances to mortgage all his property to pay a selected creditor, and to put off the law-day of the mortgage to a distant day, and in the mean time retain the possession for his own benefit; and a mortgage so doing, when it is shown

that the grantee had notice of the insolvency of the debtor, or was put on inquiry as to the condition of the debtor, is void as to existing creditors." (22) "That the giving of the deed of trust by Bowman to H. W. Cardon for the benefit of Ewing upon all of his property was an admission on the part of Bowman of his inability to pay all of his debts, or at least renders his ability to pay doubtful; and, if Ewing took such a deed upon all of Bowman's property, Ewing was put on notice or inquiry as to Bowman's creditors." (23) "A particular intent to defraud creditors is not necessary, in order to render a conveyance fraudulent and void as against them. If the necessary consequence of the deed is to hinder and delay them, then it is fraudulent and void as to such existing creditors." (24) "The use to which a deed is applied is a circumstance or fact which the jury may look to in determining the intent with which it was made; and if the jury find, from the evidence, that Ewing and Bowman have made use of the deed of trust last executed by Bowman to Cardon for the benefit of Ewing to tie up the property of Bowman from his other creditors, then they are authorized to infer that it was executed by Bowman, and received by Ewing, for the purpose of hindering or delaying the other creditors of Bowman, if they find that Bowman had other creditors." (*f*) "If the jury find, from the evidence, that Ewing's debt against Bowman, that the deed of trust was executed to secure, is tainted with usury, then Ewing is not a *bona fide* purchaser for value of the property included in his said trust-deed, and it cannot prevail against the plaintiff in this suit, if the jury find from the evidence that plaintiff was a creditor of Bowman at the time it was executed."

Matthews & Daniel, for appellant. *Reeves & Cardon*, for appellees.

WALKER, J. An execution upon a judgment rendered by a justice of the peace in favor of the appellant and against J. W. Bowman was levied upon personal property which was in the possession of Bowman. A claim to the property levied on was interposed by H. W. Cardon, as trustee, under a deed of trust by which Bowman had undertaken to convey certain property, including that levied on, to secure the payment of his promissory note to R. T. Ewing. The contest was upon the claim so interposed. Exceptions were reserved to rulings of the circuit court in the admission of evidence, and in giving and refusing charges.

1. The objections to the introduction in evidence of the deed of trust to the claimant, and of the note which it purported to secure, were properly overruled. The subsequent introduction of independent evidence of the existence of a valuable consideration to support those instruments removed the principal ground of the objections. The validity of the deed of trust being assailed by the plaintiff as a creditor whose debt was in existence at the time of its execution, its recitals of a consideration were not evidence against him. The *onus* was on the claimant to prove the existence of the alleged debt to Ewing, and the statements in the note and in the deed of trust could not help him in this regard. Bolling v. Jones, 67 Ala. 508. The plaintiff was entitled to have the jury instructed to this effect. But the rule that the recitals of consideration are not evidence against an attacking creditor would not justify the entire exclusion of the instruments. They were admissible to prove the fact of their existence, so as to show that, as between Bowman and the claimant, there had been an effectual transfer of title to the property in question. It was necessary for the claimant to go further, and prove the additional fact, necessary to the support of his claim as against the plaintiff, that the mortgage was supported by a valuable and sufficient consideration. The instruments were admissible in connection with the evidence, afterwards adduced, tending to show such a consideration.

2. It was competent for the witness Ewing to speak of one of the former notes he had held against Bowman without producing it. The fact of the existence of such note was a collateral matter, and the rule requiring the production of the note itself did not apply. Wollner v. Lehman, 85 Ala. 274, 4 South. Rep. 643; 3 Brick. Dig. p. 439, § 486. A valid debt against a person may as well be created by paying off his debts to others, at his instance and request, as by advancing money directly to him. There was no error in permitting the witness Ewing to state that he had paid debts for Bowman, and that the money so used constituted part of the consideration for the note and deed of trust. The older deeds of trust on the land were admissible upon the question of the value of the property covered by the deed of trust to the claimant. The existence of prior incumbrances lessened the value of the property taken as security. The inquiry as to the value of the property conveyed as security was material upon the question of the good faith of the transaction.

3. One of the memoranda which the witness Ewing was permitted to use for the purpose of refreshing his recollection was made in the fall of the year preceding the trial, and long after the date of the transaction to which it referred. It is not permissible for a witness, against the objection of the adverse party, to use a memorandum to revive his memory, unless it was made at the time of the transaction concerning which he is questioned, or so recently thereafter that it may be inferred that the matter was then fresh in his mind. Calloway v. Varner, 77 Ala. 541; Jaques v. Horton, 76 Ala. 238; 7 Amer. & Eng. Enc. Law, 111. It is plain that a contemporaneous record of a transaction as it was originally impressed upon the mind must be much more trustworthy than a memorandum made so long thereafter as to be itself but the result of an effort of the memory. The former leads the mind of the witness directly to the matter sought to be recalled, while the latter does not go beyond a former recollection, which may not have been distinct. The authenticity of a memorandum to which a witness may look for

a revival of his memory should be vouched for by the fact that it was made so near to the date of the transaction to which it refers that the original impression thereof could not have grown dim in the mind of the person who made it. A witness exposes himself to the hazard of being misled when he relies on a memorandum made at a time when his memory may already have become uncertain or indistinct. The witness should not have been permitted to refer to the memorandum mentioned above.

4. The owner of personal property has the right to mortgage it to secure the payment of his debts. To protect creditors and purchasers without notice, the statutes provide for the record of such conveyances. Code 1886, §§ 1806–1814. These statutory provisions impliedly recognize the right of the mortgagor to stipulate in the instrument for his retention of possession of the mortgaged property, or to retain such possession with the consent of the mortgagee. The courts cannot pronounce a recorded mortgage of personal property void, as against unsecured creditors, merely because the mortgagor is left in possession; for the law permits that to be done, the recording being regarded as a substitute for a change of possession. Jones, Chat. Mortg. (3d Ed.) §§ 329–330; Benedict v. Renfro, 75 Ala. 121. It is plain that this power of incumbering personal property, the possession of which is retained by the owner, may be readily perverted to the unlawful purpose of securing an unauthorized benefit to the grantor, or of hindering, delaying, or defrauding his creditors. But the law sanctions the *bona fide* use of this form of security, even though the debtor may be embarrassed or insolvent. The legitimate scope of such an instrument, as against the grantor's creditors, is the *bona fide* appropriation of property to secure a debt honestly due. If any part of the purpose of the parties thereto is that it shall avail or be used for the ease or favor of the grantor, it is void as to his creditors. Reynolds v. Crook, 31 Ala. 634. Whenever such purpose, or a trust for the use of the grantor, appears upon the face of the instrument, the court, without looking further, pronounces it void as against the grantor's creditors. Thus, a mortgage of merchandise which expressly or impliedly leaves the mortgagor in possession, and free to make sales from the mortgaged property for his own benefit, in its very nature involves such a reservation of a benefit to the mortgagor as invalidates the instrument, and the court will pronounce it invalid as a conclusion of law. Benedict v. Renfro, 75 Ala. 121; Owens v. Hobbie, 82 Ala. 466, 3 South. Rep. 145. If, however, the mortgage of such property provides for the sale thereof by the mortgagor for and on account of the mortgage, and that the proceeds of such sales be applied to the mortgage debt, then such mortgage is not fraudulent on its face. Murray v. McNealy, 86 Ala. 234, 5 South. Rep. 565. A mortgage of personal property cannot be pronounced fraudulent without evidence *aliunde* to this effect, unless it appears from an inspection thereof that the purpose of the parties embraces the reservation of a benefit to the mortgagor, or that there was an intent to have the transaction go beyond the legitimate object of securing a debt, and to operate, in part at least, to hinder, delay, or defraud the mortgagor's other creditors. Unless such infirmity is disclosed upon the face of the instrument, the question of its validity as against the grantor's other creditors is one of fact, to be determined on the evidence as to the situation of the parties and the circumstances attending the transaction. In Wiley v. Knight, 27 Ala. 336, the facts were that a creditor, who had implied notice that the debtors were insolvent, took from them a mortgage of substantially all their property, the value of which greatly exceeded the amount of the debt to be secured. The law-day of the mortgage was postponed nearly six years; the possession, in the mean time, remaining in the mortgagors. The transaction was held to be fraudulent, because its necessary effect was to tie up more of the debtor's property than was reasonably necessary to secure the debt, and because of the unauthorized benefit reserved to the grantors. If the question as to whether there was fraud in the transaction is triable by the court, and it appears from the evidence that a creditor, knowing that there are other creditors, who may be delayed or hindered in the collection of their debts, or, having knowledge of some fact calculated to put him on inquiry, and thus charge him with notice, yet takes a mortgage whereby he ties up greatly more of the debtor's property than is reasonably sufficient to secure his debt, and in the mean time permits the debtor to remain so long in the possession and enjoyment of the property that the necessary consequence of the transaction is to favor the debtor, and to help him to baffle his other creditors, then such mortgage will be declared fraudulent in fact as against such other creditors. Reynolds v. Welch, 47 Ala. 200. The same result follows whether the unauthorized operation of the instrument is disclosed by the terms thereof or by evidence of the circumstances connected with its execution. In the present case there is nothing in the impeached deed of trust, as it is described, without being copied, in the bill of exceptions, to authorize the court to pronounce it fraudulent on its face. The question, then, as to the validity of the transaction, was one of fact to be submitted to the jury. When the instrument shows upon its face that it was made in trust for the use of the mortgagor, or with the intent to hinder, delay, or defraud his creditors, the court must pronounce the legal conclusion that it is invalid as to such creditors. When such infirmity is not disclosed upon an inspection of the instrument, and it is attacked as fraudulent as against the mortgagor's creditors, unless both the law and the facts are submitted for decision by the court it is for the jury to ascertain from the evidence as to the circumstances attending its execution whether, as matter of fact, it was made in trust for the use of the mortgagor, or with the intent, participated in by the

mortgagee, to hinder, delay, or defraud the mortgagor's creditors.

When the attacking creditor proves the existence of his debt at the time the mortgage was executed, the *onus* is then cast on the mortgagee to show that the debt which the mortgage purports to secure was justly due at the time of its execution. If this proof is made, and the evidence stops here, the attack upon the mortgage is not sustained. But the assailing party may go further, and prove that the mortgage was made with intent to hinder, delay, or defraud the creditors of the mortgagor. In this inquiry as to the intent, the burden of proof is shifted upon the complaining creditor. Moog v. Farley, 79 Ala. 246; Gordon v. Tweedy, 71 Ala. 202. The charge of the court on this subject was correct. Charges 11 and 17 requested by the plaintiff were properly refused, because each of them asserts, in effect, that when the plaintiff made out a *prima facie* case the burden was then cast upon the claimant, not only to prove that the secured debt was justly due, but also to negative the existence of a fraudulent purpose or intent in the making of the mortgage.

The mere retention of possession by the mortgagor, or a provision in the mortgage to that effect, is not such a reservation of a benefit to him as invalidates the instrument against his existing or subsequent creditors. Such a reservation of possession until default is authorized by the law, if the debt which the instrument purports to secure was justly one, and the mortgagee was not a party to any intent to use the instrument to hinder, delay, or defraud the mortgagor's creditors. It is the existence of such actual or necessarily imputed evil intent which will justify the impeachment of the instrument as a fraud upon creditors. It is not permissible for one creditor to use his claim for the purpose of shielding the debtor's property from his other creditors. Though one of the objects of such creditor is to secure the payment of his own debt, yet, if the arrangement by which this is done involves the intent on his part to aid the debtor in holding his property against his other creditors, then such arrangement is fraudulent and void as to creditors participating therein. To be valid, the arrangement must be "without any intent to lock up the property from creditors for the use of the debtor." When the creditor taking the security knows that there are other creditors who may be delayed or hindered in the collection of their debts, or has knowledge of facts or circumstances calculated to put him on inquiry, and thus charge him with notice, the arrangement which he makes must not go beyond the permissible purpose of securing his own demand; and if, with such knowledge or notice, he participates in a purpose of the debtor to thwart his other creditors, and with such intent takes a mortgage which ties up greatly more of the debtor's property than is reasonably sufficient to secure his debt, and in the mean time permits the debtor to hold and use the property for his own benefit, so that the necessary result is to favor the debtor, and to help him to baffle his other creditors, then the transaction is fraudulent and void as against other creditors. If it is any part of the purpose of the mortgagee, in taking the mortgage under such circumstances, to secure thereby a benefit to the mortgagor which involves the hindering, delaying, or defrauding of any other creditors, the instrument cannot stand against the attack of such other creditors. Benedict v. Renfro, 75 Ala. 121; Constantine v. Twelves, 29 Ala. 607; Price v. Mazange, 31 Ala. 701; Reynolds v. Welch, 47 Ala. 200; Price v. Masterson, 35 Ala. 483; Seaman v. Nolen, 68 Ala. 463; Hayes v. Westcott, 91 Ala. 150, 8 South. Rep. 337. Though the natural effect of the transaction was to hinder, delay, or defraud the grantor's creditors, and though he executed the instrument with that purpose, yet if the grantee did not participate in such intent, but accepted the conveyance for the sole purpose of securing a *bona fide* debt of the amount named in the instrument, then the security could not be pronounced invalid because of its effect upon the rights of other creditors, or because of the fraudulent purpose of the grantor. Shealy v. Edwards, 75 Ala. 411.

Whether the mortgagee participated with the debtor in an intention to have the mortgage serve the purpose of putting the property included therein in such a position as to secure an unauthorized benefit to the mortgagor, or to hinder, delay, or defraud other creditors, is generally a matter of inference or deduction from the circumstances attending the transaction. Such transactions may be presented in various aspects, and it is not for the court to suggest what facts may warrant unfavorable inferences. On the inquiry as to whether the mortgage was given in good faith, and solely for the security of a just debt, or was vitiated by a purpose to benefit the mortgagor at the expense of his other creditors, it is competent to show that the preferred creditor, having notice that there were other creditors, took a mortgage covering substantially all of the debtor's property, and greatly more than enough to afford him ample security; or that by the arrangement he unreasonably postponed the collection of his demand, and in the mean time allowed the mortgagor to retain and use the property; or that the whole or a material part of the mortgaged property which was retained and used by the mortgagor was perishable, or of such a character as to be profitable in its use. It is for the jury to draw the deductions or inferences from the facts proved. The impeached instrument cannot be pronounced invalid unless they find from the evidence that it was made in trust for the use of the grantor, or with an intent, participated in by the grantee, to hinder, delay, or defraud the grantor's creditors.

It is unnecessary to review in detail the numerous charges given and refused. The propositions contained in most of them may be readily tested by the rules above stated. Defects in the several charges requested by the plaintiff will be briefly noted. Charges 1, 2, 4, 5, 6, and 20, which were refused, were faulty in failing to

predicate the existence of an intent on the part of the mortgagee to benefit the mortgagor, or to hinder, delay, or defraud his creditors. Charges 9 and 23, requested by plaintiff, make the effect of the instrument upon the rights of other creditors the test of its validity, without regard to the real intent of the grantee therein. If the debt to Ewing was based upon his payment in good faith of claims against Bowman, at Bowman's request, such payment was a valuable consideration moving from Ewing, which was not vitiated by the fact that the claims so paid off in good faith were not themselves supported by valuable considerations. Charge 3 of the plaintiff's series was incorrect in asserting the contrary of this proposition. Plaintiff's charge 14 was properly refused because there were several deeds of trust in evidence, and the charge did not refer specifically to the one which was the matter of contest. Charge 22 assumes that the deed of trust in question covered all of Bowman's property. There was evidence tending to show that some of his property was not included. Charge 24 was argumentative. Unless the usury in the debt to Ewing was allowed and received for the purpose of fraudulently swelling the debt, it would not have effect to avoid the deed of trust. Harris v. Russell, (Ala.) 9 South. Rep. 541. Charge *f*, on this subject, was properly refused. Reversed and remanded.

(94 Ala. 501)

FARLEY v. FARLEY.

(*Supreme Court of Alabama.* Feb. 4, 1892.)

DIVORCE — PLEADING — COMPLAINT — VALIDITY OF MARRIAGE.

1. An averment in a bill for divorce that, on a certain day, complainant, "whose maiden name was ——, was lawfully and legally married unto ——," sufficiently avers the marriage.

2. A ceremony of marriage without license, and performed by an unauthorized person, and imposed on a woman by false pretenses, but believed by her to be lawful and *bona fide*, is valid for all civil purposes, unless and until avoided by the deceived person. Beggs v. State, 55 Ala. 108, followed.

3. An averment in a bill for divorce that "defendant has been guilty of adultery with divers parties and persons, whose names are unknown to your oratrix," is sufficiently certain.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Bill for divorce by Daisy Farley against H. C. Farley. From a decree overruling a motion to dismiss the bill, defendant appeals. Affirmed.

Watts & Son, for appellant. *Chas. Wilkinson*, for appellee.

CLOPTON, J. Appellee seeks by the bill the dissolution of the bonds of matrimony, on the ground that defendant has abandoned her, and committed adultery with divers other women. The appeal, being taken from a decree overruling a motion to dismiss the bill for want of equity, and a demurrer thereto, involves only the sufficiency of its allegations. The bill alleges that the parties were of the age of consent. The averment as to the marriage is "that theretofore, to-wit, on the 8th day of May, 1890, your oratrix, Daisy Farley, whose maiden name was Daisy Flexnor, was lawfully and legally married unto Hoxie C. Farley, the defendant to this, your oratrix's bill of complaint." This is a sufficient averment of the marriage. 2 Bish. Mar. & Div. § 332. Defendant insists, however, that this general averment is limited and modified by subsequent allegations of facts, which show there was never a legal marriage between complainant and defendant. The allegations referred to are that defendant, having taken advantage of the innocence and inexperience of complainant, did not in fact have the marriage ceremony performed by an authorized minister, but substituted therefor a person unknown to her, who, she subsequently discovered, was not a minister; that defendant and such person represented to complainant that he was a regularly ordained minister of the Gospel, well known in the city of Montgomery; also that they had procured from the judge of probate of Montgomery county a license for the marriage of complainant and defendant; and that by these representations, which were untrue, they imposed upon her credulity, and she married defendant for her great love towards him. The bill also avers that complainant and defendant associated together and cohabited as husband and wife. Whether, under our statutes, a legal marriage can be had without license, and without solemnization, was left an open and unsettled question in Robertson v. State, 42 Ala. 510. But in the subsequent case of Beggs v. State, 55 Ala. 108, it was held that a marriage without license from the judge of probate, and without solemnization by any person authorized by statute to solemnize it,—merely by the consent of the parties,—followed by cohabitation, is valid. The statutes having been since re-enacted, without material change in phraseology, and as marriages may have been contracted on the faith of the decision, and the legitimacy of children depend on maintaining the rule therein declared, whatever may be our individual opinion as to the legality of such marriages, under our statutes, we do not feel at liberty to depart from the doctrine announced in Beggs v. State; if deemed impolitic and unwise, the legislature must furnish the remedy. It may be reasonably inferred from the averments of the bill, being taken as true, that complainant, at least, did not mean and intend to enter into the relation of husband and wife unless there was a formal solemnization of the marriage. As a general proposition, when the nuptials are delayed with an understanding of the parties that they are not to become husband and wife until a formal ceremony takes place, marriage is not constituted by copulation without such solemnization; for, in such case, consent to become husband and wife presently—indispensable to a valid marriage—does not exist. Peck v. Peck, 12 R. I. 485; 1 Bish. Mar. & Div. § 262. This, however, is not the question here presented. Complainant consented, in fact became the wife of defendant, though beguiled into the assumption, at that time, of the *status* of marriage by misrepresentations of the

legality and binding effect of the formal ceremony. The precise question is, when there is an executory agreement to marry, with the understanding that the parties were not to become husband and wife without formal solemnization, what is the effect of an intervening ceremony, without license, and performed by a person unauthorized, imposed on complainant by false pretenses and representations, but believed by her to be lawful and *bona fide?* A marriage procured by deception and fraud, except, it may be, of certain kinds and magnitude, is not absolutely void, but only voidable, and valid for all civil purposes unless and until avoided by the deceived party. The party imposed upon may disaffirm or ratify the contract of marriage after discovery of the fraud; and it has been held that voluntary cohabitation thereafter as husband and wife is a ratification. As, under the rule declared in Beggs v. State, supra, a valid marriage may be constituted, without license and solemnization, merely by the consent of the parties, certainly complainant may ratify her consent to an immediate marriage, procured by false representations, and thus, by relation, render the marriage good *ab initio*. The contract, however, can be avoided only by the party defrauded. Says Mr. Bishop: "The doctrine seems to require no qualification that a voidable marriage is, until the act or sentence transpires which renders it void, as good for every purpose as if it contained no infirmity." 1 Bish. Mar. & Div. § 116. If, in answer to the usual questions, though propounded by a person not authorized to solemnize the marriage, both parties consented to a union, defendant is estopped from asserting that the consent was not mutual, or that he did not consent; he will not be permitted to take advantage of his own wrong and fraud to escape the duties and responsibilities of the marital relation." "The party who commits a fraud is bound, and remains bound until the party deceived has made his or her election, and will thereafter be bound, or not, according to the election made." Tomppert v. Tomppert, 13 Bush, 826; Hampstead v. Plaistow, 49 N. H. 84; State v. Murphy, 6 Ala. 765. The allegations of the bill, fairly construed, show that complainant elected to treat and recognize the marriage as valid. The averment as to the charge of adultery is "that said defendant has been guilty of adultery with divers parties and persons, whose names are unknown to your oratrix." The charge is averred with a sufficient degree of certainty. Holston v. Holston, 23 Ala. 777.

Affirmed.

(95 Ala. 245)

CRAFT *et al.* v. STOUTZ.

(*Supreme Court of Alabama.* Feb. 4, 1892.)

EXEMPTIONS—PROCEEDS OF LIFE INSURANCE POLICY.

Code, § 2856, provides that a husband or father may insure his life for the benefit of his wife and children, or minor children, and such insurance is exempt from liability for his debts or engagements, if the annual premiums do not exceed $500. *Held*, that a note given by a husband, which waived exemptions as to personal property, was in no sense a lien on the annual premiums paid by him on a policy in favor of his wife, where such premiums did not exceed $500; and, at the husband's death, the proceeds of the policy belonged to the wife absolutely.

Appeal from chancery court, Mobile county; W. H. TAYLOE, Chancellor.

Bill by Craft & Co., as creditors of the estate of Arnold Stoutz, against Julia J. Stoutz, executrix, to subject certain property to the payment of their claim. Judgment for defendant. Complainants appeal. Affirmed.

William E. Richardson, for appellants. *Fredk. G. Bromberg*, for appellee.

COLEMAN, J. Craft & Co., complainants, as creditors of the estate of Arnold Stoutz, filed the present bill to subject to the payment of their claim certain property, the legal title to which is in the name of his wife, the respondent. It is unnecessary to consider the validity of the deed of 1883, by which Arnold Stoutz, the husband, conveyed the homestead to his wife. If null and void for want of consideration, or defective execution of the conveyance, or for any other cause, the mortgage on this property executed by Stoutz and wife to Phœbe A. Tuthill, on the 1st day of April, 1884, is not assailed. At the time of the execution of this mortgage complainants had no lien on or claim to this property, and the grantors had a perfect right to mortgage the same if they saw proper. This mortgage was foreclosed on the 23d day of March, 1886, and at the sale the property was purchased by one Hudson, either for himself or the mortgagee. If this property, conveyed by the mortgage to Tuthill, was the property of Arnold Stoutz, as charged in the bill, complainants, as judgment creditors of Arnold Stoutz, were authorized to redeem this property from the purchaser. Their judgment against Arnold Stoutz was recovered on the 16th day of December, 1886, and they have permitted more than two years to elapse, the time allowed by statute for redemption. The present bill is not one to redeem the property. It is averred that, on the 28th day of June, 1888, Phœbe Tuthill by deed conveyed the property to Julia Stoutz for an expressed consideration of $1,100; that, on the 28th day of June, 1888, $1,200 was borrowed by Arnold Stoutz from one Gelbke, the payment of which was secured by a mortgage executed by Julia Stoutz, the wife, and her husband on this property to said Gelbke, and that the money thus borrowed was the money paid to Mrs. Tuthill, the consideration for the conveyance to Mrs. Julia Stoutz of June 28, 1888. The bill then shows that the husband, Arnold Stoutz, died, and out of the proceeds of a policy of insurance taken out by him in his life-time for the benefit of his wife, Julia Stoutz, the mortgage to Gelbke was paid by her, and that the wife, in addition to the money paid to satisfy this mortgage, expended about $2,000 in improving the premises. The bill charges that complainants' judgment was founded upon notes made by Arnold Stoutz, in which he waived his right to claim exemption of

personal property, and that these notes antedated the payment of the annual premiums, and that the premiums paid upon the policy were voluntary, and null and void, for this reason, as against him.

The equity of complainants' bill and their right to relief, in this aspect of the case, depend upon the right of the wife to the money collected from the policy. Section 2356 of the Code provides that the wife may insure the life of the husband, for the benefit of herself, or for the benefit of herself and child or children of the marriage. It also provides that the husband or father may insure his life for the benefit of the wife and children, or minor children, and such insurance is exempt from liability for his debts or engagements, if the annual premiums do not exceed $500. In this case, as appears from the bill, the annual premiums were not so much as $500. A note waiving exemptions as to personal property is a mere debt or engagement. It in no sense creates a lien on property or money. The effect of the statute which permits the husband to insure his life for the benefit of his wife is to enable the husband to expend so much money, in the manner prescribed, for the benefit of his wife, which, without the statute, would not be exempt from liability for the debts of the husband. The creditors of Arnold Stoutz, the husband, have no claim upon the insurance money, the proceeds of the policy taken out for the benefit of the wife. This money belongs to her in her absolute right, and she had the power to expend it as she saw proper. The demurrer to the bill raised these questions, and was properly sustained. Affirmed.

(95 Ala. 309)

MORRISON v. MORRISON.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

DIVORCE—PROOF OF ADULTERY.

In a suit by a husband for divorce on the ground of adultery with one B., it appeared that defendant was living at the house of one C., apart from plaintiff. C. and wife testified that B. visited defendant at their house, and was seen to kiss her; that two different nights B. went to defendant's room, closed the door, and remained till after 11 o'clock; that, when defendant learned that C. had forbidden B. to repeat his visits, she stated that when she "got a house of her own she would do as she pleased, and would not go back on" B. There was evidence, though conflicting, that soon after leaving the house of C., and for twelve months, defendant lived with B. in a house having but two rooms, with no shutters between the rooms; that they there lived as husband and wife. *Held*, that plaintiff was entitled to a decree.

Appeal from chancery court, Bibb county; W. H. TAYLOE, Chancellor.

Suit for divorce by David L. Morrison against Maggie Morrison. The bill was dismissed, and plaintiff appeals. Reversed and rendered.

Logan Hargrove & Vande Graaff, for appellant. *Peters, Wilson & Lyman*, for appellee.

COLEMAN, J. The complainant filed his bill against his wife, the respondent, praying that the bonds of matrimony be canceled and annulled, and that he be divorced. The bill charges adultery with one Robert Brewer. The respondent answered, denying the charge of adultery, and by cross-bill asked to be divorced from her husband, the complainant in the original bill. At the hearing the court refused relief to either, and dismissed both the original and cross bill. The complainant in the original bill appeals. We agree with the chancellor that there is no proof to sustain the cross-bill, and that it was properly dismissed. In regard to the original bill, the learned chancellor seems to have considered only the evidence of the husband, the plaintiff, and of the wife, the defendant, and Robert Brewer, the party with whom, as alleged in the bill, the adultery was committed. That there was a difficulty between husband and wife, growing out of the fact that the husband accused her and Brewer of being too intimate, is not controverted, and separation of the husband and wife followed. That the wife left, and for a while lived at Henry Carroll's, are undisputed facts. Both Henry Carroll and his wife testified that Robert Brewer visited her at their house; that he was seen to kiss her, and said he could kiss and hug her now as much as he pleased; and on two different nights he went into her room, closed the door, and remained in there with her alone, one night until after 11 o'clock, and the other night they did not know when he left her room. Robert Brewer was notified by the owner of the house not to repeat his visits; and in response to this notice the defendant stated that when she "got a house of her own she would do as she pleased, and that she would not go back on Robert Brewer." The criminating facts here testified to are not denied or questioned either by the defendant herself or Robert Brewer, further than may be included in their general denial of having had illicit intercourse. The evidence by a number of witnesses, and which is neither denied nor explained, is that the respondent soon afterwards left the house of Henry Carroll, and for twelve months lived with Robert Brewer in a house having two rooms, with no shutter between the two rooms. The witnesses all state that while here they lived together as man and wife. A part of the time that they thus lived together was after the filing of the bill, but such testimony, when properly connected, is admissible to show a previous adulterous intercourse. Alsabrooks v. State, 52 Ala. 24; Lawson v. State, 20 Ala. 74; Smitherman v. State, 40 Ala. 355. The record abounds with other evidence of a criminating character, wholly inconsistent with the innocence of respondent and Brewer, unless we impute to them a frigidity of temperament or an ethical affection not common to human nature. The facts do not warrant the assumption that these parties were abnormally virtuous. The rule in cases of fornication or adultery is "that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion" that the act has been committed. Applying this rule to the evidence in the case, we are very clear that the court below erred in dismissing com-

plainant's bill. A decree will be here rendered, granting the complainant the relief prayed for in his bill of complaint. Reversed and rendered.

(94 Ala. 570)

FRIEDMAN *et al.* v. FENNELL *et al*

(*Supreme Court of Alabama.* Feb. 25, 1892.)

LIFE INSURANCE—ASSIGNMENT OF POLICY TO MINOR CHILD—RIGHTS OF CREDITORS—PLEADING.

1. Deceased took out a life insurance policy in his own name, and assigned it to a minor child. Suit was brought to subject the proceeds of the policy to the payment of debts contracted by the assured. The bill alleged that under the policy the insurance was payable to a minor child of the assured. An amendment thereto, without purporting to correct the allegation, alleged that the policy was in the name of the assured, and was assigned by him to the said child. *Held*, that the bill was demurrable for inconsistencies in the description of the policy.

2. Code 1886, § 2356, allowing a father to insure his life "for the benefit of his minor child or children," does not authorize the assignment by a father of an insurance in his own name to his minor children, he being in debt at the time.

Appeal from chancery court, Madison county; THOMAS COBBS, Chancellor.

This was a bill by Friedman Bros. against Charles H. Fennell, Jr., and the Mutual Benefit Life Insurance Company, to subject the proceeds from a policy of insurance upon the life of Charles M. Fennell, Sr., to the payment of a judgment recovered against the said Fennell in his lifetime. From an order sustaining a demurrer to the bill, complainants appeal. Affirmed.

Humes & Sheffey, for appellants. *William Richardson*, for appellees.

STONE, C. J. Our statutes permitting insurance of the life of a husband or father for the benefit of the wife or child or children is not declarative of any common-law principle, but is enabling,—creative of a new right. Insurance Co. v. Webb, 54 Ala. 688. These statutes confer a special privilege. In their nature they are an exemption of property from the payment of debts; and, to be successful in securing the exemption, the statute must be conformed to. When, however, the case exists for which the statute makes provision, the statute will be liberally interpreted in furtherance of the relief intended. Fearn v. Ward, 65 Ala. 33, 38, 80 Ala. 555, 2 South. Rep. 114; 3 Brick. Dig. 490, § 8; Felrath v. Schonfield, 76 Ala. 199; Tompkins v. Levy, 87 Ala. 263, 6 South. Rep. 346; Elliott's Appeal, 50 Pa. St. 75, 88 Amer. Dec. 525, and note. The debt against which the claim of Charles Fennell, the younger, is asserted was in existence, and the policy was taken out and the premium money paid by the father, while he was so indebted and was insolvent. It is charged in the bill, and not denied, that the said debt was in existence at and before the time when the Code of 1886 went into operation. Section 2350 of the Code of 1886 changes, somewhat, the statute on the subject theretofore existing. Code 1876, §§ 2733, 2734. The contention is urged before us that, inasmuch as the exemption secured under the later Code is an enlargement of that secured by the Code of 1876, the new or enlarged provision cannot be made to apply against creditors whose claim antedated the amended statute. 3 Brick. Dig. p. 490, § 8. For reasons to be presently stated we consider it unnecessary to decide this question. The language of the statute (Code 1886, § 2356) is that "the husband or father may insure his life for the benefit of his wife, or for the benefit of his wife and children, or for the benefit of his minor child or children." It will be seen by comparing the two statutes that the clause, "for the benefit of his minor child or children," has no counterpart in the statute theretofore existing. That clause is new. Before that time the only statutory authority for making provision for child or children by means of life insurance was to append it to the policy taken out for the benefit of the wife. The insurance there provided for inured to the wife only in the event she survived her husband; but the statute (Code 1876, § 2734) declared that, "in case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable after death to her children for their use." To come within the present statute, and to secure to the child or children the benefit it tenders, the later statute, as we have said, must be conformed to. The policy being in the name of the father, his attempt to transfer it to his child stands on no higher plane than any other attempt he might make to give away his property at the expense of his debts. Such gifts are constructively fraudulent. Insurance Co. v. Webb, 54 Ala. 688; Tompkins v. Levy, 87 Ala. 263, 6 South. Rep. 346; Fearn v. Ward, 80 Ala. 555, 2 South. Rep. 114; Battle v. Reid, 68 Ala. 149; 3 Brick. Dig. p. 490, § 8.

There were original and amended bills in this case. The original bill averred that by the terms of the policy of insurance, as taken out, the insurance money was made payable to the minor child, Charles Fennell, Jr. The answer and exhibit show that the policy was sued out in the name of Charles M. Fennell, the father, and by its terms the insurance money was made payable to him. The policy bears date February 28, 1889. On March 15th next ensuing, Charles M. Fennell assigned the policy to his son, Charles H. Fennell. The amended bill does not, in terms, correct any averments of the original bill, nor does it purport to do so. It simply adds an additional paragraph to the bill, by which it is averred that Charles M. Fennell, after the accrual of his debts, sued out a policy in his own name, paid the premiums, and that on March 15, 1889, for love and affection, and with intent to delay, hinder, and defraud complainants, assigned and transferred the policy to Charles H. Fennell, his son. This amendment fails to show the amount of the policy, or when issued. If its averments were sufficiently specific, its indications would be that it sets forth a different policy from the one relied on in the original bill. If it was intended as a correction of the mistaken description of the policy made in the draft of the original bill, it is insufficient, because it fails to refer to and correct the mistake. Consider-

ing the two together, and each as a part of the amended bill, it is inconsistent with itself in the several descriptions of the policy. The bill needs further amendment. The chancellor gave no reason for his ruling on the demurrer. The bill in its present shape is evidently bad, and, to give it equity, must be amended. We find no ground for reversing his decretal order.

Affirmed.

(95 Ala. 527)

SEYMOUR *et al.* v. FARQUHAR *et al.*

(*Supreme Court of Alabama.* Feb. 25, 1892.)

APPEAL—DECISION—PROCEEDINGS BELOW.

Where plaintiffs in trover recovered judgment, and on defendants' application the court in vacation granted a rehearing, and directed a *supersedeas* to issue, and on appeal the supreme court held that the trial court's action was erroneous, and that the facts averred in the petition for rehearing should have been heard and tried at the next term of court, the trial court erroneously refused leave to amend the petition for rehearing, and to substitute certain papers, which were part thereof, but which had been lost, and improperly dismissed the petition.

Appeal from circuit court, Fayette county; S. H. SPROTT, Judge.

Trover by A. B. Farquhar & Son against A. J. Seymour and others. From an order dismissing the petition for rehearing, defendants appeal. Reversed.

John B. Sanford and *A. B. McEachin*, for appellants. *McGuire & Collier*, for appellees.

COLEMAN, J. Farquhar & Son recovered a judgment in trover against appellants. Under sections 2873 and 2876 of the Code the defendants applied for a rehearing. In vacation, the judge presiding granted a rehearing in accordance with the petition, and directed the clerk to issue a *supersedeas* or restraining order to restrain the collection of the execution issued upon the judgment. Upon application to this court, the order of the judge granting a rehearing in the cause, and ordering a *supersedeas* or restraining order, was held to have been improperly made, in vacation, and that the facts averred in the petition should have been heard and tried at the next term of the court, as provided in section 2876 of the Code. At the following term of the circuit court of Fayette county, in which the judgment had been recovered, the petitioners for a rehearing moved the court for leave to amend the petition as set out in the proposed amendment, and also for leave to substitute certain papers, which, according to the averments of the motion, were a part of the original petition for a rehearing, and which, in transmission to the judge, were lost. The court refused to grant the amendment to the petition, or to consider the evidence offered to show the loss of a part of the papers of the original petition; holding that, under the order of the supreme court, the trial court had no discretion or further jurisdiction than to vacate the order granting the rehearing, and to dismiss the petition. From the action of the court refusing to allow the amendment, and the substitution of the papers, and from the judgment vacating the former order granting a rehearing, and dismissing the petition, the present appeal is prosecuted. When the case was here before, the decision of this court had no other scope or effect than to require that the order of the lower court, granting a rehearing and *supersedeas* or restraining order be annulled and vacated. It left the petition pending, to be heard at the first subsequent term of the trial court, under section 2876 of the Code. The statute requires the court to allow amendments of the pleadings, and it has been long held that a petition for a rehearing may be amended. Dothard v. Teague, 40 Ala. 586. The statute provides for the substitution of lost or destroyed papers in any pending cause or proceeding, and of the notice to be given to the adverse party. Code, §§ 657, 2734. An appeal lies from an order of the court refusing to grant a statutory rehearing after final judgment at law. O'Neal v. Kelly, 72 Ala. 559; 40 Ala. supra. It might give certain facts set up in the petition and proposed amendments undue weight if they were specifically pointed out and discussed in this opinion. The ruling of the trial court was not in accord with the principles herein declared. The court should allow all proper amendments to the petition, pass upon all demurrers, if any, which raise the question of the sufficiency of the petition, or have the issue of fact tried and determined, as it may direct, under section 2876 of the Code. Reversed and remanded.

(94 Ala. 25)

PERRY v. STATE.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

HOMICIDE—SELF-DEFENSE—FLIGHT.

1. On a trial for murder it appeared that, just before the killing, defendant was in an open space before a stable, engaged in hitching up his employer's horse; that he and deceased had a violent altercation; and that deceased went for a pistol, and, returning, was shot by defendant. *Held*, that the place where defendant was working was not entitled to the privileges which the law accords to one's residence or place of business, but that defendant should have retreated if he could have done so safely.

2. The fact that deceased was a violent and dangerous man, though it did not palliate the offense of taking his life, was a proper subject of consideration for the jury in determining the extent of danger, if any, to which defendant was exposed, and his means of safe escape therefrom by flight.

3. If defendant was in his proper place of business he was not required to leave there on mere threats by deceased to do him bodily harm, but in such case he was justified, if free from fault in provoking the difficulty, in preparing for defense.

Appeal from circuit court, De Kalb county; JOHN B. TALLY, Judge.

Albert Perry was convicted of manslaughter in the second degree, and appeals. Reversed.

The only exception reserved, as is shown by the bill of exceptions, went to the refusal of the court to give the following written charges requested by the defendant: (1) "The court charges the jury that the law does not require a man to retreat from his dwelling-house, and that his place of business (for this occasion, *pro hac vice*) is his dwelling-house." (2) "The court charges the jury that if one

has reasonable apprehension of great personal violence, involving imminent peril to life or limb, he has the right to protect himself even to the extent of taking another's life, if such protection cannot be otherwise secured." (3) "The court charges the jury that if they find from the evidence that Albert Perry used all the means in his power consistent with his safety to avoid the danger before he fired at Lee Williams, and was not in fault in bringing on the difficulty, then they must acquit him." (4) "The court charges the jury that if, under the evidence in this case, they find that there were such acts as to create in the mind of a reasonable man apprehension that there was great danger to his life, or there was danger of his suffering grievous bodily harm, then the defendant was not forced to retreat, but might take Lee Williams' life, if the defendant was not in fault in bringing on the difficulty." (5) "The court charges the jury that retreat is not required when the assault is made with a deadly weapon." (6) "If the jury believe from all the evidence in this case that Albert Perry was lawfully and peaceably engaged in hitching up the sheriff's buggy, and, while so engaged, Lee Williams rushed upon him with a deadly weapon, and that Albert Perry had reasonable cause to believe, and did believe, that he was in danger of losing his life or of receiving great bodily harm at the hands of said Lee Williams, and that said danger was imminent, and Albert Perry was without fault on his part, then Perry had the right to strike in self-defense, and if apparently necessary, under all the circumstances proven, for his own protection to take the life of his assailant, he would have a right to do so." (7) "If the jury believe from all the evidence in this case that Albert Perry was lawfully and peaceably engaged in hitching up the sheriff's buggy, and, while so engaged, Lee Williams rushed upon him with a deadly weapn, and that Albert Perry did believe, and had reasonable ground to believe, that he was in danger of losing his life or of receiving great bodily harm from the said Lee Williams, then he had the right to strike in self-defense." (8) "The court charges the jury that if they believe from the evidence that Albert Perry was at Mr. Frazier's house in the rightful discharge of his work, and that he did nothing to foster or bring on the difficulty with Lee Williams, the mere fact of his going to his house and getting his gun would not of itself alone, and with no act or demonstration of using it until he was forced to do so by the act of Lee Williams, take from him the right to shoot in self-defense, if he could not have escaped danger by retreating." (9) "The court charges the jury that the defendant, if they find he went home and got a gun, had the right to peaceably return and hitch up the horse, and that he had the right to bring with him a gun for protection only." (10) "If the jury believe that Albert Perry went to his house and procured a gun, and in doing so was not actuated by any motive of preparing himself to commence or enter upon a difficulty with Lee Williams, but solely and only for the purpose of being prepared to protect himself from an attack that there was a reasonable apprehension would be made upon him, and would endanger his life or put him in danger of receiving great bodily harm, and that Perry returned to continue in a peaceable manner the performance of the service for Sheriff Frazier in which he was engaged, and after he so returned he did nothing to renew the former difficulty or to bring on or provoke a difficulty with Williams, then the mere fact that he had gone to his house, armed himself, and returned to his work, would not deprive him of the right of self-defense." (11) "The court charges the jury that while the law requires that Albert Perry should be in a situation of either real or apparent danger to life or of receiving grievous bodily harm, that that danger was imminent, and that he should be reasonably justified in shooting, yet the law only requires that he should exercise his reason,—should act as a reasonable man would have acted under all the circumstances; and if, under those circumstances, a reasonable man would have believed that he was in danger of losing his life or of receiving great bodily harm, and that such danger was then impending, and said Perry did so believe, and was not the aggressor in the difficulty, and was reasonably free from fault, then he had a right to defend himself, even to the taking of the life of Lee Williams."

L. A. Dobbs, for appellant. *William L. Martin*, Atty. Gen., for the State.

STONE, C. J. The law must and does place a high estimate on human life, and the circumstances must be exceptional to excuse its being taken otherwise than in punishment of some crime which the law itself has made capital. Hence it is that when life has been taken, not in obedience to some judicial sentence, the law raises the presumption that it was feloniously taken, unless the testimony which proves the killing proves also the excuse or extenuation. Hence it is that when a homicide is proved, and the criminating proof fails to disclose the excuse or extenuation, the law-imputed, felonious guilt attaches, and the burden is cast on the defendant to rebut or repel such imputation. Hence it is that one who begins or provokes a difficulty cannot invoke the doctrine of self-defense, unless he clearly retires from the combat, and by word or deed manifests a desire and intention to be at peace. Hence it is that when one is menaced or assailed, not in his own dwelling, he must escape by flight, if he can do so safely, and without increasing his apparent danger. Clements v. State, 50 Ala. 117; Roberts v. State, 68 Ala. 156; Sylvester v. State, 71 Ala. 17; De Arman v. State, Id. 351; Ex parte Warrick, 73 Ala. 57; Wharton v. State, Id. 366; Ex parte Brown, 65 Ala. 446; Bain v. State, 70 Ala. 4; Ingram v. State, 67 Ala. 67; Jones v. State, 76 Ala. 8; Cary v. State, Id. 78. The defendant and the deceased were each of them servants in the employment of the same person, the sheriff of the county. Defendant was hostler. Aside from the testimony of the defendant himself there is a want of clearness of proof as to the origin of the quarrel. One

phase of the proof was that the deceased first insulted the defendant with opprobrious words and with threats; that thereupon he (deceased) went into the sheriff's office, and came out towards where the defendant was, having in his hand the sheriff's pistol, and was in this condition advancing on the defendant, who was in his proper place in front of the stable, harnessing and hitching up his employer's horse; that he advanced, with pistol in hand, near to the defendant, but on the opposite side of the horse, and, while pushing the horse's head aside, the defendant snatched up his gun and fired, killing him. This phase of the testimony tends to show that, about the time deceased went after the pistol, defendant went a short distance and returned with his gun, which, at the suggestion of a bystander, he set down by a buggy, and returned to the service of harnessing the horse; and that he was thus employed when the deceased approached, on the opposite side of the horse. This phase of the testimony leaves it a question for the jury to determine whether the deceased first went for the pistol or indicated such intention, or whether defendant first went for his gun. The testimony was that deceased was a violent and dangerous man. We have given only one phase of the testimony. Other testimony gave a different version. It is the province of the jury to determine the facts. Certain legal principles become important, if the foregoing phase of the testimony be found to be true. The difficulty taking place in an open space in front of the stable, that place was not entitled to the immunities and legal privileges the law accords to the actual or business residence. It was the duty of the defendant, if he was approached in a dangerous and threatening manner, to retire and escape from the conflict, if he could do so without danger to himself. If by flight he would apparently increase the danger to his own life, or if, by the attempt, he would apparently leave himself exposed to grievous bodily harm from which he could not probably escape by flight, and if he was free from fault in bringing on the difficulty, then he could stand his ground and defend himself, even at the expense of his assailant's life. The law does not require that one who is without fault shall lose his own life, that he may thereby spare that of his assailant. We are not commanded to love our neighbor better than ourselves.

There are other aspects of this question which the phase of the testimony we are considering presents. The testimony is undisputed that deceased was a man of violent and dangerous character. Now, while that fact did not of itself justify the taking of his life, or even palliate the offense, yet it was permissible to make proof of it; and such proof should be weighed by the jury in determining the extent of danger, if any, to which defendant was exposed, and his means and opportunity of safe escape therefrom by flight. "A demonstration or overt act of attack, made by such a one, may afford much stronger evidence that the life or limb of the person assailed was in imminent peril than if performed or made by one of an opposite character or disposition. Hence it would reasonably justify a resort to more prompt measures of self-preservation." Roberts v. State, 68 Ala. 156.

The testimony tends to show that defendant was in his proper place of business. He had a right to be there, if this testimony be true. He was not required to leave his place of business upon a mere belief or apprehension, or even threat, that deceased contemplated doing him grievous bodily harm; and, if threatened by words or hostile demonstration, he violated no law if he prepared himself for defense, and only for defense, against such threatened, dangerous attack. His duty to leave his employment and escape by flight, if apparently practicable, would not arise in such conditions on mere apprehension of attack. He could safely prepare, and await developments. If, however, when approached menacingly, not being within his dwelling, there was apparently reasonable opportunity for safe escape by flight, then it would be and was his duty to so escape. This, because of the law's imperative command that human life shall not be taken unless there is a present necessity, real or apparent, to strike in defense of one's own life. All these defensive rights, however, are hinged on the condition that the party resorting to them must be free from fault in provoking or bringing on the difficulty. Of the charges asked by defendant, the first was abstract, and was rightly refused on that account. Charges 2, 3, 4, and 5 pretermit all inquiry of defendant's fault in bringing on the difficulty, and for this reason were faulty. Charges 6 and 7 omit all inquiry of reasonable means of escape by flight, and for that reason were rightly refused. Charge 8 postulates, as a fact, that defendant did no act, and made no demonstration of an intention to use the gun, until he was forced to by the act of the deceased. One phase of the testimony may have justified this, but the whole testimony, taken together, did not. Charge 9 ought to have been given. Charge 10 would be faultless if the words "after he so returned" were omitted. So, if the word "reasonably" had been omitted from the latter part of charge 11, it would be free from error. Reversed and remanded.

(95 Ala. 235)

HOOPER v. DORA COAL MIN. CO.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

INJUNCTION—JURISDICTION—IRREPARABLE INJURY.

Where a bill in equity alleged that defendant had the right to mine coal and other minerals under complainant's land; that, having almost exhausted such subjacent minerals, it extended the opening of its mines into adjacent, but unconnected, lands, and brought the coal therein mined to the surface of complainant's land, to be there loaded and transported; that it deposited on his land noxious refuse and foul water; and that his land was valuable for agricultural and grazing purposes,—it entitled complainant to an injunction.

Appeal from chancery court, Walker county.

Bill for injunction by John De B. Hooper against the Dora Coal Mining Company.

From an order dismissing the bill, complainant appeals. Reversed.

John J. Moore and *B. K. Collier*, for appellant. *Coleman & Lowell*, for appellee.

CLOPTON, J. The bill alleges that complainant is the owner of the land therein described, "except all the coal and other minerals in, under, and upon said lands, and also except all timber and water upon same, necessary for the development, working, and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; also the right of way, and the right to build roads of any description over the same, necessary for the convenient transportation of said coal and other minerals from said coal lands, and the conveying and transporting to and from said lands all materials and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market." It further alleges that defendant has opened a mine on the land, and erected thereon a tramway, bridges, trestles, weigh-houses, blacksmith shops, and other buildings and works used for mining coal; that the company has ceased to mine the coal lying beneath the surface of the land to any appreciable extent, and has extended the openings of the mines to adjacent lands, from which large quantities of coal are mined, using the plant upon complainant's land to load and transport such coal, not loading and transporting coal mined beneath the surface of complainant's land. The bill further avers that the land of complainant is very valuable for agricultural and grazing purposes; and that defendant, its agents or employes, dump vast quantities of slate and other obnoxious refuse, taken from the mines on the adjacent lands, onto the agricultural and grazing lands of complainant. They also permit vast quantities of foul water to accumulate in the mines of the adjacent lands, which, by means of machinery, is ejected upon the surface of complainant's lands. The bill, which is filed by appellant, seeks to restrain appellee from using complainant's land for the purpose of loading and carrying away coal mined on such adjacent lands; also from dumping onto complainant's land slate, refuse water, and other substances and fluids taken therefrom. The court overruled all the grounds of demurrer to the bill, except the second, which is to the effect that complainant has an adequate remedy at law.

It will be observed that the case made by the bill is of a mixed character,—one where the surface is used for the purpose of mining the subjacent minerals to a small extent, and where it is used for the purpose of working mines on lands lying adjacent to a much greater extent. The bill does not inform us whether the right of defendant to mine is by reservation in a deed to the surface, or by a grant of the minerals; the grantor reserving to himself the surface. But this is immaterial; the relative rights and duties of the parties are the same. It is well settled that where one person is the owner of the surface, and another of the subjacent minerals, the surface is servient to the mining right as to the occupation and use of so much as may be reasonably necessary for the beneficial and profitable working of the mines. A reservation or grant of the minerals, severed from the ownership of the surface, carries with it the right to penetrate through the surface to the minerals for the purpose of mining and removing them. This includes the adoption and use of such machinery, methods, appliances, and instrumentalities as may be reasonably necessary and are ordinarily used in such business; and, it may be, for the storage of the minerals in the first marketable state until they can be transported with due diligence. Williams v. Gibson, 84 Ala. 228, 4 South. Rep. 350. These incidental rights must be exercised with due regard to the rights of the surface owner; without injury to the right of support for the surface, and without any permanent damage thereto, not necessary for the proper and beneficial enjoyment of the right to mine. It has been said: "The incidental power would warrant nothing beyond what is strictly necessary for the convenient working of the coal. It would allow no use of the surface; no deposit upon it to a greater extent or for a longer duration than should be necessary; no attendance upon the land of unnecessary persons." Cardigan v. Armitage, 2 Barn. & C. 197. Possibly, under our rulings, the adverb "strictly" confines the use of the easement within too narrow limits. "Reasonably necessary" is the language of this court, and we prefer to make no change in a rule which we consider so conservative. Williams v. Gibson, 84 Ala. 228, 232, 4 South. Rep. 350. It does not allow defendant to use the surface for the deposit of slate or other refuse matter taken even from the mines underneath. Marvin v. Mining Co., 55 N. Y. 538. The right to use the surface, implied from the reservation or grant, arises from and ceases with the necessity of the case. When all the subjacent ore is dug and removed, and the mine exhausted, there no longer exists any necessity for the use of the surface. Without an express reservation or grant, the right to use the plant erected on the surface of complainant's land for the loading and transporting of coal mined on adjacent lands does not exist. Midgely v. Richardson, 14 Mees. & W. 595. As regards the dumping of slate and other obnoxious substances and ejecting foul water on complainant's land, the liability of defendant is the same as that of a party who occasions injury to land unconnected with the land in which the mines are worked; the same as if he were not owner of the minerals on complainant's land.

The grounds of demurrer, raising the question as to the right of defendant to use complainant's land for loading and transporting coal mined on other lands, and for the deposit of refuse substances, whether taken from the subjacent mines or others, having been overruled, the direct and sole question is whether, on the facts averred in the bill, an injunction will lie to prevent such injuries. The foregoing principles have been stated as aiding

its determination. Under the averments of the bill, dumping the slate and other substances on complainant's land is clearly a trespass. As a general rule, an injunction will not be awarded, in the absence of special circumstances, to restrain the commission or repetition of a trespass, when an action at law for the recovery of damages affords an adequate remedy. But the jurisdiction is well established when, from the peculiar nature or use of the property, or the probability of a multiplicity of suits arising from the frequent and continued repetition of the trespass, the injury cannot be adequately compensated by an action for damages. It is difficult to define with any degree of definiteness what will constitute such irreparable injury as to warrant the interposition of the extraordinary, but conservative, remedy of injunction. The general rule is that when the trespass is of a temporary nature, or of such character and effect as may be readily compensated in damages, the trespasser being solvent, equity will not depart from the settled rule to leave the aggrieved party to his remedy at law. As to the jurisdiction of equity in such cases, there is a well-recognized distinction between injuries temporary and fugitive in their nature and injuries permanent, continuous, and of frequent occurrence. The former may be readily redressed at law; but when the injuries are of the latter character, though there may be a remedy at law, it is obviously inadequate. When the trespasses committed or threatened are of a character which destroy the substance of the inheritance, or ruin the estate, or permanently impair its future use and enjoyment in the manner in which the owner has been accustomed to use and enjoy it, pecuniary compensation is inadequate, and equitable interference demanded. Mayor v. Groshon, 30 Md. 436; Echelkamp v. Schrader, 45 Mo. 505; Nininger v. Norwood, 72 Ala. 277. In Hobbs v. Canal Co., 66 Cal. 161, 4 Pac. Rep. 1147, it was held an unlawful act for a company engaged in mining to so work and use the mine as either directly or indirectly to cover the land of another with the sand, gravel, and *debris* from such mines, thereby rendering it valueless for agricultural purposes, and that such acts will be restrained by injunction. It is true, the averments of the bill are general, and might have been more definite and precise as to the extent of the injury, present and prospective; but they are sufficient to make a case of irreparable injury, within the meaning of that term, as understood and employed in equity jurisprudence. Defendant, having become possessed in a lawful way of a location on the surface of complainant's land, and having nearly exhausted the subjacent coal, extended the opening of its mines into adjacent, but unconnected, lands; brings the coal therein mined to the surface of complainant's land, to be there loaded and transported; and deposits on his land noxious refuse substances and foul water. The frequent and continuous deposit of vast quantities of slate on lands valuable and used for agricultural and grazing purposes, and the emptying of foul or filthy water thereon, pumped from mines, where suffered to accumulate, certainly deteriorates its value and usefulness for such purposes, and permanently injures its future use and enjoyment, producing irreparable injury, to redress which pecuniary compensation is inadequate. Sullivan v. Rabb, 86 Ala. 433, 5 South. Rep. 746; Ogletree v. McQuaggs, 67 Ala. 586. The case made by the bill comes within the rule stated above, and the demurrer should have been overruled.

Reversed and remanded.

(94 Ala. 236)

KYLE v. MCKENZIE.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

CONSTRUCTION OF DEED—DISMISSAL OF CROSS-BILL—AMENDMENT.

1. A deed, after reciting that the grantors "grant, bargain, sell, and convey" certain lands designated according to a government survey, and that they "convey by quitclaim only" certain other lands designated in the same way, concluded with the following clause: "The intention of the grantors in this deed is to convey to K. all their right, title, claim, and interest in and to the lands heretofore belonging to G., and lying in said sections 13, 16, 18, 19, 21. Should the description above be incorrect, the grantors will, at any time when called on, correct the same." *Held*, that the clause limited the conveyance to such lands in the sections mentioned as had formerly belonged to G., and that the warranty did not extend to lands which, though particularly described in the deed, had never belonged to G.

2. It is error to dismiss a cross-bill on demurrer in vacation without affording an opportunity to amend.

Appeal from chancery court, Etowah county; S. K. MCSPADDEN, Chancellor.

Bill by F. E. McKenzie against R. B. Kyle to enforce a vendor's lien. Defendant filed a cross-bill, to which plaintiff demurred. Defendant's motion to dismiss the original bill was overruled, and plaintiff's motion to dismiss the cross-bill, and his demurrer to the cross-bill, were sustained. Defendant appeals. Reversed.

W. H. Denson, for appellant. *Dortch & Martin*, for appellee.

WALKER, J. The original bill was filed for the enforcement of a vendor's lien for an unpaid balance of purchase money on a sale of land by the complainant to the defendant. The defendant made his answer also a cross-bill, and charged therein that the vendor had no title to a considerable part of the land described in his deed; that in consequence of this the defendant acquired by the conveyance less land by several hundred acres than he supposed he was getting by the purchase; and he claimed that he was entitled to an abatement of the purchase money because of the alleged deficiency in the quantity of the land. The decree was on a motion to dismiss the original bill as amended for want of equity, on a similar motion as to the cross-bill, and on demurrers thereto.

The construction of the deed above referred to is the principal question in the case. That deed was executed by the complainant and his wife. They "grant, bargain, sell, and convey" certain lands

which are designated according to the government survey. They "convey by quitclaim only" certain other lands which are designated in the same way. Thus far the deed follows the ordinary forms of such conveyances. It concludes, however, with this clause: "The intention of the grantors in this deed is to convey to said R. B. Kyle all their right, title, interest, and claim in and to the lands heretofore belonging to Thomas Garrett, now deceased, and lying in said sections 13, 16, 18, 19, 21. Should the description above be incorrect, the grantors will, at any time when called on, correct the same." In the original bill as amended all the lands in the sections mentioned which formerly belonged to Thomas Garrett, now deceased, are particularly designated. It appears from the averments on this subject that all those lands were properly described in the deed. It also appears that other lands are described in the deed which never belonged to Thomas Garrett. The respondent in his cross-bill alleges, in substance, that under the contract of sale he was to pay the complainant $3,500 for all the land mentioned and described in the deed; that he would not have made the purchase had he not believed that he would get title to and possession of the land as particularly described; that 1,035 acres were embraced in that description, while the deed really conveyed only 760 acres, as the complainant had no title to some of the lands described in the deed, and as there were double descriptions of several of the parcels; and that the difference in value between the quantity of land included in the description and the quantity actually acquired by the respondent under the deed was $1,250. There is, however, no allegation that the complainant made any representation as to the number of acres sold, or that the land was bought by the acre, or that Thomas Garrett, deceased, had owned any lands in the sections named in the deed which were not included in the description therein, or that there was a failure or defect of title as to any of the lands formerly owned by Thomas Garrett. The contention of the respondent is that he is entitled in any event to the land particularly described according to the government survey, and to the number of acres called for by such description. The terms of the deed do not support this contention. It is true that the words "grant," "bargain," "sell," or either of them, as used in the deed, must be construed, unless it otherwise clearly appears from the conveyance, an express covenant that the grantor was seised of an indefeasible estate in fee-simple in the lands to which they refer. Code, § 1839; Swann v. Gaston, 87 Ala. 569, 6 South. Rep. 386. But those words must be construed in connection with the other language used in the deed, so as to give effect to the intention of the parties as expressed in the instrument. Derrick v. Brown, 66 Ala. 162. If it clearly appears from the deed, taken as a whole, that the words of conveyance and warranty were intended to apply only to such lands as had formerly belonged to Thomas Garrett, then the statutory warranty is not to be arbitrarily implied as covering lands which never belonged to Thomas Garrett. The clause of the deed last above quoted is decisive of the meaning of the instrument. It is plain that the particular description according to the government survey is controlled by the express provision to the effect that only such lands in the sections named as had formerly belonged to Garrett were intended to be conveyed. The warranty is not to be stretched to cover lands which the deed itself shows were not intended to be included therein. The intention of the grantors to convey only their right, title, interest, and claim in and to the lands theretofore belonging to Thomas Garrett, now deceased, and lying in sections 13, 16, 18, 19, and 21, is clearly expressed. The provision for such corrections as might be necessary to include such lands in the sections named which had formerly belonged to Thomas Garrett shows that the parties apprehended that the land might be incorrectly described in the deed, and that they did not intend that the particular description contained in the deed should control in determining what lands were covered by the purchase. If any of the Garrett lands in either of the sections named had been omitted from the deed, it cannot be denied that it would have been the duty of the grantors to correct their conveyance so as to make it include the omitted lands. If there had been such omission, could the grantee have claimed that the particular description contained in the deed should be treated as conclusively correct for the purpose of binding the grantor to convey the lands covered thereby, but as subject to correction for the purpose of adding other lands intended to be conveyed,—that the provision should operate only against the grantors, and not for their protection in any event? Clearly not. The obvious effect of the clause referred to is to limit the operation of the conveyance to such lands in the five sections mentioned as had formerly belonged to Thomas Garrett. The warranty does not extend to lands which, though particularly described, had never belonged to the person named as former owner. The grantee is entitled to claim nothing more, under the deed, if all the lands in the sections mentioned which had formerly belonged to Thomas Garrett were included in the deed by proper descriptions. The cross-bill does not show that any of those lands were omitted from the description in the deed, or that the title to any portion thereof has failed or is defective. The cross-complainant did not aver facts entitling him to any equitable relief. The chancellor was correct in so holding.

It cannot be affirmed, however, that the cross-bill could not be so amended as to disclose a case entitling the complainant therein to equitable relief. It was error to dismiss it in vacation without affording an opportunity to amend. 3 Brick. Dig. p. 379, § 197. For this error the decree must be reversed. Reversed and remanded.

(94 Ala. 1)

WELLS v. STATE.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

SELECTION OF GRAND AND PETIT JURORS—MEETING OF COMMISSIONERS.

1. Code, vol. 2, § 4, p. 132, providing that the jury commissioners of a county shall meet at a certain time, and proceed to draw for the ensuing year the requisite number of persons to serve as grand jurors, and then in like manner the requisite number to serve as petit jurors, does not allow the whole number to be drawn at one time, and the selection of grand jurors to be made from this number, but the grand jurors must be drawn first.

2. Code, vol. 2, § 2, p. 132, providing that the jury commissioners of a county shall meet at a certain time for the purpose of drawing jurors for the ensuing year, and that "if, for any reason, a meeting is not held at the time appointed," a meeting shall be held as soon thereafter as practicable, does not authorize a subsequent meeting merely for the purpose of correcting errors or mistakes that may have been made in drawing at the regular meeting.

Appeal from circuit court, Hale county; JOHN MOORE, Judge.

Indictment against Major Wells for murder. From an order overruling defendant's motion to quash a special *venire*, defendant appeals. Reversed.

Phares Coleman and *Charles E. Waller*, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

STONE, C. J. The trial in this case was had at the fall term of the court in 1891. The *venire* of jurors summoned for the week set for the trial was served on the defendant, as part of the *venire* from which the jury was to be, and was, selected. In this order and service the statute was strictly conformed to. Code 1886, vol. 2, p. 134, §§ 10 and 11 in note. Before entering upon the trial, the defendant moved to quash that part of the *venire* which consisted of the jurors drawn and summoned for the week, on the following grounds, which were shown by the testimony to be the facts of the case: The board of jury commissioners of the county had held their meeting at the proper place, and at the proper time, viz., "on the next day after adjournment of the last regular term of the court of commissioners," in the year 1890. At that session the commissioners had drawn grand and petit jurors to serve for the several courts to be held in 1891. At such drawing, the commissioners did not pursue statutory directions. They did not first draw the requisite number of names to serve as grand jurors, and then, in like manner, proceed to draw the requisite number of persons to serve as petit jurors. Jury St. § 4, p. 132, Code, vol. 2. They drew a sufficient number of names to serve in both capacities of grand and petit jurors, and then from this whole number selected a list to serve on the grand jury, leaving the residue to perform the petit service; and the persons thus drawn and selected constituted the several *venires* of jurors to serve during the year 1891. In this the jury commission mistook the statute, and their duty under it, and, on motion properly made, it would have been the duty of the trial court to so declare. Murphy v. State, 86 Ala. 45, 5 South. Rep. 432. The legal result of this is that the county of Hale was without petit jurors to serve during the year 1891, who had been drawn in the manner prescribed by the statute.

There being, then, no legally drawn juries to serve at the several terms of the court, in what manner was the error or omission to be remedied? This must be answered by the statutes themselves. The act of 1887 (Code, vol. 2, p. 132, in notes,) repeals all former statutes on the subject which conflicted with its provisions. We have seen that the time of drawing juries for the next ensuing year is directed to take place "on the next day after adjournment of the last regular term of the court of county commissioners * * * held in each year." Section 2. It is further provided in the same section that "if, for any reason, a meeting of the board of jury commissioners is not held at the time appointed for such meeting, a meeting shall be held on a call of the president of the board as soon after the time appointed for such meeting as practicable." We have now stated all the provisions found in the act of 1887 bearing on the question we have in hand. It will be observed that this case does not fall within that provision of the statute which declares that "if, for any reason, a meeting of the board of jury commissioners is not held at the time appointed for such meeting, a meeting shall be held on the call of the president of the board as soon after the time appointed for such meeting as practicable." There was in this case no failure of a meeting of the board of jury commissioners at the time appointed by the statute. They did meet, and they did act. The error they fell into was that in their action they did not conform to the law. They drew the requisite number of jurors, but they did not draw them as the state commanded they should be drawn. The act of 1887 makes no provision for such a case as this. It contains no clause authorizing the reassembling of the board of jury commissioners, at any subsequent time, for the purpose of correcting errors or mistakes that may have been committed at the law-appointed meeting. And we have no authority for going beyond the provisions of the statute, even though in doing so we may appear to have done the defendant no actual injury. We must observe and enforce the law as it is written. There was no authority for the action taken by the jury commission at its called meeting in June. It would seem that, when a court of original jurisdiction finds itself without juries legally drawn, and for that reason quashes the *venires*, it must, as the statute now stands, supply the omission, under section 4327 of the Code of 1886. Possibly this subject needs legislative attention. For not quashing the *venire* of petit jurors drawn and summoned for the week in which defendant was tried, the circuit court erred. Reversed and remanded.

(95 Ala. 17)

JACKSON v. STATE.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

CRIMINAL LAW—ELECTION BETWEEN OFFENSES.

Defendant was indicted for the unlawful killing of a bull, and one of the witnesses testified, on examination by the state, that he saw the defendant, on a certain Friday, shoot the bull with a double-barrel shotgun. *Held*, that the prosecutor was not compelled to elect to prosecute for the shooting at that particular time, but could prove, by the same witness, a shooting on the following Monday.

Appeal from circuit court, Lauderdale county; H. C. SPEAKE, Judge.

On the trial of Richard Jackson under an indictment for the unlawful killing of a bull, one John Holland, a witness for the state, testified "that on Friday, in the month of November, 1890, about 9 o'clock in the morning, on the premises of Aleck Jackson, in Lauderdale county, Alabama, in the cotton patch of witness, he saw the defendant shoot the bull with a double-barrel shotgun; that witness was about 60 yards distant from him when the shot was fired; that the defendant was a few steps from the bull; that witness saw the bull 'draw up' when shot by the defendant." The bill of exceptions then recites as follows: "This was the first witness and the first testimony offered. Defendant did not cross-examine witness. The prosecuting attorney then asked the witness if he had ever seen any other injury inflicted on the bull by the defendant at any other time. To this question the defendant objected, on the ground that the state had elected to prosecute for the injury on Friday; but the court overruled his objection, and the defendant then and there, in open court, duly excepted. The witness then testified that, on Monday following said Friday, he saw the defendant shoot the said bull in the cotton patch of defendant's wife, in Lauderdale county, Alabama. The court of its own motion having required the state to elect for which shooting and injury it would prosecute, the state's attorney elected to prosecute for the shooting and injury on Monday, and the evidence of the shooting on Friday was excluded. The witness then described the injury to the bull, and testified that the shooting took place about 9 o'clock in the morning, and was done with a shotgun. The defendant moved the court to exclude all the evidence of the witness in relation to the shooting on Monday, on the ground that the defendant was only indicted for one offense, and the state, having made proof of the shooting on Friday, as hereinbefore stated, had elected to prosecute for that shooting and injury, and could not prove another injury committed at another time and place. But the court overruled the motion, and the defendant, having been tried and convicted for the shooting on Monday, appeals. Affirmed.

Simpson & Jones, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

PER CURIAM. The defendant in this case was indicted, tried, and convicted "for wantonly killing or injuring a bull." The only question presented by the rulings of the lower court is whether the state made an election to prosecute for one act, and afterwards proceeded to elicit evidence concerning another. The beneficent purpose of the rule which requires an election is that the defendant shall not be prejudiced in the minds of the jury by the introduction of evidence of offenses for which he is not on trial. The term "elect" implies a knowledge of facts which go to make up two or more offenses; and while a solicitor may by his own acts and questions involuntarily effect an election, yet, to hold him to have elected to proceed for a certain offense, he must have learned enough to enable him to individualize the transaction, and then pursue his inquiry with a view of learning the details and particulars of the act or transaction thus individualized. To hold him to an election without going this far would, in many cases, amount to a denial of justice. Peacher v. State, 61 Ala. 22; Smith v. State, 52 Ala. 384; Hughes v. State, 35 Ala. 351; Cochran v. State, 30 Ala. 542; Elam v. State, 26 Ala. 48. Under the rule laid down, we hold that the solicitor had not elected to prosecute for the shooting which took place on Friday. There is nothing in the answers of the witness to questions asked which calls for the particulars or details of that shooting. We discover no error in the record.

Affirmed.

(94 Ala. 4)

ASKEW v STATE.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

JUSTIFIABLE HOMICIDE—DUTY TO RETREAT—INTOXICATION—READING FROM LAW REPORTS TO JURY.

1. In a trial for murder, it appeared that defendant and deceased, who were friends, were at the time of the killing in defendant's place of business, and that deceased was intoxicated. The court, after stating that, if defendant was in his own place of business, he was under no obligation to retreat therefrom, instructed the jury that if deceased was intoxicated to a degree so as to render him less prudent and less dangerous by impairing his physical faculties, then it was defendant's duty to exercise reasonable care to avert a difficulty with him, unless defendant increased his danger thereby, and if he failed to exercise such care he was not without guilt. *Held*, that the charge was erroneous in ignoring the fact that the killing occurred in defendant's place of business, and in assuming that it was defendant's duty to retreat therefrom.

2. Where defendant's attorney, in discussing the law involved, read to the court certain portions of opinions in cases cited by him, it was not error to allow the other side to read the facts as reported in those particular cases; the court instructing the jury that they should not consider such facts.

3. Defendant asked the court to instruct the jury that if defendant shot believing that unless he did so deceased would cut him, then they should acquit, unless defendant brought on the difficulty. *Held*, that the instruction was properly refused; it basing the right to kill on a mere belief, without any reasonable grounds for the belief.

Appeal from circuit court, Henry county; J. M. CARMICHAEL, Judge.

Thomas C. Askew was convicted of murder in the second degree, and appeals. Reversed.

Thomas Askew was indicted for the murder of Ned Grice, and was convicted

of murder in the second degree. The testimony for the state showed that the defendant shot and killed Ned Grice in the livery stable of the defendant. The circumstances attending the killing are substantially as follows: The defendant and one Whidden walked with the deceased, who was drunk, from across the street in the town of Dothan to the defendant's livery stable; that they went into the bedroom adjoining the stable; that the defendant and the deceased, who were good friends, got into a scuffle; that in falling on the bed the deceased took his pistol from his pocket, and the defendant called Whidden to come and assist him in getting the pistol from the deceased; that the defendant succeeded in getting the pistol from the deceased, and left the room, going to the rear of the stable; that said Grice came out of the room, coming towards the defendant with his knife open in his hand, and told the defendant to give up his pistol to him, using, as some of the witnesses testify, profane language; that the defendant told said Grice not to come any nearer to him with his knife open, that he was his best friend, and he hated to hurt him; that the said Grice continued to advance, staggering, as testified to by some of the witnesses, towards the defendant; that the defendant continued to tell him to stand back, otherwise he would shoot him; that upon said Grice coming within a few feet of him with the knife in his hand, his arm being by his side, the defendant raised the pistol and shot at said Grice, but the first shot missed him, whereupon the defendant shot again, and said Grice fell, and died almost instantly; that after the defendant had shot said Grice he went to the front of the stable, and told the by-standers that he had killed the best friend he had in the world. The defendant excepted to the charge given by the court, and to the court's refusal to give the following charge requested by him in writing: "If the jury are reasonably persuaded from the evidence that Askew, at the time he shot Grice, did it believing unless he did so Grice would cut him, then they will find him not guilty, unless they further believe from the evidence that Askew brought on the difficulty; and if the evidence shows that Askew merely carried Grice to his stable to care for him, and in doing so he only took from him his pistol to prevent him from doing injury to himself or to any other person present, then he did not bring on the difficulty."

Roberts & Martin, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

CLOPTON, J. The evidence showing, without dispute, that the killing occurred in a livery stable of which the defendant was proprietor, and that the deceased was intoxicated at the time, the court, after stating the general proposition that, if the defendant was in his own place of business, he was under no obligation or duty to retreat therefrom to avoid a difficulty, proceeded to further instruct the jury in substance as follows: But if the deceased was intoxicated, and in consequence thereof was less prudent, and his power of locomotion and action was so impaired as to render him less dangerous than he otherwise would have been, and this was known to defendant, "then it was his duty to exercise reasonable care to avert a difficulty with the deceased, unless by the exercise of such care he would have apparently increased his danger; and if the defendant failed to exercise such reasonable care, and if it could have been done without increasing his danger, then the defendant is not without guilt if he shot and killed the deceased." The ascertainment of the proper construction and legal effect of the charge, when referred to the evidence, is preliminary and essential to determining its correctness. The first inquiry is, what is meant by the expression that "it was the duty of defendant to exercise reasonable care to avert a difficulty, and to avoid the necessity of killing, unless, by the exercise thereof, he would have apparently increased his danger," in the manner and connection in which it is employed in the charge? When a person is assailed without the precincts of his dwelling or place of business, it is his unquestionable duty to use all the means in his power to avert the difficulty, and to avoid the necessity of taking life, if there be any mode of escape or retreat with reasonable safety. Also, notwithstanding he may be attacked in his dwelling or business house, it is his duty to refrain from taking life, unless there is imminent and pressing necessity, real or apparent. He must take care to employ no more force than is sufficient to repel the danger to his life, or the apprehended injury to his person. In these two respects alone can the duty to exercise reasonable care arise in cases of voluntary homicide, not the consequence of criminal negligence, when the accused is without fault in bringing on or provoking the difficulty. The expression, therefore, "to exercise reasonable care," though not strictly accurate, must have been employed with reference to one or both of these respects. There being no evidence tending to show that defendant was at fault, and the evidence showing that the deceased was the assailant, whether there existed a real or apparent necessity, and a reasonable mode of escape, were the only issues really involved and tried. In view of these issues, the charge was intended to assert the principles on which the defendant could set up the excuse of self-defense, when he was assailed in his own place of business by a drunken man.

The precise subject of the charge is the duty to retreat. This is apparent from the fact that it begins with a statement of the general rule as to the duty of defendant to retreat from his place of business. After stating this general rule, the charge proceeds to lay down, by way of distinction, as it were, a rule in respect to the duty of exercising reasonable care to avert the difficulty, as specially applicable when the assailant is intoxicated to the degree hypothesized. When the charge is construed as an entirety, and in reference to the evidence, when the different parts are considered in connection and in relation to each other, the legal effect of

the latter part is to limit or modify, when the assailant is intoxicated, the application of the general rule stated in the first clause; otherwise the qualifying phrase, "unless by the exercise of such care he would have apparently increased his danger," is without meaning and effect. Such may not have been the intention of the court, but it was probably so understood by the jury. A similar charge was so construed in Brinkley v. State, 89 Ala. 34, 8 South. Rep. 22. In that case the killing occurred in the house of defendant. The court gave the following charge: "That, if the defendant could have avoided the difficulty without danger to himself, he should have done so." This charge was held to be erroneous for the reason that it assumed that the defendant was bound to retreat from his house, and also to yield the right to order the deceased from his premises on account of profanity and indecent behavior, as a mode of avoiding apprehended violence. Though differing in phraseology, there is no difference in principle between the charge in that case and the charge under consideration. Unless the meaning and legal effect of the charge is to constitute the drunken condition of the deceased an exception to the general rule in regard to the duty to retreat from one's dwelling or business house, it is intrinsically inconsistent; the charge making no allusion to any other mode of exercising reasonable care. It may be that the intoxication of the deceased was a circumstance to be considered by the jury in determining whether there was apparently a present, pressing necessity for defendant to take the life of the deceased to protect his own, or to prevent great bodily harm. But voluntary intoxication did not deprive defendant of the right to defend himself against violent assault. The conduct of a person in a state of voluntary intoxication is subject to the same rules and principles as the conduct of a sober man. Nichols v. Winfrey, 90 Mo. 403, 2 S. W. Rep. 305. The charge is defective, in that it ignores the evidence showing that the killing occurred in the defendant's place of business, and assumes that if the deceased was intoxicated to a degree rendering him less prudent, and so impairing his physical faculties as to render him less dangerous, it was the duty of defendant to retreat therefrom, as a mode of exercising reasonable care to avert the difficulty, and avoid the necessity of taking his life, if his danger would not be apparently increased thereby. The charge requested by defendant was properly refused, because it bases the right to kill the deceased upon his mere belief that unless he did so the deceased would cut him, without the predicate of reasonable grounds for the belief. The circumstances must be such as would create in the mind of a reasonably prudent man the belief that such necessity existed.

The defendant also excepted to the court permitting the solicitor to read the facts in certain reported cases. It appears that the defendant's attorney, in discussing the legal questions, read to the court certain portions of the opinions rendered in those cases, and thereupon the solicitor read to the court the facts as reported. The solicitor may have deemed this necessary to show that the principles of law announced in the opinions were not applicable to this case. The court stated to the jury that they should not consider the facts read from the cases referred to. Under the circumstances, we cannot say there was error in this. It does not come within the principle declared in Williams v. State, 83 Ala. 68, 3 South. Rep. 743. Reversed and remanded.

(94 Ala. 184)

WINGO *et al.* v. HARDY.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

EQUITY—ADEQUATE REMEDY AT LAW—PLEADING.

1. Plaintiff leased certain mining property from W. on condition that, upon failure to commence shipment of ore at a given time, W. could re-enter and take possession. Plaintiff sold an interest in his lease to P., who assumed all the obligations of the original lease. On default under the lease, W. commenced an action of unlawful detainer to obtain possession, and, while such suit was pending, plaintiff instituted proceedings in equity against W. and P., asking for a receiver, and to enjoin W. from prosecuting his suit for possession, alleging as an excuse for non-compliance with the lease that W. and P. had colluded to defraud plaintiff by failure to perform on the part of P. so as to oust him of possession, W. and P. having agreed to hold each other harmless. *Held* that, plaintiff's averments constituting a legal defense that could be pleaded in answer in the suit of unlawful detainer, there was no ground for equitable relief.

2. The bill alleged that plaintiff had done all in his power to hasten the opening of the mine, and that he was delayed from six to eight weeks in obtaining rights of way for a spur track. *Held*, that the allegations were bad in that they failed to set out specifically the cause of the delay, so as to enable the court to determine whether such delay was "unavoidable," as specified by the terms of the lease.

3. The answer by W. that plaintiff did not do "all in his power to hasten the opening of the mine, or that he was delayed as alleged," was, in view of the generality and indefiniteness of the allegation in the bill, a sufficient denial, but such defense could properly be made in the action of unlawful detainer.

Appeal from chancery court, Colbert county; THOMAS COBBS, Chancellor.

Action by Nicholas Hardy against Abner W. Wingo and another. Judgment for plaintiff. Defendants appeal. Reversed and rendered.

Jackson & Sawtelle and *Roulhac & Nathan*, for appellants. *J. B. Moore* and *Kirk & Almon*, for appellee.

STONE, C. J. Wingo, in May, 1890, executed a lease to Hardy, granting to him the right to mine and remove iron ore from a quarter section of land, the property of the lessor. The lease was to continue five years, with a privilege of renewal for five additional years. By the terms of the lease, Wingo granted mining privileges in the particular quarter section, and certain other easements and privileges not necessary to be named. He incurred no liability to furnish any money, labor, or anything else in promotion of the enterprise. It was a mere lease, conferring certain rights and privileges, on Wingo's part. Hardy bound himself to open up the mines, construct and supply all necessary works and machinery, and

build a spur track connecting the mine with the railroad which ran near by. All this was to be done and completed without any assistance from Wingo. By the terms of the lease, Hardy bound himself to have the works completed and commence shipping ore by the 15th of October, 1890, to ship 100 tons per day, and to pay Wingo a royalty of 10 cents per ton for the first year, and 12½ cents per ton for each succeeding year. He further stipulated that if he failed to ship the 100 tons per day, commencing with October 15th aforesaid, then, for every day he so failed, he or his assigns would pay to Wingo "ten dollars per day for each and every day thereafter" during the time he, said Hardy, should remain in default; the monthly settlements of royalty to be made on the 25th day of each month. The lease contains this further clause: "If the party of the second part [Hardy] shall fail to pay said royalty, or the amount that is to be paid per ton for said ore, on or before the 25th day of each month, or shall fail to comply with any of the covenants herein mentioned, according to the true intent and meaning of this contract, then this contract or agreement shall be null and void, and the lessor, said Wingo, his agent, heirs, or assigns, has the right to re-enter and take possession of said leased property mentioned herein, and lease the same to other parties, if he so desires." On June 21, 1890, another clause was added to said contract of letting, by which it was agreed, by and between Wingo and Hardy, that "the only reason which will be taken into consideration by the party of the first part will be the impediment met with in securing the right of way through other parties' lands from the above property, to make connection with the common carrier. Any detention met with in that line, such as injunctions, arbitrations, or condemnation of lands by appraisements or other unavoidable delays, such time shall be extended to the party of the second part [Hardy] from Oct. 15, 1890, without penalty during the time of this lease." It is manifest that the exemption reserved and secured to Hardy from penalties and forfeitures to be incurred by non-compliance with his contract included only such as might result from impediments and unavoidable delays in obtaining the right of way in lands belonging to others, over which the spur railroad track must be constructed. For a period corresponding to the length of time Hardy might be unavoidably delayed in obtaining such right of way, his obligation to ship 100 tons of ore per day, or to pay daily the stipulated penalty of $10, was postponed beyond October 15, 1890. If there was no impediment or delay in obtaining such right of way, then the contract contains no provision excusing Hardy from his promise to deliver 100 tons of ore daily, beginning October 15, 1890, and, failing, to pay $10 per day forfeit money. Soon after the second or modifying clause of the lease was agreed on and executed, Hardy sold and conveyed a two-thirds interest in the lease to Perkins. By the terms of that sale Perkins undertook to furnish all the means, and do and perform all the work, which Wingo's lease had imposed on Hardy, and the moneys to be thus expended by Perkins were to be refunded to him, with interest, out of the first profits of the enterprise. The contract between Hardy and Perkins contains these clauses: "It is understood that the party of the second part [Perkins] shall have full management of all the business which may be transacted under said lease, also full control and disbursement of all the funds which may be derived from said business, upon the following conditions, to-wit: that the said L. R. Perkins, the party of the second part, shall conform to and faithfully carry out all of the conditions that are required of M. Hardy to carry out his part of the contract and agreement with A. W. Wingo, contained in said lease * * * It is fully understood that M. Hardy, the party of the first part, shall aid and assist in carrying on said business at the mines and elsewhere, or furnish a competent representative, from this date until the expiration of this contract, free of compensation, other than the one-third of the net profits that may be derived from said business after all expenses shall be paid." These extracts show that Perkins was to furnish all the means and labor necessary to carry out Hardy's part of the lease contract, which Hardy bound himself to aid and assist, either personally or by competent representative. This devolved on Perkins the duty and obligation to have the works completed and in operation, and to commence delivering ore and paying royalty, by October 15, 1890, and, failing, to pay daily the stipulated forfeiture, unless there was hindrance and delay in obtaining the right of way for the railroad spur-track. In November, 1890, the works not having been completed, the railroad unfinished, no ore shipped, and no royalty or penalty paid, Wingo commenced an action of unlawful detainer to obtain possession of the land embraced in the lease. The justice decided this action in favor of Hardy. Wingo thereupon took an appeal to the circuit court. Without waiting for a trial in the circuit court, Wingo, in January, 1891, commenced another action of unlawful detainer, before another justice of the peace, to recover possession of the land. Each of these actions was undecided when the bill in this case was filed, in April, 1891.

The present suit is a bill by Hardy, and Wingo and Perkins are made defendants. It sets forth *in extenso* the facts summarized above. It does not aver that the works are completed, but admits they are not. Does not aver that any ore has been shipped, or can be shipped, as matters now stand. Does not aver any payment of royalty, or any offer, willingness, or ability to make payment, or to complete the works and comply with the contract of letting. The *gravamen* of the complaint it makes—of the excuse it sets up for non-compliance with the contract—is, briefly, that Wingo and Perkins have colluded and entered into an agreement to defraud and oppress Hardy by failing to perform the contract on Perkins' part, and thus to oust him of the possession;

and that they, Wingo and Perkins, have mutually agreed and promised to protect and hold each other harmless. The bill prays for the appointment of a receiver to take charge of the works, and for an injunction against the said unlawful detainer suits; prays for specific performance of the contract with Perkins, and that Wingo's suits be perpetually enjoined. The chancellor did not appoint a receiver, but granted an injunction restraining Wingo from prosecuting his said suits. A motion was made to dissolve the injunction on two grounds: *First*, that the bill is without equity; and, *second*, that the material averments of the bill are denied in the answers. The chancellor overruled the motion to dissolve the injunction, and from that ruling the present appeal is prosecuted. No ruling of the chancellor was made on that part of the bill which seeks to have specific performance of the agreement entered into between Hardy and Perkins. It would seem, however, that chancery could not entertain jurisdiction to enforce that agreement, situated as the parties and the works were when this bill was filed. When the agreement sought to have enforced involves continuous administration of executory skill, discretion, personal supervision, or anything else of like kind, then the chancery court is without power or machinery to compel the active observance of such duties. Parties thus circumstanced are left to such redress as law courts can furnish for the breach of such contract. Marble Co. v. Ripley, 10 Wall. 339; 3 Pom. Eq. Jur. 1343; Carlisle v. Carlisle, 77 Ala. 339; Iron Age Pub. Co. v. W. U. Tel. Co., 83 Ala. 498, 3 South. Rep. 449. Does the bill contain equity, in that phase of it which sought and obtained an injunction against the prosecution of the suits in unlawful detainer? If Hardy was hindered and prevented in the performance, through Perkins, of his contract to have the works completed and in operation by October 15, 1890, by collusion and fraudulent combination between Wingo and Perkins, could that afford him excuse for appealing to the chancery court for relief? We think not. No one can insist on a forfeiture for failure to perform a condition precedent, if he himself has caused, or intentionally or knowingly aided in causing, the failure. To allow a recovery in such conditions would be to permit the wrong-doer to take advantage of his own wrong. McLendon v. Godfrey, 3 Ala. 181; Sprague v. Morgan, 7 Ala. 952; Eads v. Murphy, 52 Ala. 520; 1 Tayl. Landl. & Ten. § 269; 5 Lawson, Rights, Rem. & Pr. § 2510; Bish. Cont. (Enlarged Ed.) § 1431; Borst v. Simpson, 90 Ala. 373, 7 South. Rep. 814. This defense is legal, and, if proved, will be an answer to the actions of unlawful detainer. Under these principles the bill of complaint in this case shows no ground for equitable relief, and the injunction ought to have been dissolved on that ground. The bill, among many other things, charges that "complainant [Hardy] has done all that was in his power to hasten the opening and developing of said mines from the time they began work, on the 22d of June, 1890; that they were delayed from six to eight weeks in obtaining rights of way for the railroad." This charge is not specific enough. It should have set forth what caused the delay—"injunctions, arbitrations, or condemnations of lands by appraisements, or other unavoidable delays"—with such particularity of language, both as to persons and the nature of the proceedings, as that the court could determine whether such impediment or hindrance falls within the exceptional clause of the written lease. Facts should be averred, not conclusions. Wingo's answer to this clause is that he "denies that complainant did everything that was in his power to hasten the opening and developing of said mines, or that he was delayed as alleged." Considering the generality and indefiniteness of the charge made in the bill, this answer was a sufficient denial. This defense, like the other, was of legal cognizance, and can be made to the actions of unlawful detainer. We have not considered it necessary to notice the denials in the answers in detail. All interference with the work by Wingo, and all collusion and combination between him and Perkins, are denied. Taking the answers for our guide, the chief if not the only cause of failure to complete the work by October 15, 1890, was the fault or misfortune of Perkins in not performing his contract according to its stipulations. The decretal order of the chancellor is reversed, and a decree here rendered dissolving the injunction. Reversed and rendered.

(95 Ala. 337)

KAHL v. MEMPHIS & C. R. CO.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

COURTS—JURISDICTION—TORT COMMITTED IN ANOTHER STATE—PLEADING—DEATH BY WRONGFUL ACT.

1. Where a railroad company obtains charters from the states of Alabama, Mississippi, and Tennessee, the courts of Alabama have no jurisdiction to entertain an action against the company for negligently killing plaintiff's intestate in the state of Mississippi, since the tort was committed by a foreign corporation in a foreign state.

2. In an action against a railroad, a petition which alleges that plaintiff's intestate was negligently killed in another state by a co-employe, but fails to set out any statute of such state making the employer liable in such cases, is bad on demurrer.

Appeal from circuit court, Colbert county; H. C. SPEAKE, Judge.

Action by John Kahl, administrator, against the Memphis & Charleston Railroad Company, for causing the death of plaintiff's intestate. Judgment for defendant. Plaintiff appeals. Affirmed.

This action was brought by the appellant, John Kahl, as administrator of the estate of John P. Kahl, and sought to recover damages for the alleged negligent killing of the plaintiff's intestate in a collision which occurred on the road of the defendant. The complaint, as amended, shows that the appellee is a domestic corporation, and owns and operates a line of railroad extending from the town of Stephenson, in Alabama, to Memphis, Tenn., and that it has charters from the states of Alabama, Mississippi, and Ten-

nessee; that said line of railroad is a continuous line through this state, operated by the appellee; that the intestate of the plaintiff was a citizen of Alabama, and at the time of the accident was employed by the defendant as an engineer to run an engine of the said road from the city of Tuscumbia, in Alabama, to Memphis, in Tennessee; and that the contract of employment was made in Alabama. It was also shown that the accident which resulted in the death of the plaintiff's intestate occurred in Mississippi. The defendant demurred to the complaint, as amended, on the following grounds: (1) That it appears from the complaint that the alleged injuries resulting in the death of plaintiff's intestate occurred outside of the jurisdiction of Alabama; (2) that it does not appear from the said complaint, as amended, that the state of Mississippi gave any right to an action by said plaintiff to recover damages for the alleged injuries resulting in the death of his intestate; and (3) that the statutes of the state of Mississippi, as set forth in the amended complaint, did not purport to confer upon the personal representative of the decedent the right of action for injuries resulting in the death of said decedent. The court sustained the defendant's demurrers to the amended complaint, and, the plaintiff declining to further amend his complaint, judgment was rendered by the court for the defendant, to which ruling of the court plaintiff excepted. On this appeal, prosecuted by the plaintiff, the ruling on the demurrer and the judgment of the court are assigned as error.

J. B. Moore, for appellant. *Humes & Sheffey*, for appellee.

COLEMAN, J. The averments of the complaint show that plaintiff's intestate, while acting in the discharge of his duties as an employe of the defendant's railroad corporation, was killed in a collision of trains, caused by the negligence of the employer. The collision occurred in the state of Mississippi, and the present action to recover damages for the death of the intestate was instituted in the state of Alabama. The court below sustained a demurrer to the amended complaint, and, plaintiff declining to further amend, his action was dismissed. We are of opinion that the amendment, added to each count of the complaint, clearly avers three separate, distinct, and independent constituents of the defendant's corporate character,—one created by the state of Mississippi, one by the state of Alabama, one by the state of Tennessee,—and neither dependent upon the other for existence or authority. The averment that it was "a unit as a corporation" is a mere conclusion of the pleader. Though incorporated by the same corporate name, owned by the same stockholders, invested with like franchises, and operated under the same management, so that practically it is a single corporation, legally speaking, the corporation is composed of three separate, independent, legal entities, each depending for its existence upon the separate and independent acts of incorporation by the several states through which it passes. If the state of Mississippi should revoke and annul the charter granted by that state, the Memphis & Charleston Railroad Company, as a corporation, would still exist in Alabama and Tennessee, but there would be no such corporation in the state of Mississippi. Neither of the three states can give or take away the legal existence of a corporation beyond its territorial boundary. Within the boundary of Alabama, it is a domestic corporation; beyond that, it is a foreign corporation. These general principles find support in many adjudications. Insurance Co. v. Kamper, 78 Ala. 325; Railroad Co., v. Alabama, 107 U. S. 581, 2 Sup. Ct. Rep. 432; Paul v. Virginia, 8 Wall. 168, 181; Runyan v. Coster, 14 Pet. 122; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. Rep. 354; Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 10 Sup. Ct. Rep. 1004. It would seem to follow that the tort complained of in the present case was committed by a foreign corporation, and beyond the jurisdiction of the state of Alabama. In Rorer on Railroads, (volume 2, p. 1149, par. 3,) it is said: "The right given by statute to the recovery of damages for injuries caused by the wrong act or negligence of a railroad company, its employes and servants, is local in the courts of the county or state wherein the right is given by the statute, and the injury is incurred." A great many authorities are cited by the author to support the text. See, also, Banking Co. v. Carr, 76 Ala. 393.

The demurrer was well taken for another reason. We think it may be stated as an established proposition that if the tort complained of was not actionable in the state where it occurred, it will not sustain an action in this state. The present action is purely statutory. At common law, where death resulted from the culpable negligence of a co-employe, under such circumstances as averred in the complaint, no action could be maintained against the master. Railroad Co. v. Davis, 92 Ala. 312, 9 South. Rep. 252; Stewart v. Railroad Co., 83 Ala. 493, 4 South. Rep. 373; Railroad Co. v. Orr, 91 Ala. 552, 8 South. Rep. 360. If there exists any statute in the state of Mississippi giving an action to the administrator of a deceased employe against the master, to recover damages for the death of his intestate, caused by the negligence of a co-employe, or any statute substantially similar to what is known as the "Employers' Act" in this state, such statute ought to have been set out in the complaint. Sections 2078, 2079, of the Revised Code of Mississippi, copied in the complaint, do not cover a case like the present. In the absence of such an averment, we must presume the common law was in force in that state, and at common law the present action could not be maintained. In either view, the demurrer was well taken, and properly sustained.

Affirmed.

WALKER, J., not sitting.

(94 Ala. 102)

SHEPHERD v. STATE.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

LARCENY—EVIDENCE—INSTRUCTIONS—REASONABLE DOUBT—HARMLESS ERROR.

1. On a trial for larceny, the evidence tended to show that certain packages of seeds were consigned to one C.; that at the place of destination the car containing the packages was broken open before being unloaded; that the packages were missing; and that packages corresponding in number and description were subsequently found in defendant's possession. *Held*, that the evidence authorized a conviction of the larceny of the packages.

2. Where the evidence of guilt is purely circumstantial, it is proper for the court to refuse to instruct the jury that they should not consider, as a circumstance against defendant, the fact "that no other person was suspected of the crime."

3. The fact that a juror "feels a desire" for more evidence of criminality is not necessarily the equivalent of reasonable doubt in the mind of such juror.

4. On a trial for larceny, an instruction that "no matter how strong the circumstances, if they can be reconciled with the theory that some other person may have done the act without the guilty agency or participation of defendant, then defendant is not shown to be guilty by that full measure of proof which the law requires," is properly refused as argumentative.

5. Where the jury is recalled, after retiring to consider the verdict, and given defendant's charge previously refused, it is not error of which defendant can complain.

Appeal from circuit court, Bibb county; J. R. DOWDELL, Judge.

Henry Shepherd was convicted of grand larceny, and sentenced to imprisonment for five years, from which he appeals. Affirmed.

The testimony on which the defendant was indicted was purely circumstantial, and is sufficiently shown in the opinion. The defendant separately excepted to the refusal to give each of the following written charges requested by him: (1) "The court charges the jury that if they believe the evidence they must find the defendant not guilty." (2) "The court charges the jury that under the evidence in this case they cannot consider the fact, if it be a fact, that there is no circumstance tending to show that any other person committed the crime, or has been charged with or suspected of the crime as a circumstance against the defendant." (3) "The court charges the jury that if any juror, before pronouncing a verdict of guilty, feels the desire for more evidence tending to show the guilt of defendant, then that juror has the reasonable doubt of the defendant's guilt upon which the law requires him to acquit the defendant." (4) "The court charges the jury that the evidence in this case is entirely circumstantial; that humane provisions of the law are that a prisoner charged with a felony should not be convicted on circumstantial evidence, unless it shows by a full measure of proof that the defendant is guilty. Such proof is always insufficient unless it excludes to a moral certainty every other reasonable hypothesis but that of the guilt of the accused. No matter how strong the circumstances, if they can be reconciled with the theory that some other person may have done the act without the guilty agency or participation of the defendant, then the defendant is not shown to be guilty by that full measure of proof which the law requires." The bill of exceptions then recites: "After the jury had retired to consider upon their verdict, the court directed them to be called back into the court-room, and, the jury having been brought back accordingly, the court gave them the following charge, which had been asked in writing by defendant before their retirement, but which the court had then refused to give, to which ruling of the court the defendant had duly reserved an exception: 'The court charges the jury that if the evidence is reasonably reconcilable with the theory that defendant acquired the property from the real thief, or that, if the evidence is reasonably reconcilable with the theory that some one else was the guilty agent, then the jury must acquit the defendant.' After reading the charge to the jury, the court stated to the jury that, while he gave them the charge, they should take it in connection with the general charge of the court, and also with the further oral charge which he would give them, viz., that the jury could consider the fact of the recent possession of stolen goods unexplained, if they were satisfied from the evidence that such was the fact, as a circumstance showing that the party having such possession was the thief. To the giving of this additional oral charge by the court the defendant objected, and, his objection being overruled, he duly reserved an exception to the giving of such charge.

Logan, Hargrove & Vande Graaff, for appellant. *William L. Martin*, Atty. Gen., for the State.

MCCLELLAN, J. The evidence tended to show that certain packages of seed, about 500 in number, were consigned at Philadelphia by Landreth to E. N. Cottingham & Co., at Blockton, Ala.; that the car containing these packages arrived at Blockton, and was broken into before being unloaded; that the packages were missing, and packages corresponding in number and description were subsequently found in the possession of the defendant. Very clearly, we think, the jury were authorized to find upon this evidence that the defendant had stolen the seeds as charged in the indictment, and the general charge requested by the defendant, the giving of which would have denied them this right, was of course properly refused. Kemp v. State, 89 Ala. 52, 7 South. Rep. 413, and authorities there cited. In cases like the present one, where the guilt of the defendant is to be found, if at all, from criminating circumstances alone, it is error to instruct the jury that they may not look to the fact that "there is no circumstance tending to show that any other person committed the crime, or has been charged with or suspected of the crime." Charge 2 asked by the defendant was of this character, and hence was well refused. Childs v. State, 58 Ala. 349. The fact that a juror feels a desire for more evidence of criminality is not necessarily

the equivalent of a reasonable doubt of guilt in the mind of such juror. A juror might well "feel a desire" for more evidence, and naturally would experience such desire in all cases where he entertained any doubt whatever of guilt, whether that doubt were a reasonable one or not, in itself; and manifestly a desire for further proof, resulting from a mere unreasoned misgiving, would not involve a state of mind on the part of the juror which would make it his duty to acquit. These considerations demonstrate the infirmity of the third charge requested by the defendant. The fourth instruction asked for defendant is palpably a mere argument, and its refusal may be justified upon that ground. Potter v. State, 92 Ala. 37, 9 South. Rep. 402; Chatham v. State, 92 Ala. 47, 9 South. Rep. 607; Bancroft v. Otis, 91 Ala. 279, 8 South. Rep. 286; Little v. State, 89 Ala. 99, 8 South. Rep. 82. We do not doubt that the trial court may with propriety recall the jury after they have retired, and give them an instruction which had been previously refused to the defendant. It would seem, indeed, that in any event the defendant could not complain of such action on the part of the court, as it is taken in consequence of his original request that the charge should be given, and presumptively in all cases, and as matter of fact in this case, in his interest. Marcus v. State, 89 Ala. 23, 8 South. Rep. 155. So that, if error was committed in recalling the jury and giving the previously refused charge, it was affirmatively beneficial to the defendant, and cannot be availed of by him on appeal. Marks v. State, 87 Ala. 99, 6 South. Rep. 377. The court having properly recalled the jury, and given the charge at first refused to the defendant, its further action in that connection stands upon the same footing as if the charge had been originally given, in which case the defendant could not have complained because of any infirmity in the charge itself, since given at his instance, nor because of any explanatory charge given by the court, if such explanation were proper in itself; and that the explanatory oral instruction given by the court was proper we do not doubt. Barnard v. State, 88 Ala. 111, 6 South. Rep. 752. We find no error in the record, and the judgment of the circuit court is affirmed.

(95 Ala. 163)

CHENEY *et al.* v. KELLY *et al.*

(Supreme Court of Alabama. Jan. 6, 1892.)

ATTORNEYS—RIGHT TO COMPENSATION.

Where a firm of attorneys is retained to procure the granting of a license to sell liquor, under an agreement that they are to be paid a certain sum cash and the balance "whenever a license to sell liquor is obtained or can be obtained," they cannot recover the balance when their efforts to procure a license prove fruitless, but afterwards a license is obtained through the efforts of other parties.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Action by Kelly & Smith against E. E. Cheney and others for $250 for services rendered as attorneys. Judgment for plaintiffs. Defendants appeal. Reversed.

Gordon McDonald, for appellants. *Kelly & Smith, in pro. per.*

STONE, C. J. The claim set forth in the two counts of the complaint is substantially as follows: The Anti-Prohibition Society of Anniston, a voluntary association of the persons sued in this action, employed Kelly & Smith, attorneys, to represent them, or any member of the society, in an effort to procure a license to retail spirituous, vinous, or malt liquors in precinct 15, Calhoun county, the precinct in which Anniston has its *situs*. The attorneys were to represent the applicants for license in any and all courts that might become necessary in the attempt to obtain such license. The fee to be paid Kelly & Smith was $250 cash, and other "two hundred and fifty dollars to be paid whenever a license to sell liquor is obtained or can be obtained in said precinct." The cash payment was presently made. This suit is for the deferred payment, and the complaint avers "that a license issued authorizing the sale of spirituous, vinous, and malt liquors in Anniston as early as September 15, 1890." Whether the police jurisdiction of Anniston extends to and includes the whole of precinct 15 is not shown. It may admit of question whether the establishment of a right to obtain a license to retail within the city of Anniston is a compliance with the agreement to establish such right in precinct 15. We will not decide this question, as we prefer to place our ruling on a different ground.

The present suit does not count on a written retainer. The proof shows the defendants executed no writing. The testimony most favorable to plaintiffs shows that two persons, being a majority of a committee of three, representing a voluntary association consisting of a large number of persons, and known as the "Anti-Prohibition Society of Calhoun County," entered into an oral agreement with the attorneys, engaging their services to represent the association in certain matters of prospective litigation. Plaintiffs aver that the event has happened or transpired on which the second payment was to become due and demandable, and on this they base their right of recovery. The plaintiffs at the time of the retainer executed a receipt acknowledging the payment to them of $250, specifying the professional services they bound themselves to render, and naming the event or condition on the occurrence of which the promise to make the second payment depended. It is stated in the receipt that "said Anti-Prohibition Society of Calhoun County, Alabama, have this day employed Kelly & Smith as their attorneys to represent their interest in precinct No. 15 of said county, [Anniston,] and make such application to the probate court as may be necessary to thoroughly test the right to procure license to sell liquor in precinct No. 15, and to secure such license, if the same can be legally done, and to represent such applications of appeal, or otherwise, as may be necessary, either to supreme court, circuit court, or city court, one or

all, as may be necessary, until it is ascertained whether license can be secured, or not. * * * Terms of employment, $259.00 cash, the receipt of which is acknowledged, and $250.00 to be paid whenever a license to sell liquor is obtained, or can be obtained, in said precinct." This receipt was put in evidence by plaintiffs for the purpose of proving the terms of the retainer. It was proved, and not denied, that Kelly & Smith did render professional services in endeavoring to procure a license to retail liquors in said precinct, particularly in the case of Olmstead v. Crook, 89 Ala. 228, 7 South. Rep. 776; but in all their efforts they were unsuccessful. In a later case, (Ex parte Mayor, 90 Ala. 516, 7 South. Rep. 779,) it was decided by this court that there was no statute authorizing the city council of Anniston to enact an ordinance prohibiting sales of liquors in said city, but that they could only regulate such sale by license. We therefore decided that the prohibition ordinance adopted by the city council was in excess of its authority, and was invalid. The result of this decision was to open up the way for obtaining a license to retail liquors in the city of Anniston. The case last referred to (90 Ala. 516, 7 South. Rep. 779) arose in the matter of Mrs. Untreiner's conviction for violating the prohibition ordinance of the city of Anniston. She was not a member of the Anti-Prohibition Society of Anniston, and had nothing to do with its plans and purposes. She was an outsider, and Kelly & Smith neither represented her in that litigation, nor did the Anti-Prohibition Society or any of its members, so far as we are informed, request them to do so. They were not of counsel in the case. As we understand the contract of retainer in this case, as evidenced by the written receipt, the professional services to be rendered by the attorneys were the consideration—the only consideration—which purported to uphold and could uphold the promise. Without such services, or the agreement to render them, the promise had no consideration, and would not maintain an action. Bish. Cont. (Enlarged Ed.) § 40; Hamlin v. Wheelock, 42 Hun, 530. And, the promise to pay being made contingent on success, it was not enough that services should be rendered. They must have been successfully rendered, to entitle the plaintiffs to the additional $250. To test this: When the plaintiffs had rendered all the professional services they claim to have rendered, the right to obtain a license to retail liquors in Anniston had not been established. If no proceedings had been taken after that time, and matters had remained *in statu quo*, no one would contend the present action could be maintained. A complete answer to such suit would be that the promise to pay was conditional, and the condition had not been complied with. Now, all that was subsequently done, and which it is claimed is a performance of the condition, was done by another; and neither the plaintiffs nor defendants in this suit had any participation therein. So far as they were or are concerned, it was the merest accident. It was not a performance of the condition on which the payment of the second $250 was made dependent. The judgment of the city court is reversed, and, rendering the judgment that court should have rendered, it is ordered and adjudged that the defendants go hence, and recover of plaintiffs the costs of this suit in the court below and in this court.

Reversed and rendered.

(94 Ala. 14)

PATE v. STATE.

(*Supreme Court of Alabama.* Jan. 8, 1892.)

HOMICIDE—EVIDENCE OF THREATS—REFUSAL TO FLEE—CIRCUMSTANTIAL EVIDENCE—CHARACTER—REASONABLE DOUBT.

1. On trial for murder, threats made by defendant against deceased four months before the killing are admissible in evidence.

2. Unlawful relations existing between defendant and the wife of deceased may be shown as evidence of motive.

3. Evidence of the refusal of defendant to flee when he heard that he was to be arrested for the crime is inadmissible, in the absence of any evidence of flight offered by the state.

4. A charge that, no matter how strong the circumstances may be, if, under all the evidence, the jury believe that defendant might not have committed the crime, they must acquit, is properly refused.

5. A charge that if the evidence of defendant's good character generates a doubt in the jury's mind, apart from all the other evidence in defendant's favor, they must acquit, is properly refused.

6. It is proper to refuse to charge that, if the evidence of a witness for the state is directly contradicted by a witness for defendant, the jury may reject the testimony of either; but the burden of proof being on the state, "if all the other evidence is in equipoise," they must acquit.

7. Where there is a defense of an *alibi*, the evidence in support of it should be considered in connection with all the other evidence in the case, and, if on the whole evidence there is reasonable doubt of defendant's guilt, he should be acquitted.

Appeal from criminal court, Jefferson county; SAMUEL E. GREEN, Judge.

Rafe Pate was indicted for the murder of one John Orr, and was convicted of murder in the second degree. On the trial it was proved by the state that Sunday morning, March 15, 1891, the body of John Orr was found on Twenty-Fourth street, in the city of Birmingham, between Ninth and Tenth avenues; that he had a wound in his temple, caused by a pistol or rifle ball, which caused his death. William Robinson, a witness for the state, testified that on Saturday night, the 14th of March, 1891, he was walking along Twenty-Fourth street, between Ninth and Tenth avenues, and heard the defendant and John Orr, the deceased, disputing, and heard John Orr say, "Go away, and let me alone. You have got one child by my wife; you ought to be satisfied;" that he went on up the street, and when about 75 yards away heard a pistol shot from the direction where he left the two men standing; that this was between 9:30 and 10 o'clock at night. The state introduced testimony of an unlawful intimacy between defendant and the wife of John Orr. The state introduced testimony of threats

made by defendant against deceased in the November preceding the killing in March. The defendant offered to prove that he gave himself up when he heard there was a warrant for him, but this evidence was excluded. The evidence introduced for the defendant tended to prove an *alibi*. There was also evidence introduced by the defendant to prove his good character. John Lewis, as a witness for defendant, testified that he knew the witness Robinson, and that on March 14th he was with him at Hood's elevator from about 6 o'clock in the afternoon till about 10 o'clock at night, when he closed up the elevator, and they went down the street, and separated about 10:30 or 11 o'clock. The court refused to give the following written charges, requested by defendant: (1) "Gentlemen, I charge you that, no matter how strong the circumstances may be in this case, if, under all the evidence, you believe the defendant might not have committed the crime, then you must find him not guilty." (2) "Gentlemen, I charge you that if the defendant has proven a good character, that you may consider it, and, if it generates a doubt in your mind apart from all the other evidence in his favor, then you must find the defendant not guilty." (3) "Gentlemen, if the testimony of the witness William Robinson is directly contradicted by the witness John Lewis, and you cannot reconcile their testimony, then you may reject either; but you cannot reject the testimony of a witness capriciously, and the burden of proof being upon the state, if all the other evidence is in equipoise, you must find the defendant not guilty." (4) "Gentlemen, it is not necessary that the evidence in support of an *alibi* should cover every moment of time in which the offense was committed. It is only necessary to create a reasonable doubt that the defendant was there, and if, under all the evidence, there is any reasonable probability that the defendant was not present when John Orr was killed, then you must find him not guilty." Defendant appeals. Affirmed.

Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was tried for the unlawful killing of John Orr, and convicted of murder in the second degree.

Evidence of threats made by the defendant against the deceased previous to the killing was admissible against him. The weight to be given such evidence depends more or less on the character of the threats, the length of time intervening, and the attending circumstances. Griffin v. State, 90 Ala. 599, 8 South. Rep. 670; Long v. State, 86 Ala. 43, 5 South. Rep. 443; Barnes v. State, 88 Ala. 204, 7 South. Rep. 38; Evans v. State, 62 Ala. 6.

It was competent to show that unlawful intimate relations existed between the defendant and the wife of the deceased, and this could be shown by the acts of the parties, and, so far as the defendant is concerned, his voluntary statements to that effect were admissible against him. Such relations are evidence of motive. Marler v. State, 67 Ala. 55, 68 Ala. 584; Johnson v. State, 17 Ala. 618; Hall v. State, 40 Ala. 698.

It is permissible for the state to introduce evidence of flight on the part of the defendant after the commission of the offense, but the refusal of the defendant to flee, there being no evidence of flight offered by the state, is not admissible for him, as tending to establish his innocence. The admission of such evidence would be to allow him to make testimony for himself. Jordan v. State, 81 Ala. 31, 1 South. Rep. 577; Chamblee v. State, 78 Ala. 466; Oliver v. State, 17 Ala. 587.

In criminal cases the law only requires that the jury shall be satisfied of the defendant's guilt beyond a reasonable doubt. The state is not required by its proof to exclude possibilities, or establish the defendant's guilt beyond all doubt. Evidence of good character must be considered with the other evidence in the case, and if, upon the whole evidence, including that of good character, the jury are satisfied beyond a reasonable doubt of his guilt, it is their duty to convict. When the law says that good character alone may be sufficient to generate a doubt, it does not mean that it may be considered independent of the other evidence in the case, but in connection with it. Williams v. State, 52 Ala. 413. The first and second charges asked by defendant were properly refused.

The third charge requested was also properly refused. Although the testimony of the witnesses William Robinson and John Lewis may have been irreconcilable, there may have been other evidence in the case so bearing upon their testimony as to satisfy the jury of the credibility of the one or the other of these witnesses. The charge is argumentative also.

When the defense is that of an *alibi*, the law casts the burden upon the defendant to reasonably satisfy the jury that he was elsewhere at the time of the commission of the offense. Pellum v. State, 89 Ala. 32, 8 South. Rep. 83. This rule of law, as applicable to the defense of an *alibi*, does not require of the defendant to reasonably satisfy the jury of his exact whereabouts every moment of the time necessary to cover the period when the offense was committed, but he is required to prove such a state of facts or circumstances as to reasonably satisfy the jury that he was elsewhere than at the place where and at the moment when the offense was committed. 1 Amer. & Eng. Enc. Law, pp. 454, 455; 1 Bish. Crim. Proc. §§ 1066, 1067; Pellum v. State, 89 Ala., 8 South. Rep., supra; Allbritton v. State, (Ala.) 10 South. Rep. 426.

The first part of the charge requested in reference to the *alibi* was objectionable, for the reason that it was calculated to mislead. The jury might have inferred from the charge that the *alibi* was sufficiently established, although the testimony adduced in support of it did not reasonably satisfy the jury that he was elsewhere when the offense was committed. A case will not be reversed for refusing a charge which calls for an explanation. We lay down the true rule to be that

proof adduced to support an *alibi* should be considered by the jury with the other evidence in the case; and if, upon the whole evidence, there is a reasonable doubt of the defendant's guilt, he should be acquitted. Affirmed.

(94 Ala. 35)

JOHNSTON v STATE.

(*Supreme Court of Alabama.* Jan. 28, 1892.)

COURTS—TERM-TIME — SERVING COPY OF INDICTMENT — JURY — HOMICIDE — EVIDENCE — DYING DECLARATIONS—INVOLUNTARY MANSLAUGHTER—SENTENCE FOR MISDEMEANOR—REMARKS OF JUDGE.

1. The act fixing the time when the courts composing the ninth judicial circuit should be held declares, "in the county of Cherokee on the second Monday in January and July," and, after fixing the time for each county, provides "that this act shall not take effect until after the spring terms of said courts are held for the year 1891. Approved February 14, 1891." *Held*, that the term of the circuit court in Cherokee county which began the second Monday in July, 1891, was authorized by the act of February 14th, as the spring term of the court had expired in April following the adoption of such act.

2. Under Code, § 4449, it is sufficient to serve a copy of the indictment and *venire* on a defendant in person, "or on counsel appearing for him."

3. Where it appeared that a certain person was summoned as a regular juror for the week, but did not attend, that the regular jury had been impaneled without him, and that his name was on the *venire*, a copy of which was served on defendant's counsel, it was not error for the court to order another name to be drawn, on such juror failing to answer to his name when called.

4. Where a person is charged with having unlawfully killed his wife, evidence of his unlawful relations with another woman are admissible, as tending to show motive.

5. In a criminal action, evidence on the part of a defendant that he offered to surrender to a sheriff or refused to flee is inadmissible.

6. It is not proper to ask one witness if another witness who had testified to certain language used by defendant was not mistaken in his statement, as he should have been asked to give his recollection of the language used.

7. In objecting to the exclusion of a question, defendant's counsel stated to the court that the supreme court of the state had decided that such questions were admissible, to which the court replied, "Let them decide it again." *Held*, that the remark of the court simply implied a doubt as to the correctness of counsel's recollection as to the ruling of the supreme court, and that, as the court withdrew the remark, defendant was not prejudiced.

8. On a murder trial, a statement of deceased was inadmissible as a dying declaration, where it was not previously shown how long it was after the shooting before the declaration was made.

9. It is not necessary, to constitute the offense of involuntary manslaughter, that defendant should have intentionally pointed a pistol at deceased, as it is sufficient if he intentionally pointed the pistol, though he supposed it was not loaded, at another, and it went off and killed deceased; for Acts 1888–89, p. 67, make it an offense to point a pistol, whether loaded or not, at any person.

10. On a murder trial it was not error for the court to refuse to charge "that, if the jury believe from the evidence that defendant is a man of good moral character, then that itself may generate a doubt, although none otherwise exists," as such charge would tend to mislead.

11. The judgment of the court that defendant, convicted of a misdemeanor, perform hard labor for the county for 15 months and pay the costs of the prosecution, will be corrected on appeal, as the limit in cases of misdemeanor is 8 months.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge.

Robert W. Johnston was indicted for murder in the first degree, and from a conviction of manslaughter appeals. Modified.

On the call of the case in the lower court, the defendant moved to quash the *venire*, on the ground that he had not been individually served with a copy of the indictment and a list of the jurors summoned as a special *venire* to try his case, but that the said copy of the indictment and *venire* was served on his attorney, although he, the defendant, was in jail at the time. The court overruled this motion to quash, and the defendant duly excepted. The evidence for the state tended to show that, while the defendant was cleaning and oiling his pistol, he pointed and snapped it at his little children and his wife, without knowing that it was loaded; and the pistol went off, and the ball struck the said Margaret Johnston, defendant's wife, which wound resulted in her death. Against the objection and exception of defendant, the court allowed the state to prove that the defendant had told a witness "that he had had dealings with a woman by the name of Snow fifty times, he reckoned." The state introduced as witness one Pollard, who testified that one night when the defendant was passing his house with some prisoners his wife asked him when he would be back, to which he replied, "It is none of your G——d——d business." On the cross-examination of one Young as a witness, the defendant asked said witness that, if said Pollard did testify as above set forth, "if he was not mistaken in that statement." The court sustained the state's objection to this question, and the defendant duly excepted. The bill of exceptions then recites: "Defendant's counsel stated to the court that the supreme court of this state had decided that such questions were admissible, to which the court replied, 'Let them decide it again.' To this remark of the court the defendant then and there duly excepted. The court withdrew said remark." There was evidence introduced as to the general good character of the defendant, and also that he and his wife, whom he killed, were upon very good terms, and always seemed to treat each other well and considerately. The court gave its general charge to the jury in writing. The defendant separately excepted to the following portion of the said charge as given: "If the defendant pointed the pistol at his child, believing it was not loaded, and snapped it, and the pistol went off and killed Margaret Johnston, and this occurred in this county some time last January or February, he would be guilty of manslaughter in the second degree." The defendant also separately excepted to that part of the general charge which was as follows: "If this [the shooting of Mrs. Johnston] was done while snapping the pistol at his child, it was unlawful." And the defendant also separately excepted to the expression in the general charge that "if, by accident, Mrs. Johnston was in range,

and was shot and killed." The defendant also separately excepted to the refusal of the court to give the following written charges requested by him: (1) "Unless the jury find from all the testimony that the defendant intentionally pointed the pistol at his wife when he shot her, then the jury must find the defendant not guilty." (2) "That if the jury believe from the evidence that defendant is shown to be a man of good character, then that itself may generate a doubt, although none otherwise exists." (3) "Unless the jury believe from all the evidence that the defendant pointed the pistol at his wife intentionally, then they cannot find him guilty."

J. L. Burnett, for appellant. *Wm. L. Martin*, Atty. Gen., for the State.

COLEMAN, J. It is argued that the court at which the defendant was tried was held at a time not authorized by law. The court began on the 2d Monday of July, 1891. The act fixing the time when the courts composing the ninth judicial circuit should be held declares as follows: "(1) In the county of Cherokee on the second Monday in January and July, and at each term may continue three weeks." After fixing the time for each county, the act provides "that this act shall not take effect until after the spring terms of said courts are held for the year 1891. Approved February 14, 1891." When this act was approved the courts were then being held in the ninth judicial circuit, under the law in force as fixed by the Code, and by virtue of its provisions the last court held in this circuit began on the ninth Mondays after the fourth Mondays in January and July, and might continue for four weeks. Code, § 749. The last court to be held in this circuit under the law as fixed by the Code, and then in force, would expire some time in April following the adoption of the act of February 14, 1891. It was the purpose of the legislature that these terms should not be interfered with or affected by the new order or arrangements, and to accomplish this result it was provided that the later act should not take effect until after those terms had been completed. We think there is nothing in this objection.

Under section 4449 of the Code, it is sufficient to serve a copy of the indictment and *venire* upon the defendant in person or counsel appearing for him. Reese v. State, 90 Ala. 626, 8 South. Rep. 818. The name of John A. Kennedy was drawn from the hat as a juror in the case. The record shows that John A. Kennedy had been summoned as a regular juror for the week, but did not attend, and the regular jury had been impaneled without him. His name was on the *venire*, a copy of which had been served upon the defendant's counsel. The rule requires that, when the day fixed for the trial of one charged with a capital offense is a day of the week in which the order setting a day for the trial is made, the copy served upon the defendants shall include the names of those in attendance and impaneled as regular jurors for the week; but, when the day fixed for the trial is a day of a week succeeding the week in which the order is made, the list of jurors to be served upon the defendant must include the names of the jurors summoned to serve as regular jurors for that week. Shelton v. State, 73 Ala. 5; Posey v. State, Id. 490; Floyd v. State, 55 Ala. 61. The juror Kennedy failing to answer, the court, against the objection of the defendant, ordered the drawing from the hat to proceed. The defendant at the trial assigned no grounds for his objection, and now insists that the court should have ordered another juror summoned to supply his place. The case is not covered by section 4322 of the Code, where this course is prescribed by statute. There was no mistake in the name of the juror John A. Kennedy. It was simply the case of a juror who had been summoned and failed to attend. The principle applying here was decided in Hall v. State, 51 Ala. 13. In the latter case, a juror failing to answer to his name when drawn, the court ordered another name to be drawn, and it was held to be without error. See, also, Johnson v. State, 47 Ala. 34. The reasons for the rule are there stated. There is nothing in the objection that the name W. F. Roberts appeared in the list served upon defendant's counsel when the correct name was W. L. Roberts. It was the duty of the trial court to examine the original and copy, and determine whether the copy was correct. That was done in the present case. The record shows that the copy served contained the name of W. L. Roberts, and from an inspection of the original sent up to this court, but which was unnecessary, our conclusion coincides with the trial court.

When a person is charged with having unlawfully killed his wife, it is permissible to prove unlawful relations with another woman. It is evidence tending to show motive.

It is not permissible for a defendant to make evidence for himself by showing that he offered to surrender to the sheriff or refused to flee. On these propositions see Pate v. State, 10 South. Rep. 665, (present term,) and authorities cited.

It is not proper to ask one witness if another witness who had testified as to certain language used by the defendant was not mistaken in his statement. The witness thus interrogated should give his recollection of the language used. It is the province of the jury to draw the conclusion in such cases.

We understand the remark of the court to which exception was reserved as simply implying a doubt as to the correctness of counsel's recollection, in the statement made, as to the ruling of the supreme court. The court withdrew the remark, and we are unable to perceive how injury resulted to defendant.

No predicate was laid for the introduction of the statement by the deceased as a dying declaration, and it was not shown how long after the shooting before the declaration was made. Acts and declarations, to be admissible under the principle of *res gestæ*, must be substantially contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character.

Fonville v. State, 91 Ala. 42, 8 South. Rep. 688. The declarations were not admissible for any purpose.

Our statute divides manslaughter into two degrees, as follows: "Manslaughter by voluntarily depriving a human being of life is manslaughter in the first degree, and manslaughter committed under any other circumstance is manslaughter in the second degree." Code, § 3781. "Involuntary manslaughter" has been defined to be the unlawful killing of a human being without malice, either expressed or implied, and without intent to kill or inflict the injury causing death, committed accidentally in the commission of some unlawful act not felonious, or in the improper or negligent performance of an act lawful in itself. 6 Amer. & Eng. Enc. Law, p. 588. If an act be done unlawful in itself, but without mischievous intention, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act which ensued was unlawful. Roscoe, Crim. Ev. § 721. Misadventure, says Blackstone, happens in consequence of a lawful act; involuntary manslaughter, in consequence of an unlawful act. 4 Bl. Comm. § 192. A. whips a horse on which B. is riding; whereupon the horse springs out, and runs over a child and kills it; this is manslaughter in A., but misadventure in B. 1 East, P. C. 255. Manslaughter in the second degree is when the homicide results from the commission of a misdemeanor or civil tort, but which result was not intended or contemplated. Mitchell v. State, 60 Ala. 33.

By act of the legislature, the pointing of a gun or pistol or other fire-arm at another, whether loaded or unloaded, is made an offense. Acts 1888-89, p. 67. There is evidence—that of the witness Wilson—which tended to show that the defendant was snapping his pistol at a child when it went off, and killed deceased. The charge of the court upon this phase of the evidence was neither abstract nor erroneous. It was not necessary that the defendant should have intentionally pointed the pistol at the deceased to constitute the offense. If he intentionally pointed it at the child, and while doing this unlawful act it went off and killed deceased, although he may have supposed it was not loaded, he was guilty, at least, of involuntary manslaughter. The killing was not a misadventure.

Good character may generate a doubt in cases where, without such proof, the jury would be satisfied beyond a reasonable doubt of the defendant's guilt. But the jury are not authorized to consider the proof of good character, independent of the other evidence in the case. It is taken into consideration with all the evidence, weighed with it, and if, upon the whole evidence, the jury entertain no reasonable doubt of guilt, they must convict. The manner of expression used in the charge requested was calculated to convey to the jury that they might consider the proof of good character by itself, or independent of the other evidence, and, when separately considered, might generate a doubt. We have but recently condemned a somewhat similar charge in the case of Pate v. State, (present term,) 10 South. Rep. 665, and it is liable to the same objection as the charge criticised in Williams v. State, 52 Ala. 412. We have examined the exceptions to the general charge of the court and each assignment of error, and find no reversible error in the record. The judgment of the court that the defendant perform hard labor for the county for a term of 15 months, to pay the cost of the prosecution, was erroneous. Eight months is the limit, in cases of misdemeanor, for which a person may be sentenced to pay cost. The judgment will be here corrected in this respect, and as thus corrected is affirmed. Bradley v. State, 69 Ala. 318. Affirmed.

(94 Ala. 97)

OWENS *et al.* v. STATE.

(*Supreme Court of Alabama.* Jan. 28, 1892.)

ADULTERY—EVIDENCE.

1. On a prosecution of a man and woman for adultery, evidence of the previous marriage of the woman to another man is admissible.

2. Such previous marriage may be proved, as against the woman, by the declarations and admissions of the alleged former husband and the woman.

3. Though the evidence may show that defendants are guilty of bigamy, that does not bar a conviction for adultery.

4. Where defendants are charged with living together in a state of adultery or fornication, and the evidence shows that they cohabited some time before they were married, it is not error to refuse to charge that defendants cannot be convicted unless the jury find that the woman was previously married to another man.

5. The fact that defendants believed that one of them—the woman—was not in fact married to the alleged former husband, is no defense to the charge of adultery, if the woman was in fact so married.

Appeal from circuit court, Escambia county; JOHN P. HUBBARD, Judge.

Joe Owens and Prudence Owens were convicted on the charge of living together in adultery or fornication. The court charged the jury as follows: "Although the facts in this case might show the offense of bigamy by the defendant Prudence, you can find her guilty of adultery, if you believe beyond a reasonable doubt that she is guilty of adultery. This is not a case where the misdemeanor is merged in the felony, even if you should believe she was guilty of bigamy." The court refused the following charges, requested by defendants: "(1) Before the jury can find the defendants guilty in this case, they must find beyond all reasonable doubt, from the evidence, that the defendant Prudence Owens was married to the man Beatty. A mere adulterous intercourse with him, no matter for how long continued, will not be sufficient. (2) The court charges the jury that, if they believe from the evidence that it was understood by the defendants that Beatty and the defendant Prudence were not in fact married, they must find for the defendants." Defendants appeal. Affirmed.

Davidson & McGowan, for appellants. *Wm. L. Martin*, Atty. Gen., for the State.

WALKER, J. The defendants, Joe Owens and Prudence Beatty, were convicted on the charge of living together in a state of

adultery or fornication. The cohabitation was not denied, but the defendants claimed that they had been duly married. There was evidence tending to show that at the time of their alleged marriage the female defendant was the wife of one Beatty. Evidence was admitted without objection to show that the defendant Prudence and the man Beatty lived in the same house as husband and wife, treated each other as husband and wife, and so called each other. Against the objection of the defendants a witness was permitted to state that while the defendant Prudence and the man Beatty lived together a child who lived with them called the man Beatty father, and that the man Beatty called the defendant Prudence his wife. This evidence was admissible against the defendant Prudence. Marriage may be proved by the admissions and declarations of the parties; and the man's recognition of himself as the parent of the woman's child, and the fact that he allows the child to call him father, are circumstances tending to show marriage. Williams v. State, 54 Ala. 131; Green v. State, 59 Ala. 69; 2 Greenl. Ev. § 462. This evidence being admissible against one of the defendants, the other defendant was not entitled to have it entirely excluded. The remedy of the defendant Owens, to prevent the use of this evidence against him, was to ask instructions limiting its effect, so as to confine its influence to his co-defendant, against whom alone it was admissible. Williams v. State, 81 Ala. 1, 1 South. Rep. 179; Alsabrooks v. State, 52 Ala. 24.

The offense of bigamy is complete when the second marriage is complete, without proof of subsequent cohabitation. Beggs v. State, 55 Ala. 108. The offense of adultery is not necessarily involved in bigamy, and there may be a prosecution for living together in a state of adultery, although the parties may also be guilty of bigamy. There was no error in the charge of the court on this subject.

The first charge requested by the defendants was properly refused. There was evidence tending to show that they lived together in a state of fornication before their alleged marriage. It was not necessary to prove adultery to support the indictment. If there had been no evidence that the defendants cohabited together before formal marriage, it would have been necessary to show the invalidity of that marriage.

If the defendant Prudence and the man Beatty were in fact married, the understanding of the defendants to the contrary would not relieve their cohabitation of its adulterous character. This consideration discloses the incorrectness of the second charge requested by the defendants. Affirmed.

(94 Ala. 42)

MOODY v. STATE.

(*Supreme Court of Alabama.* Feb. 4, 1892.)

CRIMINAL LIBEL—INDICTMENT.

Under Code, § 3771, providing that any person who publishes a libel of another, which tends to provoke a breach of the peace, shall be guilty of a criminal offense, an indictment for criminal libel, which fails to charge that the libel tended to provoke a breach of the peace, is insufficient.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

John J. Moody was indicted and convicted of criminal libel, and appeals. Reversed.

Wm. L. Martin, Atty. Gen., for the State.

WALKER, J. Mr. Wharton, in discussing the offense of libel under the common law, says: "Whatever, if made the subject of civil action, would be considered libelous without laying special damage, is indictable in a criminal court." 2 Whart. Crim. Law, (9th Ed.) 1598. Another standard text-writer on criminal law thus defines the offense of libel: "It is any representation in writing, or by pictures, effigies, or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable." 2 Bish. Crim. Law, (7th Ed.) § 907. Again, it is stated in a recent commentary on the subject that "any publication which has a tendency to disturb the public peace or good order of society is a libel by the common law, and is indictable as such." Newell, Defam. 937. In a civil action for damages this court has given the following definition of libel: "Generally, any false and malicious publication, when expressed in writing or printing, or by signs or pictures, is a libel, which charges an offense punishable by indictment, or which tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society. This general definition may be said to include whatever tends to injure the character of an individual, or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse." Publishing Co. v. Crudup, 85 Ala. 519, 5 South. Rep. 332. The above definitions are to be looked to in determining whether a publication is libelous; for, while our Criminal Code provides for the punishment of libel, yet it does not define the offense further than to state the fact or circumstance which renders the libel punishable as a crime. It is clear, however, that the comprehensive definitions of criminal libel under the common law include offenses which are not punishable under our statute. The statute on the subject provides that "any person, who publishes a libel of another which may tend to prove a breach of the peace, must be punished, on conviction," etc. Code Ala. § 3771. This is a general provision prescribing the kind of libel which is to be punished criminally. A publication which is a libel within the definitions above quoted is not within the terms of the statute unless it "may tend to provoke a breach of the peace." That the publication has such a tendency is the fact which renders the libel punishable under the statute. The offense which the statute denounces is not shown unless it is made to appear that the publication is one which may tend to provoke a

breach of the peace. An indictment is insufficient when it omits to state this material ingredient of the statutory offense. When the case of Reid v. State, 53 Ala. 402, was decided, the statute, as it now stands, was not in existence. The Revised Code of 1867 was in force at that time. In that Code, as also in the Code of 1876, the section corresponding with section 3771 of the present Code was in the following words: "Any person who publishes a libel of another person, or who sends to another person a threatening or abusive letter, which may tend to provoke a breach of the peace, must be punished, on conviction, by fine and imprisonment in the county jail, or hard labor for the county, the fine not to exceed in any case five hundred dollars, and the imprisonment or hard labor not to exceed six months." Rev. Code 1867, § 3553; Code 1876, § 4106. In the case above cited the court evidently construed the words, "which may tend to provoke a breach of the peace," as having reference to the act of sending a threatening or abusive letter. The clause to which the words quoted had reference in the section as it stood in the former Codes is wholly omitted from section 3771 of the present Code. The language of the section as thus changed makes it perfectly plain that the provision is only for the punishment of libels which may tend to provoke a breach of the peace. The existence of this pernicious tendency is the fact which renders the libel a public offense, and punishable under the statute. An indictment which merely charges the publication of the libel, without stating the one circumstance which the statute makes the test of the criminality of the act, does not show the commission of the particular offense which is denounced by the statute. The indictment in the present case is without any averment as to the tendency of the publication to provoke a breach of the peace. For the lack of such averment the indictment must be pronounced insufficient. We do not regard the provision of section 3772 as dispensing with the necessity of making such averment. That section merely dispenses with the necessity, in charging the libel, of stating extrinsic matter by way of inducement or innuendo. When the law made it a criminal offense merely to publish a libel of another person, it was not necessary to state the tendency of the publication to provoke a breach of the peace. But when, as a result of a change of the statute, the libel is not criminally punishable unless it may tend to provoke a breach of the peace, the existence of such tendency must be charged as a constituent element of the offense. Reversed and remanded.

(95 Ala. 629)

HOOD v. BLAIR, Sheriff, *et al.*

(Supreme Court of Alabama. Feb. 4, 1892.)

SHERIFFS—FAILURE TO EXECUTE PROCESS—MOTION FOR SUMMARY JUDGMENT—AMENDMENT.

1. Under Code, §§ 3326, 3333, providing that where the sheriff fails to make the money on an execution issued by a justice of the peace, which by due diligence he might have made, a summary judgment for the amount may be rendered against him on motion, and that where the amount exceeds $100 the motion must be made in the circuit court, a motion made in the circuit court for judgment against the sheriff for failing to collect two executions issued by a justice, one for $100 and one for $60, is properly dismissed, as the court has no jurisdiction of the $60 included.

2. It is error to dismiss the motion finally on the ground that the objections suggested by the demurrer cannot be removed by amendment, since the circuit court would have jurisdiction of a motion for summary judgment on the $100 execution alone.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge.

Motion by S. M. Hood against John S. Blair, sheriff, and the sureties on his official bond, for summary judgment for $100 and $60, the amounts of two judgments recovered by movant before a justice of the peace, and executions for which were placed in Blair's hands. A demurrer to the motion was sustained, and the motion was dismissed; the court reciting in its order that the objections raised by the demurrer could not be cured by amendment. Petitioner appeals. Reversed.

Walden & Son, for appellant. *Burnett, Cardon & Daniel*, for appellees.

WALKER, J. A summary judgment may be rendered against a sheriff for failing to make the money on an execution issued by a justice of the peace, which by due diligence might have been made, for the amount of the execution and interest, and 5 per cent. damages on the amount thereof; and the motion must be made in the circuit court when the amount claimed, by reason of interest or damages, exceeds the sum of $100. Code, §§ 3326, 3333. Under former statutes, such judgments could not be rendered against sheriffs for any negligence or misfeasance on their part in levying process issued by, and returnable before, justices of the peace. Thompson v. Acree, 69 Ala. 178. The motion in this case disclosed a state of facts authorizing a summary judgment against the sheriff for failing to make the money on the execution issued on the judgment for $100. The circuit court was without jurisdiction to render such judgment for the failure to make the money on the execution on the judgment for $60. That matter presented a case for a summary judgment by a justice of the peace. The motion, as made, presents two separate and distinct causes of action, which could not be joined, and as to one of which the circuit court was without jurisdiction. The demurrer to the motion upon this and other grounds was properly sustained. But the motion could have been amended so as to cure its defects.

The circuit court erred in adjudging that the objections suggested by the demurrers could not be removed by amendment, and in dismissing the motion on that ground. A mere failure by the court to tender an opportunity to amend before dismissing the motion would not be reversible error, in the absence of any showing that the right to amend was denied. Mohon v. Tatum, 69 Ala. 466. In such case, it is not made to appear that the appellant was denied a privilege to which he was enti-

tled. There is simply a failure to show that the question as to the existence of the right was raised in the lower court. When, however, this right is expressly denied by the court, and the motion is dismissed on this ground, it sufficiently appears that the appellant was deprived of a valuable right, and this error to his injury entitles him to a reversal. Reversed and remanded.

(69 Miss. 452)

MEMPHIS & C. R. CO. v. JOBE.

(*Supreme Court of Mississippi.* Oct., 1891.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action against a railroad company for injuries to plaintiff, caused at a crossing by a train running at an unlawful speed, where the principal question is as to plaintiff's contributory negligence, it is error to charge that plaintiff, though guilty of negligence, can recover, "unless this negligence was in whole or in part the cause of the injury."

Appeal from circuit court, Alcorn county.

Action by M. J. Jobe against the Memphis & Charleston Railroad Company for personal injuries. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

The injuries were alleged to have been received in a collision with one of the railroad trains, while plaintiff was crossing the track of the railroad in the city of Corinth, and when the train was running at a greater rate of speed than six miles an hour. The damages were laid at $10,000. The defendant pleaded the general issue, and several special pleas setting up the contributory negligence of Jobe at the time of the collision. Issue was joined on the special pleas. Plaintiff, at the time of the injury, was a stout and active man. He was in the habit of crossing the railroad at the point where he was injured. On the occasion of his injury he undertook to cross it when he knew the train was due. He was driving two horses, gentle, and at one time good, but then broken down and poor. The harness was plow gear, with no breeching to enable the horses to hold back. There was a descent towards the track from the direction Jobe was driving. Before going down the descent, Jobe stopped his team long enough to look and listen, and, not seeing or hearing any train, proceeded to cross the track, and, as he says: "I looked up the railroad, and then down it, and before I knew it my horses' heads were somewhere about the track," and the train then came along so rapidly that "it bolted right on me before I saw it." Jobe says he never heard the train, though there was evidence for the defendant to the effect that appellant's trains could be both seen and heard from the point at which Jobe stopped before attempting to cross the track.

Mayes & Harris and *Inge & Burge*, for appellant. *Pitts & Meeks* and *J. M. Boone*, for appellee.

COOPER, J. This case is another illustration of the danger of unnecessarily multiplying instructions. On this appeal we are confined to the consideration of the errors appearing in the instructions for the plaintiff, but we suggest that on the next trial counsel for both parties may, with full justice to the issue involved, reduce the number of charges requested. Several of the instructions of the plaintiff are subject to just criticism, but the voluminous and numerous charges for the defendant have probably cured their defects. But the thirteenth instruction for the plaintiff is erroneous, and is not cured by any other. By that the jury was told that, "although they may believe from the evidence that the plaintiff, Jobe, was guilty of negligence in approaching the railroad at the time of the injury, still, unless they further believe from the evidence that this negligence was in whole or in part the cause of the injury, they will find for the plaintiff." There was practically but one question for decision by the jury, which was whether the plaintiff was guilty of contributory negligence in going upon the track of the defendant in front of a rapidly approaching train, which was confessedly being run at a greater rate of speed than allowed by law within an incorporated town. The whole evidence shows that almost instantly after the plaintiff passed upon the road he was struck by the train. It is impossible to conceive of an absence of causal connection between the negligence of the plaintiff in going on the track (if, in fact, he did negligently go thereon) and the injury he sustained. The whole question was whether he negligently went on the track in front of the train by which he was struck. If he did, that fact, found by the jury, ends the case, for in the nature of things it contributed directly to the injury. It cannot be true, under the uncontroverted circumstances, that the jury could find that the plaintiff was guilty of negligence in going on the track, and yet also find that such negligence did not contribute to the injury. This the thirteenth instruction virtually told the jury might be done, and this was erroneous. Judgment reversed.

HYATT v. LESLIE.

(*Supreme Court of Mississippi.* Oct., 1891.)

ATTACHMENT—CLAIMS OF THIRD PARTIES—EVIDENCE—EX PARTE AFFIDAVIT.

On the trial of a claim interposed by a third party to mules attached, an *ex parte* affidavit by an employe of the attachment defendant that defendant hired the use of several teams, among which were the mules in controversy, and that defendant told him (the employe) that said mules belonged to said claimant, and directed him to keep their time, was inadmissible.

Appeal from circuit court, Alcorn county.

C. J Hyatt sued out an attachment against one Howard, and the writ was levied on seven mules in the possession of said Howard. M. T. Leslie interposed her claim to the mules, and on the trial of the claimant's issue, over the objection of Hyatt, the court below permitted the claimant to introduce in evidence the affidavit of one Paul, which was, in substance, as follows: That he (Paul) took some mules to said Howard, (who was a contractor,) which had been rented to Howard by one Sadler; that he was, on

his arrival, employed by said Howard to look after the stock, and to "keep time" of the teams; that Howard had at that time the seven mules in controversy, and had told him that these mules belonged to appellee, Leslie; that Howard also had a lot of mules belonging to one Jones, had pointed out to affiant the different teams, and directed him (Paul) to "keep their time," so that he (Howard) could settle properly for them; that he had always heard the seven mules were the property of appellee, Leslie, and never heard Howard "lay any claim to them." Verdict and judgment for the claimant. Hyatt appeals. Reversed.

E. S. Candler, Jr., for appellant. *J. M. Boone*, for appellee.

COOPER, J. It must have been because of some inadvertence on the part of the court that an *ex parte* affidavit was admitted in evidence. The record, however, discloses the fact that it was objected to by the plaintiff at the time. Upon what principle it was supposed to be competent we are at a loss to imagine. Judgment reversed.

(44 La. Ann. 333)

STATE v. McCARTHY. (No. 10,952.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)[1]

MURDER — CONTINUANCE — JUROR — PEREMPTORY CHALLENGES — OBJECTIONS WAIVED — VENIRE — USE OF AMANUENSIS — INDICTMENT — DATE.

1. The rulings of the trial judge in matters of continuance will not be interfered with, unless manifestly wrong, arbitrary, and glaringly erroneous.

2. The right of peremptory challenge is not the right to select, but to reject, jurors.

3. The objection to a juror that he was a member of the grand jury which presented the indictment comes too late on motion for a new trial. The objection should have been urged when he was examined on his *voir dire*.

4. When the trial judge has heard the evidence and ruled on the admission of a confession made by defendant, he is not required to make a note of the evidence, to be incorporated in a bill, when the testimony of the witness is of such a character as not to influence his ruling on the points presented in the bill.

5. When the indictment charged that the murder was committed "on or about the 28th December, 1890," the words "on or about" are surplusage. The real date is that which is specifically charged.

6. It is not sufficient to set aside the *venire* when the clerk of court employs an amanuensis, who acts directly under his supervision, to write the names of jurors on the slips of paper to go into the "general venire-box." In such a case the amanuenis is not an intruder upon the deliberations of the jury commissioners.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; E. T. LEWIS, Judge.

Indictment against Luma McCarthy for murder. From a judgment on conviction, he appeals. Affirmed. Rehearing refused.

E. P. Veazie, for appellant. *W. H. Rogers*, Atty. Gen., for the State.

McENERY, J. The defendant was indicted for murder, convicted, and sentenced to be hung, from which judgment he appeals. There are in the record 14 bills of exceptions.

The rulings of the district judge on the motions for continuance were largely within his discretion. From his statements appended to the several bills, we do not think that he abused the discretion vested in him. It will not be disturbed unless manifestly erroneous. State v. Green, 43 La. Ann. 402, 9 South. Rep. 42; State v. Johnson, 36 La. Ann. 853; State v. Clark, 37 La. Ann. 128; State v. Wilson, 33 La. Ann. 262; State v. Primeaux, 39 La. Ann. 673, 2 South. Rep. 423. The several bills to the rejection of jurors may be disposed of by stating that the obnoxious jurors did not serve on the jury which tried the accused. State v. Aarons, 43 La. Ann. 406, 9 South. Rep. 114; 43 La. Ann. 402, 9 South. Rep. 42; State v. Ford, 42 La. Ann. 255, 7 South. Rep. 696; State v. Lewis, 41 La. Ann. 590, 6 South. Rep. 536; State v. Durr, 39 La. Ann. 751, 2 South. Rep. 546; State v. Carries, 39 La. Ann. 931; 3 South. Rep. 56; State v. Ford, 37 La. Ann. 443; State v. Shields, 33 La. Ann. 1410; State v. Cazeau, 8 La. Ann. 109.

The objection to a juror that he was a member of the grand jury which found the bill comes too late on a motion for a new trial. The objection should have been urged when the juror was sworn on his *voir dire*. State v. Thomas, 35 La. Ann. 24.

Relying upon the doctrine in the Selley Case, 41 La. Ann. 143, 6 South. Rep. 571, the defendant took a bill of exceptions to the ruling of the trial judge, refusing him the privilege of taking down certain statements of a witness relative to the confession of the defendant. This request was made after the witness had testified, and the judge had ruled on the confession, admitting it to go to the jury. The case is not similar to the Selley Case. There is no conflict as to the statements of the judge and the defendant's counsel as to what the witness had sworn to. The trial judge emphatically states that the confession was free and voluntary, and that "there was not the slightest evidence to show that any inducements or threats were held out to the accused, or to show that the accused was in a state of mania superinduced by intoxication." While adhering to the doctrine in the Selley Case, we are not disposed to so extend it as to absolutely interfere with the trial judge in matters addressed to his sound discretion, and to require him, after he has heard the evidence and ruled on the confession, to make a note of the testimony of a witness who did not state any fact relating to the matter complained of in the bill. The ruling on this bill applies to No. 11.

The motion in arrest of judgment alleges that the indictment is fatally defective in substance, in charging the murder to have been committed on or about 28th December, 1890. The words "on or about" are surplusage. The real date is that which is specified. Time is not the essence of the offense here charged, and the time, therefore, stated in the indictment is immaterial as to exact date, if it be charged before finding of indictment. Whart. Crim. Law,

[1] Rehearing refused March 7, 1892.

§ 267; State v. Williams, 30 La. Ann. 843; State v. Walters, 16 La. Ann. 401.

Bill No. 1 is presented with great force, and we have given the utmost consideration to the able argument of defendant's counsel. The defendant, on the first day of the term, filed a motion to quash the indictment, charging that the jury commissioners, in drawing the jury, disregarded the provisions of Act 44 of 1877. The complaint is that one Raoul Pavy, a minor, who was sometimes employed in the clerk's office, wrote the names and residences of some of the jurors on the slips of paper which were to be placed in the "general venire-box." If this fact stood alone and unexplained the case would be brought within the ruling of State v. Taylor, 43 La. Ann. —, 10 South. Rep. 203. In this case, we said: "The clerk omitted to perform the duties specially assigned under the act, and the box was not of that kind provided with lock and key, as the law directs; but these are irregularities only, and it was not shown that they were done for the purpose of injuring the defendant, or with any fraudulent intent, or that some great wrong had been done him. It is essential to show these facts in order to set aside the indictment for such irregularities as are alleged." We held in the case that the irregularities embraced within the meaning of section 10 of the act referred to those committed by the commission, and that when a person not a commissioner intruded himself upon their deliberations, and did acts which it was the duty of the commission to perform, these were not acts of the commissioners, but of one who had no authority to perform them, and therefore null and void. The ruling of the trial judge may well stand without impugning the decision in the Taylor Case. In the latter case, there was nothing to explain or qualify the act of the third person who performed the duty assigned to the clerk, and who, for aught that appears, acted independently and without control or supervision. But here the judge's statement in the bill says: "The evidence shows that the writing of the names on the tickets was done under the immediate supervision and direction of the clerk and jury commissioners in the clerk's office, and by an amanuensis in the regular employ of the clerk." If, as thus appears, the writing was done under the eye and direction of the clerk, by one acting merely as his amanuensis, it would be extending strictness beyond reason to hold that the *venire* was thereby vitiated. Under such a holding, if the clerk were temporarily disabled from writing by a wound or other injury to his hand, a *venire* could not be drawn, and the machinery of justice would be stopped. In the Taylor Case, we were careful to state that the omission of duties by the clerk specially assigned to him under the act were irregularities only, and embraced within the meaning of section 10 of Act 44 of 1877. Proof, therefore, of injury and fraudulent intent must be proved, in order to affect the *venire*. In the case at bar the amanuensis did not intrude himself upon the deliberations of the commission. He was present with full knowledge of the commissioners, and acted directly under the supervision and control of the commission, doing only an act which, in effect, was the act of the clerk of court. His act was therefore the act of the commissioners, and, if irregular, must be treated as an irregularity imputable to the commission. Judgment affirmed.

(44 La. Ann. 253)

GODCHAUX v. BAUMANN. (No. 10,942.)

(*Supreme Court of Louisiana.* Jan. 4, 1892. 44 La. Ann.)[1]

FIXING CAUSE—PRACTICE ON APPEAL—EJECTMENT AGAINST TENANT—SUMMARY PROCEEDINGS—NOTICE TO QUIT—TACIT RENEWAL—JURISDICTIONAL AMOUNT.

ON APPLICATION TO FIX CAUSE.

Sections 2156 and 2163 of the Revised Statutes, so far as they apply to the fixing of causes in this court, together with all other statutes on the same subject-matter, were repealed by Act No. 70 of 1884, but, considering that suits to recover possession of leased premises are entitled to speedy trial, in the exercise of the discretion vested in this court the order to fix by preference after three days' notice is granted.

ON THE MERITS.

1. The proceedings to eject a tenant are summary.

2. At the expiration of the lease the statute provides 15 days' notice to the tenant to remove.

3. Upon his failure to comply, suit may be brought, and the defendant notified by citation to appear and defend after three days.

4. The jurisdiction must be tested by the pecuniary amount in dispute, as shown by the pleadings, and as appearing from the nature of the action.

5. It may be shown on the trial, if admissible by the nature of the action, that the amount involved is within the court's jurisdiction.

6. Plaintiff had the right to ejectment proceedings against the tenant of his property after 15 days' notice upon the expiration of the lease.

7. No plea of tacit renewal for another month having been presented, the lease will not be presumed to have been continued or tacitly renewed, (reconducted.)

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Suit by Leon Godchaux against Emile Baumann to recover possession of certain premises. Judgment for plaintiff. Defendant appeals. Affirmed. Rehearing refused.

Frank Michinard, for appellant. *Buck, Dinkelspiel & Hart* and *F. J. Dreyfous*, for appellee.

ON APPLICATION TO FIX CAUSE.

FENNER, J. This is a suit by a landlord to recover possession of leased premises, and an application is made to fix the same by preference after three days' notice under the provisions of sections 2156 and 2163 of the Revised Statutes. These sections of the Revised Statutes, together with all other statutes regulating the order of trial of appeals in this court, were repealed, so far as they apply to appeals in this court, by act No. 70 of 1884, which vests this court with full authority "to regulate the trial of causes before it, and to change existing rules, as, in their opinion, may be deemed advisable for a better adminis-

[1] Rehearing refused March 7, 1892.

tration of justice," and which repeals "all laws on this subject-matter, and all laws in conflict herewith." In the exercise, however, of the discretion thus vested in us, we consider that the policy of the law and the better administration of justice require a speedy trial of causes such as this, and on that ground we grant the order prayed for. Order granted.

ON THE MERITS.

(Feb. 8, 1892.)

BREAUX, J. The plaintiff claims from the defendant possession of the premises No. 91 Canal street. He bought the property on the 25th June, 1891, and alleges that at the time the defendant claimed to be a lessee of the property under verbal lease from plaintiff's author. He alleged a second lease, which expired on the 8th of October, 1891, and that he gave notice to defendant lessee to remove from the leased premises within 15 days. The time having elapsed, suit was brought, and the defendant was cited to answer the petition within three days, in compliance with the judge's order. The defendant filed an exception to the order of the court requiring him to answer within three days, and fixing the cause for trial on 2d November, 1891. He also excepted to the jurisdiction of the court; alleged that the petition disclosed no cause of action, and is vague. The court, under the authority of State v. Judge, 37 La. Ann. 843, ruled that all the defenses relied on, whether exceptions or merits, must be pleaded at one time, but gave to defendant's counsel opportunity to file further defense in addition to the exception filed. None other was offered. Judgment was rendered for plaintiff, condemning the defendant to deliver possession of the premises. Ejectment proceedings to eject a lessee are summary. The statute provides that on the termination of the lease, to repossess his estate the lessor shall give his tenant notice to remove, and allow him the time granted by law for such removal. If the tenant shall refuse to comply after the expiration of the delay, the lessor may cite him, whenever the monthly rent exceeds the sum of $100, to appear before the district court, in order to be there condemned to deliver possession of the leased premises. On proof of these facts, the court may give judgment ordering the delivery of possession. The case is always to be tried by preference, when applied for. An appeal does not suspend execution unless the defendant has filed a special defense, supported by his oath. "The statute specifically requires that these proceedings of a landlord against his tenant be summary." State v. Judge, 37 La. Ann. 844. Article 756, Code Prac., gives to the court a discretion in relation to the trial of summary cases, with which the appellate court will not interfere. Police Jury v. Manning, 16 La. Ann. 182. The ejectment of a tenant must be tried summarily. Pesant v. Heartt, 22 La. Ann. 293. The court had the authority, in compliance with its rule relating to the trial of summary cases, to require the defendant to file all his pleas with his answer.

With reference to the citation to answer within three days. The proceedings being summary, the statute limiting the notice to three days applies to the citation, *i. e.*, to the notice by citation, and excludes these summary cases from the delay applying to the ordinary action by petition and citation. If the time be not limited to three days to answer, cases made summary would be subject to greater delays than ordinary cases. There was no necessity of a statute to secure the speedy trial of summary cases. If the notice of the statute did not refer to the citation, and applied to the setting of the case, it was purposeless, and did not secure any right. "We are bound to presume that the law is useful, and construe it with reference to some use." Domat.

Relative to the court's jurisdiction. The monthly or yearly rental is the test of the court's jurisdiction. The lease expired September 30, 1891. The rental was $4,000 per annum. The defendant contends that, as it was not the value of the property, but the annual or monthly rent, which gives jurisdiction, and as the petition does not allege the amount of the rent, the court was without jurisdiction. Plaintiff declared on a lease, the amount of which shows the court had jurisdiction. If the jurisdictional amount was not sufficiently expressed in the petition, it has been made ample by the act of lease offered to meet the plea to the jurisdiction.

On the exception of no cause of action. Plaintiff, in his petition, alleges that he bought the property, at the time under lease; that, the lease having expired, notice to vacate had been given to the tenant. The notice and the return are annexed to the petition. The purchaser became subrogated to the rights of the vendor under the lease. Rev. Civil Code, art. 2733; Walker v. Vanwinkle, 8 Mart. (N. S.) 563. The demands for relief are consistent and conformable to the nature of the remedy. He had the legal right to ejectment proceedings against the tenant of his property, at the expiration of the lease, after 15 days' notice. The defendant contends in argument that, more than one week having elapsed, (the lease expired 30th September, 1891, and notice to vacate was served on the 8th of October following,) the lease was tacitly renewed (reconducted) for another month. Suit to eject the defendant was brought October 26, 1891. The defendant, in his pleadings, has not claimed any rights of renewal. Whatever rights he may have had under article 2689, relative to the presumption of renewal of the lease, are enforceable in accordance with the plea covering them. Act 96 of 1888, in amending section 2155 of the Revised Statutes, as to notice, necessarily amended the Civil Code on the subject,—*i. e.*, article 2686. Upon the expiration of the lease, the notice may be given, and need not precede the period of the lease's duration by 15 days.

The last in the order of the pleas, as presented, is that of vagueness. Full notice was given to the defendant of the grounds of the action. There is a definite issue presented. The defendant could not be taken unawares by the evidence admissible under the pleadings, as the petition

was explicit in substantial particulars. The lease was alleged and admitted in evidence under the allegations. The object of the demand, the nature of the title, and the cause of action were stated. There can be no just reason for maintaining that plaintiff's action is vague. Judgment affirmed, at appellant's costs.

(44 La. Ann. 188)

PENOUILH v. ABRAHAM. (No. 10,965.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

WRIT OF SEIZURE AND SALE—PREMATURE ISSUANCE—SUBSEQUENTLY ACCRUING INSTALLMENTS—PROVISION FOR, IN ORDER OF SALE.

1. A writ of seizure and sale is not prematurely issued when one installment of the debt is due.

2. The property should be sold for cash to meet the matured note, and on terms of credit to correspond with the unmatured notes.

3. When the prayer of the petition asks that the mortgaged property be sold for cash to pay one installment, which is due, and the balance of the price on credit, to meet other installments not due at the time, and all of the unmatured installments fall due before the case is disposed of, the court may order the sale for cash to pay all matured installments.

(*Syllabus by the Court.*)

Appeal from district court, parish of Lafourche; TAYLOR BEATTIE, Judge.

Suit by B. Penouilh, tutor, against S. Abraham. Judgment for defendant. Plaintiff appeals. Modified.

E. A. O'Sullivan, for appellant. *L. P. Caillouet*, for appellee.

MCENERY, J. This case, on substantially the same issues, has been before this court at two terms, and the facts in the case and the law governing them are fully set forth in 42 La. Ann. 326, 7 South. Rep. 533, and 43 La. Ann. 214, 9 South. Rep. 36. In the first case all the defenses urged by the plaintiff in injunction, in the proper interpretation of the agreement therein referred to, except as to the time when the payments should commence, were effectually, and, we had hoped, finally, disposed of. In the last case the plea of *res adjudicata*, filed by defendants, was overruled, and the case remanded to be tried on its merits. The district judge, in his written opinion, reviewed the history of the case in the several phases of this protracted litigation. He properly concluded that in 43 La. Ann. 214, 9 South. Rep. 37, in referring to what was said in the reasons given for refusing a rehearing in the case reported in 42 La. Ann., 7 South. Rep, we made no suggestion as to the date from which the time granted to the debtor should commence to run. In this case we said: "In the course of our opinion on the application for rehearing we accepted as true the claim that under the agreement the delays granted ran from its date." The language was qualified in the succeeding paragraph, which is copied and commented on in this case. The judge *a qua* therefore concluded that the only issue before him was as to the time when the delay commenced. Taking it for granted that we had fixed September 12, 1888, as the time from which the delay should commence, the plaintiff, in the order of seizure and sale, alleged this date from which the maturity of the notes should date. The district judge fixed the date January 5, 1889,—the date of the purchase of the mortgaged property by Abraham,—when, as stated in the opinion in 42 La. Ann., 7 South. Rep., the *status* of the parties was fixed. The agreement fixed no date for the delay. Abraham was to sell to the tutor of the minors their portion of the plantation held in indivision when he should get possession and ownership of the property through the contemplated partition proceedings. The price was the amount of that indebtedness, with costs added. The partition suit was abandoned, and Abraham became the owner of the property through another judicial process. The only means of now executing the agreement is by allowing the time stipulated in it for the tutor to pay the indebtedness of the minors. The delay, therefore, could only commence from the time when Abraham was in a situation to carry out the agreement, when, if the tutor had tendered the money, he would have been able to transfer the property to him. He was in this position on the 5th of January, 1889. When the order of seizure and sale issued, one installment was due. The writ did not, therefore, issue prematurely.

The district judge rendered judgment dissolving the injunction so far as it arrested the seizure and sale of the property on the first installment, which was due, and perpetuated the injunction for the credit installments which had not matured, reserving to the seizing creditor the right to proceed upon the second and third installments at the proper time and in proper form. A special mortgage creditor, whose claim is payable in installments, may, on non-payment of any installment, have the property sold to pay the whole debt in cash, for so much as is due, and for the remainder on terms of credit corresponding with the unmatured installments. Code Prac. art. 686. During the pendency of the injunction all of the deferred payments have become due. The defendant in the injunction prays to amend the judgment so as to order the sale to be made for cash to pay all the matured installments. The court, on dissolving an injunction against an order of seizure and sale for the payment in cash for an installment due, and on time for those not due, may order the whole sale to be made for cash if the latter mature pending the injunction. Dwight v. Richard, 5 La. Ann. 365; McCleland v. Bideman, Id. 563; McCalop v. Fluker, 12 La. Ann. 551. All of the installments secured by the mortgage not due at the time the order of seizure and sale issued have matured since the issuing of the injunction. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to dissolve the injunction absolutely, and to order the sale of the property mortgaged for cash to pay the entire mortgage debt and interest, and costs and attorney fees, as stipulated in the act of mortgage. In other respects the judgment is affirmed.

(44 La. Ann. 137)

POLICE JURY OF PARISH OF LAFOURCHE *et al.* v. THIBODAUX BRIDGE CO. (No. 10,969.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

TOLL-BRIDGE ERECTED BY CORPORATION FOR TOWN —EXPIRATION OF FRANCHISE—OWNERSHIP.

1. Where a corporation builds a bridge for a town and parish jointly, and the exclusive privilege is granted to the corporation to collect toll for a designated number of years, at the end of the franchise, unless there is an express agreement to the contrary, the bridge must be delivered to the parish and town without compensation. The town and parish became the owners of the bridge when it was completed, and the corporation which built it only owned the franchise.

2. The consideration for building the bridge for the political corporation was the franchise granted to the building corporation.

(*Syllabus by the Court.*)

Appeal from district court, parish of Lafourche; TAYLOR BEATTIE, Judge.

Suit by the police jury of the parish of Lafourche and others against the Thibodaux Bridge Company, in liquidation, to recover possession of a bridge. Judgment for defendant. Plaintiffs appeal. Reversed, and a new judgment entered.

L. P. Caillouet, for appellants. *Knobloch & Moore*, for appellee.

MCENERY, J. By Act 67 of 1855 the legislature of the state authorized the police jury of Lafourche parish and the town of Thibodaux to construct a bridge across the bayou Lafourche, within the corporate limits of the town of Thibodaux; and the two political corporations were authorized to contract with any person or corporation to build the same, and to grant to the person or corporation constructing the bridge the exclusive right and privilege to collect toll as the police jury or said town might allow for a term not to exceed 20 years. The privilege to collect toll was granted, and the schedule of prices for crossing the bridge fixed. The defendant corporation was organized for the purpose of building the bridge. The company built the bridge. It was destroyed in 1862. From this time to 1867 the town of Thibodaux operated a ferry for its exclusive privilege. In 1866 the police jury of Lafourche and the town of Thibodaux were authorized by legislative act to reconstruct the bridge. The defendant company, under and by virtue of this authority, reconstructed the bridge, with the exclusive privilege to collect toll until 31st December, 1891.

The fifth section of the charter of the defendant company is as follows: "When the period has arrived for the liquidation of the affairs of this corporation, that liquidation shall be conducted by three stockholders, to be elected by a majority of the stockholders in amount, and shall be styled 'Liquidating Commissioners.' It shall be their duty to sell and dispose of the entire property of the corporation (except the bridge, that shall be abandoned to the police jury of this parish, and to the mayor and trustees of the town of Thibodaux) on terms to be fixed by a majority of the stockholders in amount at a general meeting. They shall collect all amounts then due this corporation, and, after paying all its liabilities, divide the net proceeds of sale and collection among its stockholders," etc.

On the 15th of January, 1892, plaintiffs instituted this suit, claiming the right of being put in possession, and without any compensation to defendant, of the bridge in controversy, basing their right on the above-quoted article of the charter of defendant company. The answer of the defendant is that the plaintiffs cannot go into possession without paying defendant for the value of the material and the cost of construction of said bridge, and they pray judgment in reconvention against plaintiffs therefor. The judgment of the district court decrees plaintiffs entitled to the bridge, and awards judgment in favor of defendant in reconvention for $13,500; and plaintiffs appeal therefrom.

The stipulation in the written agreement signed by counsel herein is "that the sole question submitted for decision is whether or not the plaintiffs, under the fifth article of defendant's charter, and the law in such cases made and provided, are entitled to the said bridge and pier without paying or compensating the defendant company therefor;" and it is further stipulated therein that, "in the event of it being held that payment or compensation is due, then the court shall award judgment against the plaintiffs for such sums as the evidence may establish, as being equal to the value of the materials and cost of construction of said bridge and pier." It is admitted that the bridge reverts to plaintiffs, and the question presented is whether they are compelled to pay the defendant corporation for the value of the material and the cost of construction. There was no written contract between the parties. The bridge company having been organized for the special purpose of building and operating the bridge, it seems that the contract was embodied in its charter. In the fifth section of the charter, it is stipulated that the bridge, at the expiration of the life of the company, shall be abandoned to the plaintiffs. The word "abandoned" was used in the sense that the company intended to relinquish and surrender its rights of property in the bridge to the plaintiffs. This is made evident by the fact that in said section 5 of the charter the company, in process of liquidation at the expiration of the charter, provided for the sale of all its property, except the bridge, which was to be abandoned to plaintiffs, and the distribution of the proceeds among the stockholders. No provision whatever is made for the sale of the bridge, and the distribution of the proceeds, thus showing that no proceeds from its sale were ever intended to be realized. In the legislative permission to authorize the plaintiffs to contract for the building of the bridge, there is no power granted to the plaintiffs to buy the bridge. Without this authority, conferred upon the plaintiffs by the legislature of the state, they are without power to purchase the bridge from the defendant corporation. Under the general power conferred by statute to build bridges the local author-

ity may purchase a bridge already constructed along a highway, which it is necessary for the public to use, by private persons or a corporation. But when the structure is of that character that it is intended to bridge a navigable stream, costing a large sum of money, and it is necessary to get legislative permission to build it, the local authority cannot go beyond the power specially conferred by the act of the legislature. In a particular case, where the legislature deems it necessary to grant the power to construct a particular bridge at a designated point, it withdraws the power in the particular case to build the bridge, conferred upon the local subdivision generally to build bridges. The state issues a special mandate to build the bridge according to legislative will at the point located. The bridge constructed by the defendant connected a system of public highways. It continued a highway over a navigable stream. There is no way of vacating or extinguishing the highway except by due course of law. The highway was legally established when the bridge was built. It must remain so, and the defendants at the expiration of their franchise cannot obstruct its public use. The defendant corporation only had a right of franchise in taking tolls. The bridge, when completed, became the property of the plaintiffs. There is no obligation on the part of the plaintiffs to pay for the material and cost of construction, in the absence of an express agreement.

"It has been held that where a canal company built a bridge partly for its own use, and partly for the use of the public, the materials of the bridge, after it had been swept away from the place, and after the abandonment of the canal, belonged to the county, and did not pass to the purchaser of the canal under a decree of foreclosure." Elliott, Roads & S. p. 36. The author above quoted, on page 33, says: "If the corporation, in consideration of the grant of the franchise to gather tolls for a designated period, builds a bridge connecting with a system of public highways, the fair and just intendment is that at the expiration of the time fixed by law the bridge shall remain for the public. Nor is there any injustice in this rule; for those who accept the franchise must know, as a matter of law, that the bridge which once becomes a part of the system of highways, so as to be necessary for the public convenience, must so remain, although the period for reaping profit from it may have expired. It is in truth on this implied condition that such franchises are granted and accepted." In the case of Bridge Corp. v. City of Lowell, 15 Gray, 106, it was held that a bridge might be lawfully taken and appropriated to the use of the public by right of eminent domain, and without compensating the proprietors for the actual value of the bridge as a structure, independent of their franchise, but only for the loss of the franchise.

The consideration for building the bridge was the franchise to collect tolls for a designated number of years. The plaintiffs needed the bridge for the convenience of the public. The defendants agreed to build it for the franchise granted. The bridge, as soon as completed, became the property of the plaintiffs, and, at the termination of their franchise, defendants are compelled to deliver the bridge to plaintiffs. They asserted their duty in their charter when, in the fifth section, they agreed to abandon the bridge to the plaintiffs. The defendants owned the franchise, and not the bridge. They had the use of the bridge during the existence of their franchise, and held it in trust for the public. The defendant corporation, under their charter, stood in the same relation to the public as the plaintiffs would have done had they built the bridge.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered and decreed that there be judgment for the plaintiffs, decreeing them to be the joint owners of the bridge across Bayou Lafourche built by the Thibodaux Bridge Company, in accordance with the prayer of plaintiffs' petition, and that the liquidating commissioners deliver to the plaintiffs said bridge, with the piers, pilings, and appurtenances belonging to the same, without delay and without cost. And it is further ordered that the reconventional demand of defendants be rejected.

(44 La. Ann. 339)

O'CONNER v. ILLINOIS CENT. R. CO. (No. 10,913.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)[1]

DANGEROUS PREMISES—DUTY OF OWNER—RIGHTS OF TRESPASSER—CHILDREN—INVITATION.

1. The possessor of lands or tenements is not at liberty to plant in them dangerous instruments, which may seriously injure trespassers; but he is under no duty to keep his premises in a safe condition for others than those whom he invites, and therefore he is not liable to trespassers for injuries they may receive from defects, not amounting to traps, in such premises.

2. If a person allows dangerous implements to be exposed on premises occupied by him, he will be responsible for injury caused thereby to any person entering the premises by his invitation or procurement, express or implied, who is not notified thereof, if he is in the use of due care.

3. The owner of land or other property may properly inclose dangerous machinery upon his own premises, such machinery being an essential industrial factor; and a trespasser who meddles with such machinery cannot recover damages for the injuries his meddlesomeness has brought upon himself.

4. Railroad companies are not placed under the same degree of obligation as to care and diligence to guard against injuries to strangers as they are to those with whom they have contractual relations. To the former their obligation is, upon consideration of humanity and justice, to conform their conduct to the rights of others, and, in the prosecution of their lawful business, to use every reasonable care and precaution to avoid their injury.

5. In so far as children of tender years are concerned, no fault or blame can attach to them for entering upon the premises of another uninvited, for in all cases they may be assumed to have exercised due care; and if, upon so entering, they be injured by dangerous implements of the occupant, the question determinative of the

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[1] Rehearing refused March 7, 1892.

latter's negligence is whether they had an invitation, either express or implied, to enter.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Action by Nicholas O'Conner against the Illinois Central Railroad Company to recover damages for injuries to his child. Judgment for plaintiff. Defendant appeals. Reversed. Rehearing refused.

Girault Farrar, for appellant. *T. J. Gilloly* and *Branch K. Miller*, for appellee.

WATKINS, J. The father institutes this action for the recovery of $25,000 damages, as compensation for injuries inflicted upon his minor child, which resulted in the amputation of his left leg, causing great pain and suffering. This case was tried by the judge, who found $7,500 for the plaintiff, and defendant has appealed.

Plaintiff's counsel claim that the case made out by the evidence is that the accident happened on a square of ground belonging to the defendant, bounded by Magnolia, Clio, Locust, and Calliope streets, in the city of New Orleans, and which the company used for the storage of old freight-cars of sundry kinds, trucks, and wheels not in service; that, among other things usually stored in the yard, were what are called "coal-dumps," or cars of a peculiar construction, being composed of only two wheels attached together by an axle, and on which is placed a wooden frame-work, which extends fore and aft, and may be seesawed on either side of the axle; that this square is surrounded by a plank, or board fence, "which for years has at all times been full of holes, caused by missing planks," through which the children of the neighborhood would pass in and out in going to and returning from play, and where they frequently resorted, being attracted there by the coal-dumps, on which they would amuse themselves, some riding, while others pushed them along the rails; that, in accordance with the established usage of the neighborhood, plaintiff's child went into the yard, in company with a party of children, to play, and, while riding on one of these coal-dumps, which was pushed along the track by others, he fell off, and was run over by the car, receiving injuries necessitating the amputation of his leg. It will be observed from the foregoing that plaintiff's reliance is solely and exclusively, for proof of defendant's negligence, upon the customary and long-protracted bad condition of its fence inclosing the premises above described, which operated in invitation and inducement to the children of the neighborhood to resort to the dangerous proximity of these coal-dumps to play. This theory is combated by defendant's counsel on the ground that the evidence shows that the employes and agents of the defendant used every reasonable precaution to keep children out of its yards; and that the proximate cause of the accident was the acts of the child's companions and older boys, who accompanied him into the yard,—one of whom was an elder brother. That the whole front of the company's yard fronting on Locust and Clio streets is protected by a close board fence, about seven feet high, except where it is intersected with public streets, through which there are openings, so as to allow cars to be switched across said streets into other and adjoining squares belonging to the company. That on the evening of the 23d of July, 1890, the plaintiff's minor child went into the yard, with a party of little comrades, and commenced playing with the wheels on the defendant's tracks, when the accident happened, and injury resulted, as stated above.

Taking the two statements together, the solitary question of fact mooted seems to be whether the customary bad condition of the defendant's fence was such as to offer inducement to children of the neighborhood to enter their yards for purposes of amusement and play; and, this being determined favorably to plaintiff, the question of law thereon raised is the negligence *vel non* of defendant under the circumstances related. In this as in kindred cases there are apparently many incompatible statements of fact, which we shall not attempt to traverse in detail, and reconcile, but rest contented with the announcement of our conclusions on this particular question after recapitulating the evidence.

The plaintiff introduced several witnesses residing in the immediate vicinity of the place where the accident happened, and who were supposedly familiar with the defendant's premises from frequent and personal observation; and from their testimony we extract the following synopsis, viz.: One of them testifies that near the corner of Locust and Clio streets there were two or three of the planks broken off of the company's fence at one place, through which he saw persons frequently passing; that it was afterwards repaired by the company's employes, and then broken again; that that was the only opening he saw at that time, there being no openings in the fence on the Clio or Calliope street side. This witness was the gentleman who heard the child's cry of alarm, and ran to his relief, and removed the truck wheel from his broken limb. Another one—a little fellow of 13 years of age, who was one of the companions of the injured boy—confirms the statement of the witness just referred to, and says that it was through this opening they entered the defendant's yard on the evening of the accident. Another speaks of two or three openings in this fence, several months previous to the occurrence; "two or three big openings, and about four little ones; the larger ones being about two feet wide." But there was an opening on the Magnolia-Street side, to allow cars to be switched across the street into the adjoining yards. Another testifies, in a general way, that the fence was "always, [at] one time or another, broke," and that he frequently "passed through the yard for a short cut;" that he passed through the hole in the fence at the corner of Clio and Locust streets. He only refers to one other hole. Another describes the same two holes. Another, one place

only, where there was a single plank off. Another speaks of two places; and another of three or four places, where there were planks knocked off. This is a fair summary of plaintiff's testimony on the subject. With regard to the length of time these holes remained continuously open the witnesses differ widely; some stating for a few weeks, and others for one or two years. But, on the contrary, defendant's witnesses, while admitting the existence of holes in the fence, deny that same existed for any considerable length of time, and affirm that the fence was frequently repaired, and as frequently broken down again; and, while admitting that children and boys often congregated in defendant's yard,—climbing over the fence, or passing through the holes,—they were just as repeatedly driven out, and warned against trespassing again. One of the company's employes, a car inspector, states that he has seen boys knock the fence down. Has seen them climb over the fence many a time; and that to keep them out has been a matter of great trouble to him. Has frequently seen the watchman and others drive them out of the yard. He says that he could see no possible way of keeping them out, except by the company detailing a man for that special purpose. Another, the yard foreman, states he has frequently driven the children out of the yard, and just as soon as he was out of sight they would come in again. He says it would "require an army of policemen steadily [employed] to keep them out." He states further "that when the fence was fixed they would get in by way of Magnolia street, where there is a gate, through which the cars pass to and fro, and in and out of the yard. We had locks; and every time they were fixed on the gates they would break them." Another, the night-watchman, states that he has frequently driven children out f the yard, and has himself nailed up the hole in the fence at the corner of Clio and Locust streets. "They keep me busy getting nails all the time, to keep the planks up. Whenever I saw one down, I nailed it up again." Has often seen boys climb that fence, and has thrown them off of it. Another witness, who lives opposite the corner of Clio and Locust streets, states that he has seen the hole in the fence at that place repaired frequently. Saw it open and then closed, and then saw the boys knock it down again. Another witness fully corroborates his statement. The section foreman, whose duty it is to keep the fence in repair, states that he has been engaged in that capacity for 20 years, and during that period of time has resided within a block of defendant's yard; and that he has repeatedly closed the hole in the company's fence at the corner of Clio and Locust streets; and that he closed it once in May, and again in June, prior to the happening of the accident on the 23d of July, 1890. That he had occasion to mend it 10 or 15 times a year, on account of boys knocking it down. Says he would repair it on one day, and go back on the following day and find it down again. Another witness, a master mechanic, says that on the identical evening on which the accident occurred he chased a party of children out of this yard.

On this state of facts, was the defendant guilty of negligence, or did the company's agents and employes exercise due care and caution? It must be borne in mind that the plaintiff is an utter stranger to the railroad company, claiming damages *ex delicto*, with whom neither the child nor its parent had any contractual, or even *quasi* contractual, relations at time of the accident. And just here we may with propriety advert to the views entertained by the judge *a qua* in respect to the testimony, and which grounded his judgment in plaintiff's favor. In recapitulating the evidence he says, among other things: "The grounds are inclosed by board fences, but in those fences were openings, caused by planks being removed, which made entrance into the grounds from the public streets a matter of no difficulty. These openings, at different places, remained unclosed for months preceding the injuries of plaintiff's child." It is proper just here to observe that on this question there is a diversity of opinion among witnesses, but the whole of it has given us an impression just opposite that which our learned brother of the lower court has received. It is true that one of plaintiff's witnesses said in a general way that the fences were "always, [at] one time or another, broke," and that he frequently and customarily "passed through the yard for a short cut;" yet he accompanies this statement with the admission that he passed through the hole at the corner of Locust and Clio streets, and refers to but one other hole in the fence around this particular yard. The proof affirmatively shows that plaintiff's child passed through this hole on the afternoon of the accident. No witness testifies that any child or adult or animal passed through any other hole into the defendant's yard. Defendant's night-watchman testifies that he nailed this hole up frequently. A gentleman who lives opposite that corner, as a witness states that he has frequently seen this particular hole repaired. Saw it open, and then saw it closed again. Saw the boys knock it down. This witness is substantially corroborated by two other witnesses, strangers to the company. In addition the section foreman, who resides a block and a half away, and whose special duty it is to keep this fence in repair, among other things, as a witness, states that he has repeatedly closed this hole; that he closed it once in May, and again in June, of 1890, just prior to the accident on the 23d of July; that he has had occasion to mend it 10 or 15 times a year, on account of the boys knocking it down; that he would repair it one day, and go back on the following day and find it down again. The judge further observes: "That the company knew all these facts, [and] took measures, at times, to mend the broken places, and to drive children from the inclosure, is [a fact] well established, [yet] it did not take the proper measures, nor make the needed repairs," as it did subsequently. But in this regard we are of opinion that it is matter of importance to be considered that two or

three witnesses testified that they saw children climb over the fence to get into the yard. One witness says that he pushed little boys off the fence. One of plaintiff's witnesses states that there was an opening on the Magnolia-Street side of the square, to allow the cars to be switched through on the company's tracks; and one of the defendant's witnesses stated that "when the fence was fixed they [the boys] would get in by the way of Magnolia street, where there is a gate through which the cars pass. * * * We had locks, and every time they were fixed on the gates they would break them." It seems to us that it would be rather a difficult question to determine what, under such circumstances, would be "the proper measures" for the railroad company to take; but what is of greater importance for us to determine is whether the means resorted to were sufficient to relieve the company from imputation of negligence. The lower judge evidently did not think the proof of defendant's negligence, in reference to the openings in the fence, sufficient, because he adds another reason altogether for his conclusions, thus: "It was negligence to leave the trucks and dumpers and connected wheels on the tracks, for they were not only exceedingly dangerous, but of a nature to tempt the curiosity and invite the playfulness of children. * * * The defendant's negligence left the dangerous dumpers, wheels, and trucks in close proximity to the streets, in a thickly populated neighborhood, where they could be seen by passers-by, and where they could be easily approached by children. They were not securely inclosed nor locked, but were left exposed, where they could be set in motion by a child." The judge evidently had in mind the cases of Westerfield v. Levis, 43 La. Ann. 64, 9 South. Rep. 52, and Railroad Co. v. Stout, 17 Wall. 657, to which he makes reference. But the facts of this case, so far as we have proceeded with the discussion, render them impertinent to the question of the defendant's negligence; and so, also, is the averment of fact that it was negligence of defendant to leave the coal dumps, etc., on its tracks, or in close proximity to the streets; or that they were left exposed and unlocked, if the tracks were inside of an inclosure of sufficient height and strength to keep innocent and unsuspecting children out of their reach. And we think the proof abundantly shows that defendant's fence was adequate for the purpose, so long as it remained unbroken by mischievous persons; and we also think it fully established that the company exercised at least ordinary care to keep it in a safe condition, by making necessary repairs. In so far as the alleged negligence of the defendant in reference to the exposure of the trucks, dumps, and wheels are concerned, we do not understand that plaintiff's petition or briefs rests on such an hypothesis as that; nor could they do so.

The law of this case, as developed by the facts recited, may be briefly stated. It is founded on the law of damages *ex delicto*, as announced in the Code, which declares that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Rev. Civil Code, art. 2315. "Every person is responsible for the damages he occasions not merely by his act, but by his negligence, * * * or his want of skill." Id. art. 2316. It is founded on fault or neglect. A distinguished author, in a treatise on Negligence, says: "It is enough to say now that a possessor of lands or tenements is not at liberty * * * to plant in them dangerous instruments which may seriously injure trespassers; but he is under no duty to keep his premises in a safe condition for others than those whom he invites, and therefore he is not liable to trespassers for injuries they may receive from defects, not amounting to traps, in such premises." Whart. Neg. §§ 344, 821. Again he says: "If a person allows a dangerous place to exist in premises occupied by him he will be responsible for injury caused thereby to any other person entering upon the premises by his *invitation or procurement, express or implied*, and not notified of the danger, if the person injured *is in the use of due care.*" (Our italics.) Id. § 826; citing Coombs v. New Bedford Co., 102 Mass. 572; Id. § 350. To such a case the rule *sic utere tuo*, etc., applies. With reference to children of tender years, it may be conceded that in all cases they have proceeded with due care; but can it be said that the condition of defendant's fence operated as an "invitation or procurement, express or implied," to the plaintiff's child? Upon this precept another important rule has been formulated by that author, viz.: "The owner of land or other property may properly inclose dangerous machinery on [his] own premises, such machinery being an essential industrial factor. * * * Hence comes the well-established rule that *a trespasser who meddles with an instrument in itself dangerous cannot recover damages for the injuries his meddlesomeness has brought on himself.*" Id. § 347. But the author says further: "So, with regard to leaving a dangerous instrument on a thoroughfare, it is *negligence to leave such an instrument on a place of public access, where persons are expected to be constantly passing and repassing*, and when persons are not required to be on their guard, or *where children are accustomed to play; but it is not negligence to leave such an instrument in a private inclosure, which, from its very privacy, excludes the public, and puts on their guard all who enter.*" (Our italics.) Id. § 112; citing Railroad Co. v. Stout, 17 Wall. 657. And in referring to that case the author speaks of the principle therein announced thus: "It was held that a railroad company was liable for damages sustained by a boy when playing with a turn-table left by the company unguarded and unlocked on its own grounds; it being shown that the boys of the neighborhood were in the habit of resorting to the place for play, and that this was known to the company." Whart. Neg. § 860. A parallel case is cited from Lane v. Atlantic Works, 111 Mass. 136. These various citations from this justly cele-

brated author, which are predicated on the established jurisprudence of the country, are quite sufficient to show that the instant case does not disclose the defendant's negligence as matter of law; for, if little boys did resort to the defendant's premises for purposes of amusement and play habitually, it was certainly against the defendant's wishes, and over its agents' and employes' protest, made repeatedly, although ineffectually. Notwithstanding the fence of the company, inclosing the dangerous coal-dumps and wheels, was frequently open, in places, possibly for a greater length of time than it should have been allowed to remain open, yet these openings were not occasioned by the company's employes, or persons holding even *quasi* contractual relations to it; but they were occasioned by acts of trespassers upon their private grounds. And the proof is clear that the agents and employes exercised ordinary care in its safe-keeping. They used timely and repeated efforts to keep the apertures closed. The children were repeatedly warned against the danger, and driven away, and on more than one occasion they were pulled off of the fence. Mr. Hutchinson announces the general rule to be that railroad companies are not placed under "the same degree of obligation as to care and diligence to guard against injuries to strangers" as they are to those with whom they have contractual relations; for with regard to the former their "duty is governed by the general principle of law that every one is obliged, upon considerations of humanity and justice, to conform his conduct to the rights of others, and, in the prosecution of his lawful business, to use every reasonable precaution to avoid their injury." Hutch. Carr. p. 447. And this rule has been sanctioned in many cases. Snyder v. Railroad Co., 42 La. Ann. 302, 7 South. Rep. 582; Lott v. Railroad Co., 37 La. Ann. 337; Hoag v. Railroad Co., 85 Pa. St. 293; Cauley v. Railroad Co., 98 Pa. St. 500; Whart. Neg. §§ 300, 301; Thomp. Carr. pp. 344, 345; Hearn v. Railroad Co., 34 La. Ann. 160; Montfort v. Schmidt, 36 La. Ann. 750; Reary v. Railroad Co., 40 La. Ann. 32, 3 South. Rep. 390. To this rule the case of Westerfield v. Levis, 43 La. Ann. 67, 9 South. Rep. 52, does not apply, for in that case the negligence of the defendants was fully established by their having left a heavy iron roller, with two mules attached thereto, unattended by a driver, on an open public street, the mules not fastened, and the wheels of the roller unlocked. The aggravated question in that case was whether the child, who was mortally injured, was of sufficient age and discretion to have been guilty of contributory fault. The general rule, as announced by Mr. Wharton, that "there is no duty imposed upon the owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation, either express or which may fairly be implied" from the surrounding circumstances, has been sanctioned in many cases. Severy v. Nickerson, 120 Mass. 306; Pierce v. Whitcomb, 48 Vt. 127; McAlpin v. Powell, 70 N. Y. 126; Gramlich v. Wurst, 86 Pa. St. 74; Railroad Co. v. Henigh, 23 Kan. 347; Morgan v. City of Hallowell, 57 Me. 375; Railroad Co. v. Carraher, 47 Ill. 333; Murray v. McLean, 57 Ill. 378.

In conclusion we cannot do better than quote, in illustration of the rule stated, from the case of Hargreaves v. Deacon, 25 Mich. 1, in which the plaintiff sued as administrator of his minor child of tender years, who was killed by falling into a cistern of the defendant, which had been left uncovered; and in stating the duty of protection and care on the part of the proprietor, the court say: "If on private property, not open of right to the public, it applies less generally, and only to those who have a legal right to be there, and to claim the care of the occupant for their security while on the premises against negligence, or to those who are directly injured by some positive act involving more than passing negligence. Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business, or of general resort, held out as open to customers or others whose lawful occasions may lead them there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity, or motives of private convenience in no way connected with business or other personal relations with the occupant." On a full and exhaustive examination of the facts furnished in the record, and all the authorities appertaining thereto, we are fully convinced that the negligence of the defendant is not made out, and the plaintiff's case must fail, and the judgment be reversed. It is therefore ordered and decreed that the judgment appealed from be reversed, and it is now ordered that the demands of the plaintiff be rejected, at his cost in both courts.

(29 Fla. 223)

DEWHURST *et al.* v. WRIGHT.

(*Supreme Court of Florida.* March 10, 1892.)

ESTOPPEL BY DEED—RESULTING TRUST—ENFORCEMENT—HOMESTEAD ENTRY—TRANSFER OF RIGHT.

1. Where one without title has conveyed land in his own right, with covenants warranting the title, and afterwards the title comes to him in the capacity of a trustee for a different person, the newly-acquired title does not inure to the former grantor of such covenantor, nor pass to him. The estoppel arises only where the covenantor takes the new title in the same right in which he had previously conveyed it.

2. Where a person makes a lawful purchase of land for himself with his own money, taking the title in the name of another person, a trust results in favor of the purchaser, and the person in whose name the title is taken becomes a trustee of the title in favor of the purchaser; but such title does not either inure to the benefit of or pass to a third person, to whom the person in whose name the title was taken had previously conveyed the land by warranty deed.

3. A court of equity will not declare or enforce a resulting trust contrary to the policy of the law as defined in a public statute, but will leave suitors asking its aid where it finds them, if it appears that they are seeking to evade the policy of the law.

4. The provisions of the second section of the act of congress of June 15, 1880, entitled "An act relating to public lands of the United States," that "persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing," may make cash entry of the land, do not include a person to whom such right of the entryman has been transferred subsequent to such statute; and where such a transferee has entered the land with his own money, and for his own benefit, but in the name of the entryman, it not appearing that he dealt with the government officers as such transferee, a court of equity will not declare or enforce a resulting trust in favor of such transferee or his grantee, against a third person in possession of the land, and to whom the original entryman had previously to such transfer, but subsequent to the statute, executed a conveyance of the land.

(*Syllabus by the Court.*)

Appeal from circuit court, Lake county; JOHN D. BROOME, Judge.

Bill by Fannie B. Dewhurst and others against William Wright to recover land. From an order dismissing the bill on demurrer plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by RANEY, C. J.:

1. The facts shown and allegations and prayer made by the bill are as follows: On June 1, 1870, the appellee's co-defendant, Polydore Dean, entered the land in question, 160 acres, now in Lake county, but then in Sumter, as a homestead, under the laws of the United States, in the Tallahassee land-office, the entry being No. 4,667 of the series of June, 1870. In December, 1878, final proof was made under section 2291 of the Revised Statutes, and the final certificate, No. 4,261, Gainesville office, was issued on December 6, 1883. Intervening the final proof and the issue of the final certificate, Dean conveyed the land to Wright on August 31, 1883, by deed, with full covenant of general warranty. In August, 1884, Dean was cited to appear at the Gainesville land-office on the 25th day of the following November, to answer a charge of fraud in the proof of his continuous residence on the land. Dewhurst, the co-appellant, appeared, as attorney for Dean, in compliance with the citation, and found that the United States officials were in possession of proof that Dean had not complied with the law as to residence, he having lived on the land for not longer than two years, although he had sworn in his affidavit of August 17, 1878, in making final proof, that he had continuously resided thereon for six years. Dewhurst prepared for Dean an appeal to the commissioner of the general land-office, praying that Dean be allowed to make new proof of his homestead entry, and obtain titles to the land embraced in the same. A letter from the receiver of the land-office at Gainesville, dated December 6, 1884, addressed to Dewhurst, "attorney for Polydore Dean," St. Augustine, Fla., states that the petition had been forwarded that day to the general land-office for consideration. This petition was refused by the commissioner, and the land-officers at Gainesville were notified of such refusal by a letter of December 29, 1884, and they on January 13, 1885, notified Dewhurst, as attorney for Dean, of such refusal, and, with a view to the cancellation of the entry, cited Dean to appear on the 23d day of February, and furnish proof concerning the alleged abandonment of his homestead entry and fraudulent proof.

2. On December 2, 1884, Dean conveyed the land in question to Dewhurst, the consideration stated in the deed being $200, and the deed being recorded in the public records of Sumter county on the 8th day of the same month. This deed is a formal conveyance of the land and of all the estate, right, title, and interest, "both vested and which may hereafter accrue, property, possession, claim, and demand whatsoever, as well in law as in equity," of the said Dean, and has full covenants of seisin, and of power to sell and convey, and of general warranty. On the last-named day Dewhurst conveyed the land to one Bradley, of Pittsburg, Pa., the consideration named being $960, and it having a covenant of general warranty.

3. The bill also alleges that Dewhurst, finding that Dean had no defense to the charges of fraud, and that the proofs of the same were unmistakable, and that his claim and interest were forfeited, and his homestead entry about to be canceled, obtained from the commissioner of the general land-office an admission that Dean had still the right to make a cash purchase of the land embraced in such entry; and as an evidence of such right the bill refers to a letter of September 26, 1884, to Dewhurst, from the acting commissioner, Smith, in reply to one from Dewhurst on the 16th of the same month. The acting commissioner, replying to Dewhurst's inquiry if Dean could purchase the land under the second section of the act of June 15, 1880, says there is nothing in the proceedings thus far to defeat Dean's right to purchase under that act. The bill states that Dewhurst so advised Dean, and urged him to make such purchase; that Dean was totally indifferent in the matter, and declined to purchase the land, urging his total inability to provide any, even a small sum, of the money necessary; that, finding that Dean could not obtain the means to purchase the land, and that otherwise it would be totally lost, and the United States would continue to retain the title against Dean, he, (Dewhurst,) for a valuable consideration, purchased from Dean the equitable title to the land, no other claim or title then remaining in Dean to said lands, except a right to make cash purchase thereof under the above act of June 15, 1880, and that he received from Dean the above deed of December 2, 1884; that Dean had not, at the date of such conveyance, nor at any other time, disclosed that he had executed any other and former deed, but had at all times declared that he had a full and clear title, subject only to the title of the United States; that Dean did declare to Dewhurst that

by and with his consent one William Wright was "cropping" on the land, but was there without any claim of right thereto, he having entered thereon by permission of one Fred Williams, who had entered on said lands by consent of Dean, and to whom Dean had given permission to erect a house on the land, in which house Wright was then residing; that, relying on the statement made by Dean that he had full right to sell and convey his equitable title, the legal title being still in the United States, he (Dewhurst) did with his own money purchase said legal title, as hereinafter set forth, and did "for a valuable consideration" receive from Dean a conveyance to him of the equitable title of said Dean in and to said land, with a release of all right of dower by his wife, first having been informed over the hand and seal of the clerk of Sumter county that there was no conveyance of record in his office of or concerning such land.

4. That Dewhurst did, on January 23, 1885, with his own moneys, make payment to the United States for the legal title of said land, said payment having been made to the receiver of the United States land-office at Gainesville, Fla., as evidenced by the complainant's check of that date on Florida Savings Bank, drawn in favor of such receiver for $200; that the receiver transmitted to Dewhurst, in return for such check, his duplicate receipt, which on April 20, 1885, was transmitted to the general land-office, and thereafter, in due course of time, and according to law, the patent for said land was duly transmitted to Dewhurst, of which a copy, duly certified, will be presented on the trial of the cause.

5. That Dean, being the owner of the legal title to such land by reason of the purchase thereof by Dewhurst from the United States on January 23, 1885, having been made in the name of Dean, although for the use of Dewhurst, did, for further assurance, execute to Dewhurst, February 14, 1885, his deed of conveyance, with full covenant of seisin and general warranty for said land.

6. That on the 10th day of June, 1885, Bradley and wife conveyed the land to Mrs. Dewhurst, with covenant of warranty against all claims of all persons whomsoever.

7. That in the summer of 1886 Dewhurst learned that Wright had received from Dean a deed of conveyance "to the land owned by your oratrix," and which Dean had attempted to convey to said Wright under and by virtue of his fraudulent claim of a homestead right and title, which would have inured to said Dean under and by virtue of section 2291 of the Revised Statutes of the United States, had he complied with the provisions of said law, but, Dean having failed to so comply, the said homestead right never inured to said Dean for want of compliance with said law, as admitted by Dean in his sworn petition for leave to make new proof in support of said homestead claim, and no right or title to said lands existed in said defendant Dean at the date of his pretended conveyance to Wright on the 31st day of August, 1883.

8. That no equitable title ever existed in Dean, because the sole and only title ever derived from the United States was derived by virtue of the cash entry and payment made January 23, 1885, "with the moneys of this complainant Dewhurst, paid by him upon the strength of the covenants of said defendant Dean;" that he was in possession of the land, and had full right to sell and convey the same, and because Dean had conveyed to him (Dewhurst) the land, with full covenants of seisin and warranty upon December 2, 1884.

9. That Wright's deed was not recorded till June 23, 1885, or more than six months after the record of the deed from Dean to Dewhurst or from Dewhurst to Bradley; that the consideration named in the deed is only $20; that, even if Dean, on August 31, 1883, had had any right or title to said lands, which complainants deny, complainants are not affected in their right and title to own and possess said lands, as the pretended conveyance to Wright is void as to subsequent purchasers for value without notice.

10. That Dean did not, after the date of his pretended conveyance to Wright, acquire a title to said land which would, by virtue of his covenants in the pretended conveyance of August 31, 1883, inure to the benefit of Wright, because he never acquired any other than a bare legal title as trustee for the complainant Dewhurst, who paid all the purchase money by which was acquired the title to said land. That by such payment Dewhurst alone became the *cestui que trust* as to the legal title, whether such legal title remained in Dean, or, by force and construction of law and by virtue of the covenants in the deed of August 31, 1883, the legal title to said land passed to the defendant, Wright. And complainants pray the court to decide what is in law the effect of said deed of August 31, 1883, if any it has; and, if it shall decide that in law it is effective to pass the after-acquired title of Dean, to declare Wright a trustee, holding the legal title for the benefit of Mrs. Dewhurst, as the grantee of Bradley, who was the grantee of Dewhurst.

11. Complainants allege, in effect, that they took without notice of said deed, and Wright went into possession as a tenant of Dean's tenant, one Williams, and at the time when Dean occupied and claimed the land as his homestead; that Wright now holds possession of said land, but only by virtue of his original entry under and by leave of Dean, without any claim of ownership; that complainants are informed that Wright is now claiming the whole or some part of said lands adversely to Mrs. Dewhurst, and that he now claims that he held such lands adversely to Dean at the date of Dean's conveyance to Mrs. Dewhurst, but complainants believe that the possession of Wright, beginning by entry while the land was still held and claimed by Dean by virtue of his homestead entry, and such entry, being by permission of one under Dean, must be deemed to be under and in subordination to the title of Dean up to such time as Wright took action to es-

tablish by some act of notoriety the fact that he claimed to hold said lands adversely to the title of Dean.

12. That recording the deed was the first notice given by Wright that he held adversely to Dean; that Wright has never returned the land for taxes; that the title to the land may be decreed to be in Mrs. Dewhurst; that the deed to Wright be canceled, and to be void as against her, "her husband and assigns;" that Wright be ordered to execute and deliver to her a deed of conveyance of the premises; and for general relief.

13. Wright demurred to the bill as not showing a case entitling complainants to discovery or relief, and as stating a case determinable at law, and the chancellor dismissed the bill on hearing the demurrer, from which order complainants have appealed.

W. W. Dewhurst, for appellants. *J. B. Gaines*, for appellee.

RANEY, C. J., (*after stating the facts.*) The purchase of land represented by the bill was made under the second section of the act of congress approved June 15, 1880, and entitled "An act relating to the public lands of the United States." This section provides that persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than $1.25 per acre, and the amount heretofore paid the government upon said lands shall be taken as a part of said price: provided, that this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws. Page 558, 1 Supp. Rev. St. U. S.

The real purpose of the bill is to have Wright declared a trustee of the title of the land in favor of Mrs. Dewhurst, and to require him to convey the same to her by proper deed.

Dean had, prior to the approval of the above act of congress, made an entry of the land, and had received his first certificate, but not a patent. Subsequent to the act, proceedings were instituted to cancel the entry for fraudulent proof as to residence on the land. He was clearly within the provisions of the above act of congress, but the bill informs us not only that he was indifferent to purchasing under its provisions, and could not provide the money to do so, but that he in fact declined to purchase, though urged to do so by Dewhurst, and that Dewhurst, with his own money, purchased the title of the United States, and took the title in the name of Dean. The bill is not framed upon the theory that Dewhurst advanced the money for Dean, or made the purchase for him, nor that at the time he paid the money he was acting for Dean in any representative capacity, nor under any agreement between him and Dean by which Dean would become the trustee of the title under an express trust in Dewhurst's favor. The theory of the bill, on the contrary, is that Dewhurst purchased the land for himself, and paid for it with his own money, as purchaser, and took the title in Dean's name, and that thereupon a trust resulted in his favor; and that by virtue of the conveyances from Dean to him, and from Dewhurst to Bradley, and from Bradley to Mrs. Dewhurst, the last-named party has become invested with the right to have a trust declared against Wright, to whom Dean had conveyed before conveying to Dewhurst, and to a conveyance from Wright.

Assuming that Dewhurst could have purchased lawfully the land for himself, and did so with his own money, and took the title in the name of Dean, the result would have been that, upon such purchase being made, Dean would have held the land in trust for Dewhurst or Dewhurst's grantees, such trust being what is known as a "resulting trust," (Perry, Trusts, § 133, and note 4;) but the title so vested in Dean in trust would not have inured to the benefit of Wright under his prior warranty deed from Dean, nor have passed to Wright from Dean. Where one without title has conveyed land in his own right with covenants warranting the title, and afterwards the title comes to him in the capacity of a trustee for a different person, such newly-acquired title does not inure to the former grantee of the covenantor. The estoppel arises only where the covenantor takes the new title in the same right in which he had previously conveyed it. 3 Washb. Real Prop. marg. p. 475, § 37; Burchard v. Hubbard, 11 Ohio, 316; Kelley v. Jenness, 50 Me. 455; Jackson v. Mills, 13 Johns. 463; Sinclair v. Jackson, 8 Cow. 543, 587; Jackson v. Hoffman, 9 Cow. 271; Marsh v. Rice, 1 N. H. 167; Rumlet v. Otis, 2 N. H. 167. We are satisfied that no benefit would have inured to Wright from the patent to Dean if the effect of such patent had been to vest the title, as between Dean and Dewhurst, or Dean and Dewhurst's grantee, in Dean, in trust for Dewhurst or such grantee; and that it would not, either of itself or through the aid of the former deed from Dean to Wright, have constituted Wright a trustee for Dewhurst, or for Dewhurst's grantee. It was Dean, not Wright, whom Dewhurst, in the eyes of the law, intended to make a trustee, and the law usually constitutes one under such circumstances. Wright's position is not only wholly disconnected from the transaction, but entirely hostile to it.

The trouble with complainants' case is that they are asking a court of equity to aid them in something which is contrary to the policy of the law. This a court of equity will not do, but, judging those who pray at its hands relief which the courts of law cannot afford by the case they make for themselves, it will leave them where they are if it appears they are seeking to evade the policy of the law as defined in a public statute. I Perry, Trusts, § 131; Proseus v. McIntyre, 5 Barb. 425; Baldwin v. Campfield, 8 N. J. Eq. 891; Cutler v. Tuttle, 19 N. J. Eq. 549; Ford's Ex'rs v. Lewis, 10 B. Mon. 127; Camden v. Anderson, 5 Term R. 709; Ex parte Yallop,

15 Ves. 60; Ex parte Houghton, 17 Ves. 251; Groves v. Groves, 3 Younge & J. 163; Childers v. Childers, 1 De Gex & J. 482; Atkins v. Kron, 5 Ired. Eq. 207; Leggett v. Dubois, 5 Paige, 114; Hubbard v. Goodwin, 3 Leigh, 492; McCaw v. Galbraith, 7 Rich. Law, 74; Anstice v. Brown, 6 Paige, 448.

The purpose of the act of congress, as set out above, was the relief of persons who had previously entered for homestead lands under any of the homestead laws of the United States, and also the relief of the persons to whom the right of those having so entered lands for homesteads had been previously attempted to be transferred by *bona fide* instrument in writing. The policy of the act was to permit these two classes of persons to purchase for cash, or make a cash entry of the lands upon the terms stated in the act, and thus save them from the loss consequent upon failure to comply with the ordinary statutory requirements as to residence or occupation and improvement in case of homestead entries. Neither of these classes include, nor does the policy of the act embrace, a person to whom the person making the entry may have made a transfer, or a *bona fide* attempt to transfer, subsequent to the act. The act does not permit a person who belongs to neither of the two favored classes to avail himself of the benefits offered them, by doing for himself and with his own money, but in their name, and upon their application, and the proof of identity which the provisions of the act palpably render indispensable, that which he could not do if acting avowedly and openly for himself; nor will a court of equity, even though a patent in the name of one entitled to it under the provisions of the above statute had been secured by a person not belonging to either of the favored classes, relieve such person of unanticipated obstacles to the beneficial realization of that which the statute never intended he should acquire under its provisions.

If the bill showed that Dewhurst had applied to the government in his own name as the transferee of Dean under Dean's deed of December 2, 1884, to him, for the benefit of the act of congress, and that the land-officer had decided that he was by virtue of such deed entitled to the benefit of the act, and had actually sold to him, and made the conveyance in the name of Dean, a different case would be before us, and we do not say what our conclusion would be. As it is, the bill is not sufficient in its statement of the details of the procedure to justify a conclusion that Dewhurst has operated in this way and in his own name, and not under the name of Dean. It cannot be inferred from the statements of the bill that the government officers have dealt with Dewhurst as the transferee of Dean. The only inference legitimate, in view of the law, is that Dewhurst, after Dean's refusal to purchase, did so really for himself as between him and Dean, but actually in Dean's name. This the law did not permit him to do, and a court of equity will not sanction.

We of course do not mean to intimate any judgment as to the validity of the patent. No such question is before us. However valid it may be as between Dean and the government, (and we do not say it is not entirely so,) we only say that a court of equity will not aid complainants upon the case made by the bill, but will, as to the case made by this bill, leave all the parties in the position they occupy at law.

The order appealed from is affirmed.

YOUNG, J. of the fourth circuit, sat in the place of MABRY, J., who was disqualified.

(29 Fla. 553)

JOHNSTON v. STATE.

(*Supreme Court of Florida.* March 24, 1892.)

CRIMINAL LAW — APPEAL — SUFFICIENCY OF EVIDENCE — INSTRUCTIONS — OBJECTIONS NOT MADE BELOW.

1. An appellate court will not disturb the verdict of a jury as being contrary to the evidence when it is not contrary thereto, but is sustained by it.

2. Even admitting that there may be an error in one of the charges, the verdict will not be disturbed on account of it where it is clear that such error is corrected by other charges on the same point, and particularly where the testimony is such as to preclude the conclusion that the party is not guilty of the offense of which he has been convicted.

3. An appellate court may refuse to notice points urged in the brief of counsel for a plaintiff in error, which are not covered by the assignment of errors.

4. The striking out of immaterial testimony by the court is not error.

5. An objection not made in the trial court as to the admissibility of evidence cannot be urged in the appellate court.

(*Syllabus by the Court.*)

Error to circuit court, Orange county; JOHN D. BROOME, Judge.

Indictment against Thomas A. Johnston for murder. From a judgment on a verdict of manslaughter in the second degree defendant brings error. Affirmed.

E. K. Foster, for plaintiff in error. *William B. Lamar*, Atty. Gen., for the State.

MALONE, Circuit Judge. At the fall term, 1890, of the circuit court for Orange county, in the seventh judicial circuit, Thomas A. Johnston, the plaintiff in error, was tried upon an indictment charging him with the murder of one William Lee, and found guilty of manslaughter in the second degree by a petit jury. He then moved the court for a new trial, but the court denied this motion, and sentenced him to imprisonment in the penitentiary for the period of five years.

Thereupon he removed said suit by writ of error to this court for review, and assigned the following errors, viz.: (1) That the verdict was contrary to the evidence; (2) that the court erred in giving charge No. 4.

A review of the testimony in this case will be necessary in order to determine whether these assignments of error are well taken. This testimony is very voluminous, and we will not undertake to repeat it all, but will repeat the substance of it only, which is as follows, viz.:

On the morning of the 9th day of May, 1890, Thomas A. Johnston, the plaintiff

in error, and William Lee, the deceased, met near Yates' house, in the road leading from Orlando to Oakland, in Orange county. Both men were riding on horseback, at a moderate gait; the former going towards Oakland, and the latter towards Orlando. When within about 25 yards of each other both checked their horses to a walk, and just as they passed each other Johnston suddenly turned his horse, presented a 38 Smith & Wesson pistol to Lee's back and fired, shooting him in the back. The pistol was held so close to Lee when it fired off that it burned his clothing. Lee then fled in the direction of Orlando, hollering, "Oh Lord!" his horse running at full speed, but keeping in the road. Johnston, pistol in hand, urged his horse to a run also, and pursued Lee, and again shot him in the back while he was fleeing. After this second shot, Lee fell from his horse into the road, dead, and then Johnston checked his horse before he reached the corpse, and turned and rode off in the opposite direction to Dink Patrick's; and afterwards, during the same morning, returned to Orlando, and surrendered himself to Mr. Anderson, the sheriff of Orange county, and at the same time informed him that he had shot Will Lee in the back with a pistol, which he exhibited, and killed him.

It appears that the deceased had already threatened to kill Johnston, and that these threats had been communicated to Johnston a short time before the homicide.

The statement of Johnston himself varies very little from this testimony. His statement about his meeting the deceased in the road and the circumstances connected with the homicide is the following, viz.: "I was right up to Yates' house, and when I looked up I met Will Lee. He was close to me. I don't know whether he came around the corner of the fence or where. I never saw him until he was right there, and he said, 'God damn you, I have got you now,' and by that time he was in about three or four feet of me, and he spurred his horse up towards me, and struck at me, and missed me, just brushing my left shoulder. Then I reached and jerked my pistol out, and my horse sorter turned, and I shot him right about there, [indicating.] Then I turned my horse around, and he started to run, and my horse did, too; and I shot at him again as he went off, and both horses was running, and he fell off."

The plaintiff in error contends that the verdict was contrary to the evidence, because this testimony proved that the homicide was justifiable, and did not prove manslaughter in the second degree.

We do not think that this contention is tenable. The testimony does not, in our opinion, prove a case of justifiable homicide. It is true that it appears from the testimony that the deceased had threatened to take Johnston's life, but it also appears that at the time that he was shot and killed the deceased did nothing that evinced an immediate design to execute said threats. Indeed, there is a total absence of any testimony whatever showing any hostile demonstration or overt act of attack on the part of the deceased against Johnston that indicated an immediate design to take Johnston's life, or to do him great personal injury. Besides, it will be observed that Johnston himself did not state that he apprehended or had apparent reason to apprehend that the deceased designed to kill him, or to do him great personal injury, and that there was imminent danger of said design being accomplished, and that he slew the deceased to prevent it. It is true that Johnston stated that the deceased spurred his horse up towards him, and struck at him, but missed him, just brushing his left shoulder, but does not state what the deceased struck at him with, and we are left to infer that it was his left hand.

Now, it will be observed that Johnston did not shoot the deceased as he approached him, but waited until the deceased had passed him, then suddenly turned and shot the deceased in the back without any warning whatever; and when the deceased fled after receiving the bullet in his back he pursued him, and shot him in the back again, and continued the pursuit until the deceased fell from his horse into the road, dead.

It is evident that when Johnston fired those fatal shots he had no apparent reasonable ground to apprehend that the deceased designed to kill him, or to do him great personal injury, and that there was imminent danger of such design being accomplished.

We think that this homicide was without justification, and was wholly unnecessary. The verdict, therefore, in our opinion, is not contrary to the evidence, but sustained by it. Under these circumstances, this court will not disturb this verdict. Hicks v. State, 25 Fla. 535, 6 South. Rep. 441; Anderson v. State, 24 Fla. 139, 3 South. Rep. 884; Robinson v. State, 24 Fla. 358, 5 South. Rep. 6; Huling v. Bank, 19 Fla. 695; John v. State, 16 Fla. 554; Mayo v. Hynote, Id. 673; Sherman v. State, 17 Fla. 888.

We will now consider the second assignmen of error, viz.: That the court erred in giving charge No. 4, which is in the following words, viz.: "A person has the right to defend himself against an attack by another, and to kill such other when there is reasonable ground to apprehend a design on the part of such other person to commit a felony upon him, or to do him some great personal injury, and there shall be imminent danger of such design being accomplished. It must appear that the assault was imminently perilous, or that it would appear to be imminently perilous to a reasonable man, situated as the party assaulted was situated; and, unless there be a plain or apparently plain manifestation of a felonious intent, or intent to do great personal injury, no assault will justify killing the assailant."

The plaintiff in error has failed to point out to us any error in this part of the charge. But, even if error had been pointed out therein, not only is it corrected by the other and full charges given, but it would be harmless, and would not defeat the verdict, because the testimony is such as to preclude the conclusion that the

killing was excusable or justifiable, and sustains the verdict. Wooten v. State, 24 Fla. 335, 5 South. Rep. 39; Brown v. State, 18 Fla. 472.

It is urged in the brief of counsel for plaintiff in error that there was error in excluding certain testimony of a witness named Nobles, relating to the statements of the deceased as to his intention to gather the prisoner's cattle; and also that there was error in permitting a horse other than that ridden by Lee to be ridden across a bridge at the view of the scene of the killing, taken at the request of the prisoner, by the court and jury. As these points are not included in the assignment of errors, we are not required to notice them. We will, however, say that the testimony of Nobles is entirely immaterial, and could have had no effect upon the conclusion reached by the jury; and that the objection urged here as to the horse was not made at the time of the riding across the bridge at the view.

The judgment is affirmed.

MALONE, J., of the second judicial circuit, sat in the place of TAYLOR, J., who was disqualified.

(29 Fla. 1)

STOCKTON v. POWELL *et al.*

(*Supreme Court of Florida.* March 12, 1892.)

CONSTITUTIONAL LAW—IMPROVEMENT OF NAVIGABLE STREAM—REGULATION OF COMMERCE—ISSUE OF BONDS—SPECIAL LEGISLATION—COUNTY COMMISSIONERS—NOTICE OF MEETING—COUNTY BOND—ELECTION—RETURNS—QUALIFICATIONS OF VOTERS.

1. The purpose for which, under the act of June 11, 1891, entitled "An act to authorize Duval county to improve the navigation of the St. Johns river, and to issue bonds in aid thereof," the proceeds of the bonds are authorized to be applied, is "the work of improving the navigation of the St. Johns river, and removing obstructions therefrom, within the county of Duval." This work is a county purpose, within the meaning of the provisions of section 5, art. 9, of the constitution, that the legislature shall authorize the several counties to assess and impose taxes for county purposes, although the river is a navigable stream and public highway, and may run from its mouth in the county, and hundreds of miles beyond the limits of the county, and through other counties, and commerce is carried on as an entirety upon it from its mouth towards its source for the distance stated, and thence back, and a large portion of its commerce is to or from other states and foreign countries, and the commerce and business of the river confined within the limits of the county are very small and of no importance. The statute is not in conflict with the constitutional provision designated.

2. Commerce with foreign nations and among the states embraces, not only subjects which are national in their character and require, in order to preclude discriminating regulations by the states, uniformity of regulation affecting all the states, but also such matters, within the purview of such commerce, as are local in their nature or operation, and can be properly regulated by provisions adapted to their particular circumstances. The power of congress to regulate commerce with foreign nations and among the states is exclusive only in so far as it relates to those subjects of such commerce that fall within the former or national class. As to this class the states have no power to act, even in the absence of congressional regulation, but, as to any subject within the other or local class, the states have plenary power of control so long as congress does not act as to it. The improvement of a navigable river connecting with the ocean, and constituting a navigable water of the United States, but lying entirely within a state, is a subject falling within the second or local class, and such improvement may be made by or under the authority of the state so long as the free navigation of the river, as it may be permitted by the laws of the United States, is not impaired, or any system for its improvement provided by the general government is not interfered with or defeated.

3. The act of June 11, 1891, (chapter 4077, St.,) authorizing the county of Duval to improve the navigation of St. Johns river, and remove obstructions therefrom, is not in conflict with the provision of the constitution of the United States, which gives congress power to regulate commerce with foreign nations and among the several states.

4. If it be that the act of June 11, 1891, authorizing the county of Duval to improve the navigation of the St. Johns river, and to issue bonds, the proceeds of which are to be applied to such purpose, does not provide any means or method for paying the principal and interest on the bonds, such fact is not a good objection to the validity of the act or to the issue of the bonds thereunder, nor is the fact that such provision may not be otherwise made.

5. The courts have no power to inquire whether the notice of application to the legislature for local or special legislation, required by section 21 of article 3 of the constitution, and by the legislation thereunder, defining the method of publishing and proving the publication of such notice, (Act of May 31, 1887; chapter 3708, St.,) has been given. To ascertain and decide whether the required notice has been given is exclusively a legislative function and duty, and the passage of a special or local act is a legislative judgment that proper notice has been duly published, and that the legal evidence thereof was "established in the legislature" before the bill was passed, and the courts are concluded by such judgment.

6. A recital in the records of a special meeting of a board of county commissioners, that the meeting was "called by the chairman for the purpose of ordering an election" as to issuing bonds of the county under the provisions of a designated statute, is, in the absence of allegation and proof to the contrary, sufficient evidence that notice of the time and purpose of such special meeting was given to each member of the board.

7. A special meeting of a board of county commissioners, of which each commissioner has been duly notified, may be adjourned to a subsequent day by the members present, a majority of the entire board; and, it seems, that less than a majority may do so. The members present at such meeting have actual notice of the adjournment, and those not present are charged in law with notice thereof, and the adjourned meeting is but a continuation of the original one, and anything done at the adjourned meeting concerning the matter for which the meeting was originally called is as legal as if it had been done before the adjournment.

8. Where a regular meeting of a board of county commissioners adjourns to a subsequent day, all the members being present, each member is charged with the official duty of attending, and with notice of any lawful action to be taken at such adjourned meeting, and anything done at such meeting, within the power of the board to do, is not rendered invalid by the fact that one member did not attend it.

9. A statute providing for an election as to the issue of bonds by a county directs that the returns of the election shall, within two days after the election, be delivered to the clerk of the circuit court, to be laid before the board of county commissioners, and that the board shall publicly canvass the returns at their "next regular or special meeting," and declare the result. *Held*, that the purpose of the act in the use of

the words quoted was to secure promptness of action upon the part of the board, rather than to exclude from any particular meeting the power to canvass the returns, and that a canvass of such returns made at an adjourned regular meeting held on a day subsequent to the election, to which day the regular meeting had been adjourned from a day prior to the election, was legal.

10. Payment of poll-taxes was not a requisite or qualification for voting at the election in Duval county as to issuing bonds under the act of June 11, 1891, for the improvement of the navigation of the St. Johns river. Though this is not expressly declared by the act, its provisions show clearly a legislative intent that no such qualification was to be required, but that all persons duly registered as voters, and retaining the qualifications which preserve the legality of registration, should have the right to vote.

11. The act of June 11, 1891, authorizing Duval county to improve the navigation of the St. Johns river, required returns to be sent to the clerk of the circuit court, and to be delivered by him to the county commissioners, and authorized the commissioners to canvass them. The county judge and supervisor of registration had nothing to do with the canvass under the general election law, and properly took no part in it.

12. That a canvassing board has before it, when making a canvass of votes cast at an election, not only the returns properly made under the statute, but also a duplicate return made to an officer which the law did not require to be made, is immaterial.

13. The mere fact that oaths of inspectors and poll-lists may have been transmitted to an officer not authorized to receive them is an irregularity which does not affect the result of an election, or the legality of the canvass of returns duly made of votes cast at the election.

14. The act of June 11, 1891, authorizing Duval county to improve the navigation of the St. Johns river, provides that the bonds to be issued under the act "shall bear the seal of the aforesaid county of Duval." The county commissioners passed a resolution that "the seal of the circuit court for Duval county, and of this board, now in use, is adopted as the common seal of Duval county." *Held*, that the act authorized the use of the seal of the circuit court of Duval county in sealing the bonds, and, to the extent that the resolution indicated the will of the board that it should be so used, the resolution was valid, but not further or otherwise.

(*Syllabus by the Court.*)

Appeal from circuit court, Duval county; W. B. YOUNG, Judge.

Suit by Telfair Stockton against Benjamin R. Powell and others, county commissioners of Duval county, to restrain them from issuing certain bonds. From a judgment dismissing his bill on demurrer, plaintiff appeals. Affirmed.

Cooper & Cooper, for appellant. *Randall & Foster*, for appellees.

RANEY, C. J. I. This is a suit for an injunction to restrain the appellees, who are the county commissioners of Duval county, from issuing bonds under the provisions of an act approved June 11, 1189, and entitled "An act to authorize Duval county to improve the navigation of St. Johns river, and to issue bonds in aid thereof." Chapter 4077, p. 119, St. 1891. The purpose for which the proceeds of the bonds are authorized to be applied is "the work of improving the navigation of the St. Johns river, and removing obstructions therefrom, within the county of Duval." Section 8, p. 121. The demurrer to the bill was sustained, and, the complainant declining to amend, the bill was dismissed.

The first objection urged against the issue of the bonds is that the purpose for which their proceeds are applicable under the statute is not a "county purpose," within the meaning of our constitution; and hence that the act is unconstitutional. Counties are, according to our constitution, the recognized legal political divisions of the state, (sections 1, 2, art. 8;) and the same fundamental law (section 5, art. 9) provides that "the legislature shall authorize the several counties and incorporated cities or towns in the state to assess and impose taxes for county and municipal purposes, and for no other purpose."

If "improving the navigation of the St. Johns river, and removing obstructions therefrom, within the county of Duval," is not a county purpose, in so far as Duval county is concerned, the act is contrary to the last-stated provision of the constitution, and void, and the bonds are of no validity, and equity has jurisdiction to enjoin their issue. High, Inj. § 1282 et seq.; Chestnutwood v. Hood, 68 Ill. 132; List v. City of Wheeling, 7 W. Va. 501; State v. County Court, 51 Mo. 359; Allen v. Inhabitants of Jay, 60 Me. 124.

The bill informs us that the river named is a navigable stream and public highway, running not less than 200 miles beyond the limits of the county, and through several other designated counties, and that commerce, travel, and transportation are carried on as an entirety upon the stream from its mouth in Duval county, where it empties into the Atlantic ocean, towards its source, and from its source to its mouth, at least the distance stated, and through each and all of such counties; and that a large portion of this commerce is to or from other states and foreign countries, and that the commerce and business on the river confined within the limits of Duval county is very small and of no importance. The other averments of the bill are numerous, and will be noticed, but these give us an understanding of the character of the stream intended to be improved. It is not exclusively local, either in its being or its use, but runs through Duval, and through or between several counties, and is the highway of their local as well as their other commerce, including interstate and foreign commerce.

The authorities have formulated no generally accepted definition of a "county purpose," but leave each case involving the question to be decided as it may arise. In the case of Cotten v. County Com'rs, 6 Fla. 610, where the fourth section of article 8 of the constitution then under consideration was substantially like the fifth section of article 9, supra, of the present organic law, it was contended by the appellants that locality within the county was the true test of a work being one that is included within "county purposes," while the position of the commissioners was that anticipated benefits from the work was the proper criterion. The answer of the court to these contentions was that neither, taken

by itself, "will furnish the correct rule, but, as a general rule, it requires a concurrence of both; for it will readily strike the mind of every one that a great enterprise may be embraced entirely within the limits of a county, and therefore exclusively local, without, in the slightest degree, being entitled to the distinctive character of a county purpose; while, on the other hand, another enterprise, though entirely without the county limits, may confer innumerable benefits upon and advance the best interests of the county, with as little claim to the character of a county enterprise." These observations are followed immediately by the further remark that it would be as improbable, as it is dangerous, to attempt to prescribe any definite rule to be looked to as furnishing any correct test on the subject. Pages 623, 624.

If it be that locality within the county is essential to render an improvement a "county purpose," it is clear that the work contemplated by this statute furnishes a compliance with this requirement, for under the act nothing is to be done outside of the county; and, this being so, it becomes, for all the purposes of this case, immaterial whether or not the absence of the feature, locality within the county, will always avoid as unconstitutional any legislation providing for public improvements or works through the instrumentality of a county government and county taxation, and consequently nothing should or will be said on that point.

It is not denied that an improvement must, to fall within the pale of "county purposes," be one for a public purpose, as taxation cannot be resorted to for private purposes, or for the benefit, aid, and promotion of private enterprises. This principle has never been questioned, but there has been, and always will be, more or less difficulty and conflict of opinion as to whether particular projects were or are for a public or a private purpose. In many cases the aid authorized to be given by counties in the construction of railroads was in the shape of subscription for capital stock of or of donations to the companies proposing to build the roads, and such subscriptions and donations were upheld almost invariably, (Cotten v. County Com'rs, supra; Commissioners v. King, 13 Fla. 451;) but with us it is assumed that this form of promoting the construction of highways has been inhibited by a constitutional provision, ordaining that "no tax shall be levied for the benefit of any chartered company of the state, nor for paying interest on any bonds issued by such chartered companies, or by counties, or by corporations, for the above-mentioned purpose," (section 7, art. 9.) There is, however, no feature here of aid, even in form, to any incorporated or other company, nor does the statute propose any benefit to any private purpose or private enterprise. The work is to be carried on under the direction and control of the public agencies named in the act, and no individual, natural or artificial, nor any company, incorporated or unincorporated, is the special object of the benefaction of the improvement contemplated, but it, on the contrary, is for the public without discrimination. The use of the river, when improved as contemplated by the statute, is not to be appropriated, either directly or indirectly, to or for the benefit of any one person as against another.

It was said in Cotten v. County Com'rs, supra, that to obtain a correct interpretation of the term "county purpose," as used in the constitution then in force, which constitution was framed in 1838-39, we must look to contemporaneous legislation on that subject, and the uniform action of the county courts under the territorial government, and that by making this reference it will be abundantly demonstrated that at that day county purposes were taken to embrace principally the erection and repair of court-houses and jails, the opening and maintaining public thoroughfares within the limits of their respective counties, by opening roads, building bridges and causeways, and keeping the same in repair, licensing and regulating ferries and toll-bridges. In somewhat the same strain, Judge Cooley, in treating of what constitute public purposes for which taxation may be laid, says, in his work on Taxation, (2d Ed.) p. 116, that in deciding whether, in a given case, the object for which the taxes are assessed is public or private, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal; that whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation. And, on a subsequent page (130) of the same chapter, he observes that one of the most important functions of government is making provision for public roads for the use, of the people, the variety of which is great, and the mode of construction and operation difficult. No question, he asserts, is made of the competency of the legislature to levy taxes for the common highway, the improved turnpike and macadamized road, the planked or paved street, the canal, the tramway, or the railway, any or all of which may be constructed by the state, or, under state authority, by the municipal subdivisions of the state within whose limits they may be needed. Again, in Commissioners v. Migheis, 7 Ohio St. 109, a case characterized by Judge Dillon (section 23, Dill. Mun. Corp.) as one in which the distinction between cities and towns, or municipal corporations proper and involuntary *quasi* corporations, such as counties, is very clearly drawn, "the means of travel and transport" are designated among the purposes for which county organizations are created. Further, it is said in Nichol v. Mayor, etc., 9 Humph. 252, of "corporation purposes," as applicable to a city, that they

include "all facilities of canals, roads, the improvement of rivers by which their navigable use is extended, by all which the commercial interests of a town are increased and expanded by reason of the increased facilities of communication thus furnished, by means of which the wealth of its population, individually and collectively, is increased, with a consequent increase of the comforts and enjoyments of life;" but, however, with the qualifying remark that these improvements must have some connection with the corporate town claiming them as corporate purposes more direct than that which would result from the general increased prosperity of the country by reason of such improvements made without a direct reference to or indirect connection with the town; and that the improvement must have such relation to the town as to be the medium through which this prosperity is attained, and must begin or terminate at the town, or pass through or so near to it as to be capable of affecting its direct interests.

Even if we were without more direct authority upon the question, it would seem difficult to hold that the improvement of the St. Johns river, within the limits of Duval county, is not a county purpose. The river is a highway, a means of travel and transport, useful to the local interests of the people of the county, and, to our minds, clearly within the local purpose for which counties and their governments are created. That the commerce and business on the river local to the county is small, or, in our judgment, of "no importance," does not change the character of the river or its improvement as a county purpose, nor affect the power of the legislature to authorize the improvement, or of the county authorities to make it in the manner prescribed. The function of the judiciary is to confine the legislature and the county authorities to the limits prescribed by the constitution, and not to control the exercise of any discretion that may be within such limits. That we might think the establishment of an ordinary road, or the widening or other improvement of an old one, or other exercise of firmly established instances of power, entirely unnecessary, or the improvement now in question unadvisable, cannot justify a usurpation upon our part of legislative or executive functions; and the same principle must control our action when we are urged to interfere on the ground that the subject of the improvement, or its result, may be of greater benefit to foreign interests than to those local to the county. That a river may be used more for intercourse and commerce between counties, or even states, than for that which appertains simply to the county proposing to improve it, and that its improvement will redound in a greater degree to the benefit of those engaged in such foreign transportation and traffic, is no stronger argument against the improvement of the river within the county than it would be to urge, as a reason for not making or improving an ordinary road, that the travel and carriage upon it affecting interests beyond the county, or by persons not resident in the county, would be more extensive than the local travel or carriage.

Still we are not without more direct adjudication upon the part of this improvement being a county purpose. The effect of the decision in Hasbrouck v. City of Milwaukee, 13 Wis. 37, is, that a legislature may authorize a city to issue bonds for the construction of a harbor, but that the construction of railroads, canals, harbors, and the like internal improvements cannot be done by a municipality without a specific grant of the power by the legislature. In Taylor v. Commissioners, 2 Jones, Eq. 141, an act authorizing the commissioners of an incorporated town to subscribe to the stock of a company incorporated for the purpose of improving the navigation of a river contiguous to the town, was held constitutional, although the improvement contemplated by the act was to begin several miles above the town, and to pass through several other counties than the one in which the town was situated. Goddin v. Crump, 8 Leigh, 120, is a case in which legislation authorizing the city of Richmond to subscribe for stock in a company incorporated for the purpose of connecting the navigable waters of the James river with those of the Ohio river, and providing for taxation to pay for the principal and interest of money borrowed to pay for such stock, was held constitutional, as being a corporate purpose. Among other observations of the opinion, it is said that the removal of the bar in James river above Warwick would be fairly a corporate act, since it would greatly redound to the advantage of Richmond, would benefit its trade, and diminish the charges which now incumber and embarrass it; for, though the work would be done beyond the limits of the city, the consequence of effects of it would be felt throughout its borders.

We fail to find in the authorities cited by appellant's counsel anything inconsistent with the above conclusions. They will be noticed in the succeeding paragraph.

Mobile Co. v. Kimball, 102 U. S. 691, is a case in which a statute of Alabama authorized the issue of bonds of the county of Mobile by its proper authorities, to be used by a designated board under authority granted them in the improvement, cleaning out, deepening, and widening of the river, harbor, and bay of Mobile, or any part thereof, or the making an artificial harbor. This board entered into a contract with Kimball and another for dredging a channel through Dog river bar, in Mobile bay, and the work was completed in March, 1873. Two of the contentions of appellant were (1) that the statute was invalid, as being in conflict with the commercial power vested in congress; (2) that the expense of the work could not, under the constitution of Alabama, be imposed on the county of Mobile, the work being for the benefit of the whole state. The views of the court as to the former of these objections are pertinent to the second subdivision of this opinion, and will be noticed in it. The

conclusion reached as to the second objection was against it; and having previously observed that the issue of the bonds was the loan of the credit of the county for a work, public in its character, designed to be of public benefit to the state, but more especially and immediately to the county, (see, also, President & Com'rs of Revenue v. State, 45 Ala. 399,) yet it was held, assuming as true the contention that the act fastened upon one county the expense of an improvement for the whole state, that, when any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised, and that it may apportion the burden ratably among all the counties or other particular subdivisions of the state, or lay the greater share, or the whole, upon that county or portion of the state specially and immediately benefited by the expenditure, and that any injustice or oppression in the imposition of the expense on less than the whole state was remediable, not at the bar of the courts, but at the polls. In Davidson v. New Orleans, 96 U. S. 107, an assessment of real estate in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owner of his property without due process of law. The court, while it avoided the danger of attempting a definition of "due process of law," held that there is due process of law when the statute requires that such a burden, or the fixing of a tax or assessment, before it becomes effectual, must be submitted to a court of justice, with notice to the owners of the property, all of whom have the right to appear and contest the assessment. Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. Rep. 663, decides nothing, for which notice can be taken of it here, but that it is within the discretion of the legislature of California to prescribe a system for reclaiming swamp lands, when essential to the health and prosperity of the community, and to lay the burden of doing it upon the districts and persons benefited. In the case of Board v. Weider, 64 Ill. 427, the constitution provided that the corporate authorities of counties, cities and towns, and other local subdivisions, naming them, might be vested with power to assess and collect taxes for corporate purposes; and it was held that, to come within the meaning of this provision, a tax for corporate purposes must be for such purposes, and such only, as are germane to the objects of the creation of the municipality, and at least such as have a legitimate connection with those objects, and a manifest relation thereto, and that a location or site for a state institution provided for by law,—a state reform school for juvenile offenders and vagrants,—in a certain township of a county, was not a county purpose justifying the issue of bonds of the county to provide such a site, and that a statute authorizing such issue of bonds was unconstitutional. Mather v. City of Ottawa, 114 Ill. 659, 3 N. E. Rep. 216, decides that, under the same constitutional provision, a municipal corporation is prohibited from levying a tax in aid of a merely private enterprise, although the purpose may be one that will add to the wealth and prosperity of the municipality. Bonds of the city were issued under an ordinance approved by a vote of the people authorizing the mayor to borrow a large sum "for the use of the said city, to be expended in developing the natural advantages of the city for manufacturing purposes," and providing for the issue of bonds for the same. The bonds were given to an agent of a private corporation, to be by him expended in the improvement of the water-power upon certain rivers within the city, and he negotiated them to a person residing in the city, and it was held that the bonds were void, not being issued for a corporate purpose. The decision in Board of Sup'rs of Will Co. v. People, 110 Ill. 511, is, in effect, as is stated in Cooley on Taxation, (page 180, note,) that a state may, by general law or otherwise, require a county to share with a town in the cost of an expensive bridge or road, though, in general, the towns bear the whole cost of such works. The question was as to the constitutionality of a statute which provided that, in certain cases, a county should pay half the expense of the construction of a bridge in a town, or between two towns, which the town authorities might desire to build, the town authorities to furnish the other half. The constitutional provisions invoked were (1) that the general assembly might "vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of contiguous property or otherwise," and that for all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, the same "to be uniform in respect to persons and property within the jurisdiction of the body imposing the same;" (2) that the general assembly should not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, "but shall require that all the taxable property within the limits of such corporations shall be taxed for the payment of debts contracted under authority of law," the same to be "uniform," as stated above. The reasons assigned why the statute conflicted with the above provisions of the organic law were that it attempted to confer discretionary power of local taxation upon persons other than the corporate authorities of the district to be taxed, and authorized the levy of a tax for township purposes on property not subject to the jurisdiction of the authority not levying the tax; that the legislature could not impose a debt upon a municipal corporation without its assent. The statute and tax were sustained, and while the conclusion of the opinion is that taxation, in pursuance of a general law of the state, for the purpose of building bridges, maintaining public highways, and similar objects in which the people of the state are directly interested, is not taxation for a strictly local purpose, within the meaning of the fundamental law set out, and

that municipal authorities in levying taxes for such purposes, as distinguished from the mere private concerns of a municipality, are in a large sense merely agencies of the state in carrying into effect general laws enacted for the common good, it is also the conclusion and judgment of the court that the expense of such bridges and highways could be imposed on the county, as had been done in that case. The other authority referred to by appellant is section 746 of Dillon on Municipal Corporations, stating the provisions of the Illinois constitution, to the effect that "the corporate authorities of * * * cities * * * may be vested with power to assess and collect taxes for corporate purposes, and that the supreme court of that state had held that the provision limited taxation by municipal authorities to local or corporate purposes, and restrained the legislature from granting the right of local or corporate taxation to other than the corporate authorities of the municipality or place to be taxed."

No comment on these cases seems to us necessary to show that they do not conflict with our conclusion that the improvement proposed by the act under consideration is a "county purpose," and the statute valid against the objection we have been considering.

II. It is also alleged in the bill that the general control of the river for purposes of navigation and commerce is under the general government of the United States, which has had the same surveyed, and lights and light-houses, buoys and channel marks, placed in and along said river, and has done, and is now engaged in, a large amount of public improvement in said river, both at its mouth and at different points beyond the limits of Duval county towards the source of said river, placing jetties therein, and in other respects endeavoring to improve the navigation of the river and to remove obstructions therefrom.

This part of the bill might be treated as abandoned by the appellant, as it is not legitimately within any discussion to be found in his brief. We, however, are not satisfied to permit the point to pass unnoticed; for if the statute constitutes, in view of those allegations, or for other apparent cause, an interference with the works or jurisdiction and policy of the general government, we ought to arrest promptly any attempt at its enforcement, and not leave this to be done in the courts of the United States, as it might be, at the instance of proper suitors in that forum. The obligation rests no less upon us than it would on a national tribunal having jurisdiction in the premises.

In Mobile Co. v. Kimball, 102 U. S. 691, cited supra, while it is held that the power conferred on congress by the commercial clause of the constitution—that giving power to regulate commerce with foreign nations and among the several states—is exclusive, so far as it relates to matters within its purview which are national in their character, and admit or require uniformity in any legislation affecting all the states, and that commerce with foreign countries and among the states, strictly considered, consists in "intercourse" and "traffic," including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities, and that to "regulate commerce," as thus defined, there must, to secure against discriminating state legislation, be only one system of rules applicable alike to the whole country and prescribable only by congress; yet it is also decided that state legislation is not forbidden touching matters either local in their nature or operation, or intended to be mere aids to commerce, and for which special regulation can more effectually provide. "The improvement of harbors, bays, and navigable streams within the states," says the opinion, "falls within this last category of cases. The control of congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The states have as full control over their purely internal commerce as congress has over commerce among the several states and with foreign nations, and to promote the growth of that internal commerce, and insure its safety, they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation, as permitted under the laws of the United States, or defeat any system for their improvement provided by the general government." The statute was held not to be in conflict with the constitution of the United States. The decision in Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185, was that the Chicago river and its branches, although lying within the limits of the state of Illinois, are navigable waters of the United States, over which congress, in the exercise of its power under the commercial clause of the constitution, may exercise control to the extent necessary to protect, preserve, and impose their free navigation; but until that body acts the state has plenary authority over bridges across them, and may vest in the city of Chicago jurisdiction over the construction, repair, and use of these bridges within the city; and, further, that there was nothing in the "ordinance of 1787," or the subsequent legislation of congress, precluding the exercise of such power by the state. The cases of Willson v. Marsh Co., 2 Pet. 245; Gilman v. Philadelphia, 3 Wall. 713; Pound v. Turck, 95 U. S. 459; Cardwell v. Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423; Hamilton v. Railroad Co., 119 U. S. 280, 7 Sup. Ct. Rep. 206; and Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811,—are illustrations of the plenary power of a state, in the absence of and until congress acts on the same subject, to authorize the construction of bridges and dams, over and in navigable rivers lying entirely within its borders, and the consequent obstruction of such streams. The case of

Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313, is, however, like that of Mobile Co. v. Kimball, one involving the feature of an improvement of navigable waters under state authority. The legislature of Illinois adopted measures for improving the navigation of the Illinois river, including the construction of a lock and dam at two points on the river. The works were constructed at large expense principally borne by the state, it being represented that a small portion was contributed by the United States, and tolls were prescribed under the state legislation for the passage of vessels through the locks. The complainants owned steamboats and barges engaged in interstate commerce, which had to pass through such locks, and alleged that prior to the construction of one of the dams they were able to navigate the river without interruption, except such as was incident to its ordinary use in its natural state; and that the dams were an impediment to the free navigation of the river, and wholly impeded, except at extreme high water, the navigation of the river by steam-boats and other vessels which were previously accustomed to navigate it, unless they passed through the locks, and stating the amount they had paid as tolls imposed upon the cargoes of ice, and for the passage of their boats and barges through the locks. The toll charges were sustained. In the opinion it is said: "The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. * * * For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharfs and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels. The state is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois river, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the state, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state,—and on that point the state must necessarily determine for itself,—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals."

Answering the suggestion that appropriations by congress had been expended in improving the Chicago river, it is said in Escanaba & L. M. Transp. Co. v. Chicago, supra, that no money had been expended above the bridge objected to in that suit, which bridge was erected and regulated by the city under state legislation; and that consequently no bridge interfered with the navigation of any portion of the river which had thus been improved, but that, if it were otherwise, it was not perceived how the improvement could affect the ordinary means of crossing it by ferries and bridges; that, "to render the action of the state invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the general government must directly interfere so as to supersede its authority, and annul what it has done in the matter." In Bridge Co. v. Hatch, supra, another case of a bridge authorized by state legislation, it is held that there must be a direct statute of the United States in order to bring within the scope of its laws obstructions and nuisances in navigable streams within a state, they being offenses against the laws of the state within which the navigable waters lie, but, in the absence of a federal statute, not an offense against the United States. That, until congress acts respecting a navigable stream entirely within a state, the state has plenary power, yet congress is not concluded by anything that the state, or individuals by its authority or acquiescence, may have done, from assuming entire control and abating any erections that may have been made, and preventing any other from being made except in conformity with such regulations as it may impose. The fact of the appropriation by congress of money to be expended in the improvement of the river, and that of making of the city, where the bridge was, a port of entry, were urged by counsel as objections to the authority of the state and the validity of its legislation, and were disposed of thus by the court: "The argument of the appellees, that congress must be deemed to have assumed police power over the Willamette river in consequence of having expended money in improving its navigation, and of having made Portland a port of entry, is not well founded. Such acts are not sufficient to establish the police power of the United States over the navigable streams to which they relate. Of course, any interference with the operations, constructions, or improvements made by the general government, or any violation of a port law enacted by congress, would be an offense against the laws and authority of the United States; and an action or suit brought in consequence thereof would be one arising under the laws of the United States. But no such violation or interference is shown by the allegations of the bill in * * * this case, which simply states the fact that improvements have been made in the river by the government, without stating where, and that Portland has been created a port of entry." See, also, Cooley, Const. Lim. (5th Ed.) 728–733.

Viewed in the light of these authorities, we fail to see in the allegations of the bill anything fatal to the statute. The statute does not attempt to regulate any matter which is national in its character, or affects all the states, and admits of or requires uniformity of regulation; or to interfere with the control of the river for any such purposes by the general government; but, on the contrary, it provides for an improvement purely local in its character. The fact that such government has surveyed the river, and estab-

lished lights and light-houses, buoys and channel marks, in and along it, does not necessarily, if at all, oust a state of its jurisdiction to improve the navigation of the river, and remove obstructions from it, or to authorize the same to be done. The improvement to be effected under the act may not, and in so far as the record before us and the statute show do not, in any wise, affect such surveys, nor the purposes of such lights, light-houses, and buoys, and channel marks; and surely, if it be that their establishment has the effect to prevent an improvement by the state which would interfere with their purposes, a statute which does not specify an inconsistent improvement will be construed to intend and authorize only those improvements not interfering with them, and will be upheld for such purposes, and the responsibility will be upon the agencies authorized to make the improvements to do it in such a manner as not to result in an interference, and this, too, at the peril of being arrested in the prosecution of their work.

The allegations of the bill as to the jetties and other improvements of navigation of the river by the United States are answered by the observations just made, and those quoted in the next preceding paragaph, from the cases of Escanaba & L. M. Transp. Co. v. Chicago and Bridge Co. v. Hatch. The fact that the general government may have made or may be making improvements at one or more places on a navigable river, lying, as does the St. Johns, entirely within a state, does not, of itself, preclude the right of the state to make improvements at different places. Neither the bill nor the statute shows any interference with the operations, constructions, or improvements of the general government, or any violation of any law of the United States.

The bill alleges also that any and all work done upon the St. Johns river under this act must and will be controlled by the government of the United States, and except as that government, and its officers and agents, may prevent, the defendants, appellees, nor any officers or agents of Duval county, will be permitted to conduct and carry on the proposed work upon the river, except under the direction of the general government, its agents and officers. This allegation, whether considered as an inference from that immediately preceding it, and set out at the head of this subdivision of the opinion, or as an independent assertion, is a mere conclusion of law, which is justified by nothing stated in the bill or appearing on the face of the statute.

III. The validity of the statute is also assailed on the ground that it does not provide any means or method of creating a sinking fund or other fund to pay the principal and interest on the bonds. There is no express provision of this kind in the act. If it be, however, that this power is not otherwise given or is not implied by the authority given to contract the stated debt, or, in other words, to issue not exceeding $300,000 of coupon bonds of the county, in denominations of $500 and $1,000, the principal of which is to be payable at the end of not less than 20, nor more than 40, years, and to bear interest at not more than 6 per cent. per annum, payable semi-annually, the bonds to be engraved, signed, and sealed as directed in the statute, the same to be sold at not less than their face value, and the proceeds applied to improving the navigation of St. Johns river and removing obstructions therefrom, we still do not think this a valid objection to the act or to the issue of the bonds.

IV. Another objection to the act is the alleged non-compliance with the local legislation clause of the constitution, § 21, art. 3, which is: "In all cases enumerated in the preceding section all laws shall be general and of uniform operation throughout the state, but in all cases not enumerated or excepted in that section the legislature may pass special or local laws: provided, that no local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least sixty days prior to the introduction into the legislature of such bill, and in the manner to be provided by law. The evidence that such notice has been published shall be established in the legislature before such bill shall be passed."

An act of May 31, 1887, c. 3708, p. 73, St. 1887, defines the method of publication and of the proof thereof under this provision of the organic law. It requires that it shall be published in a newspaper in the county or counties where the person, matter, or thing to be affected resides or is situated, at least once a week for at least 60 days, or by posting the same at not less than three public places therein, one of which is to be the court-house door of the county or counties, and another the locality or localities where the person, matter, or thing may reside or be for the time stated, such notice to contain a short statement of the object desired by said special or local legislation. The evidence required of the publishing in a newspaper is the affidavit of the publisher, and that required of the posting is the affidavit of the person posting, such affidavits to be appended to a copy of the notice.

The notice alleged to have been published in this case, as shown by an exhibit to the bill, is as follows: "Notice. Notice is hereby given that an application will be made to the legislature of the state of Florida at its next session for the passage of an act enabling the county of Duval to issue bonds, not exceeding two hundred and fifty thousand dollars, for the purpose of deepening and otherwise improving the channel of the St. Johns river, within the county of Duval, and for other purposes of public improvement." February 21, 1891.

There is attached to this copy of the notice an affidavit made December 11, 1891, by the business manager of a designated newspaper published in Duval county, and states that the notice, which is annexed, had been published in the paper once in each week "for ninety-seven days, begin-

ning on the 21st day of February, 1891, and ending May 28th, 1891."

The objections are: (1) That the notice does not state the substance of the act, as it gives notice of application for an act enabling the county to issue, not exceeding $250,000 of bonds, to be used for the purpose of deepening and otherwise improving the channel of the river, whereas the act as passed authorizes the issue of bonds to an amount not exceeding $300,000, and the application of the proceeds thereof to the work of improving the navigation of the river, and removing obstructions therefrom, within the county of Duval. (2) That the notice was published once a month, beginning February 21, 1891, and the act was introduced into the legislature May 2d of the same year. (3) That the records of the proceedings of the legislature do not show that evidence that the notice had been published as required by law was established and proven in the legislature before the act was passed, nor any evidence of such notice.

The obligation resting upon the legislative department of the government to conform to the requirements of this provision of the constitution, and to the statute law enforcing the same, cannot be questioned. No local or special bill, within the purview of the proviso of this section of the organic law, should be passed, except and until notice of the intention to apply for the passage of the same has been given in the manner contemplated by the constitution, and authorized legislation thereunder; nor is it ever to be presumed that any branch of the legislative department will give its sanction to any such local or special legislation until legal and satisfactory evidence that such notice has been published shall be "established in the legislature." This feature of the fundamental law is as binding upon the consciences of those intrusted with the legislative function of the government as is any other part of the constitution, but this truth is by no means conclusive that power has been given the judiciary to sit in judgment upon the performance of the duty thus imposed upon a co-ordinate branch of the government. No such power has been given to the judiciary. To decide whether or not the notice has been given is a legislative function, not only in its nature, but as a result of the provision that "the evidence that such notice has been published shall be established in the legislature before such bill shall be passed," which provision, as excluding any interference in the matter by the judiciary, supplements the inhibition pronounced by the second article of the constitution, that no person properly belonging to one of the departments of the government shall exercise any powers appertaining to either of the others, except in cases expressly provided for by that instrument.

We are not without authority sustaining this conclusion. The constitution of North Carolina, framed in 1868, provided (section 12, art. 2) that "the general assembly shall not have power to pass any private law unless it shall be made to appear that thirty days' notice of application to pass such law shall have been given under such direction and in such manner as shall be provided by law." In Brodnax v. Groom, 64 N. C. 244, where the objection to an act was that it had been passed without 30 days' notice of the application, the conclusion of the court was that, taking the statute to be a mere "private act," the ratification certified by the lieutenant governor and speaker of the house of representatives made it a matter of record which could not be impeached before the courts in a collateral way; that there could be no doubt that acts of the legislature, like judgments of courts, are matters of record; and the idea that the "verity of the record" can be averred against in a collateral proceeding is opposed to all the authorities. The first constitution of West Virginia ordained (section 12, art. 7) that no new county should be formed having an area of less than 400 square miles; or if another county be thereby reduced below that area; or if any territory be thereby taken from any county containing less than above number of square miles; and that no new county should be formed containing a white population of less than 4,000; or if the white population be thereby reduced below that number; or if any county containing less than 4,000 white inhabitants be thereby reduced in area. A suit was brought to restrain the collection of county and township taxes of Lincoln county, the bill alleging that, at the time of the creation of the county, A. D. 1867, it did not contain 400 square miles, or 4,000 white population, and that by its creation the county of Cabell was reduced below the area of 400 square miles; and that, although by an act of 1868 sufficient territory was added to Lincoln county to give it an area of 400 square miles, its population was still below 4,000, and Cabell county was still further reduced in territory by that act; and that, though by an act of 1869 additional population and territory were added to each of the named counties, the county of Cabell still contained less than 400 square miles. The supreme court of that state in Lusher v. Scates, 4 W. Va. 11, held that the subject of creating new counties belonged to the legislature alone, and, to exercise the power conferred, it must inform itself of the existence of the facts, including those as to area and population, and others indicated above, prerequisite to enable it to act on the subject; and that how it might do so, and upon what evidence, the legislature alone must determine, and that its determination, when made, concluded all further inquiry by all other departments of the government; and that its final action, terminating, in an act of legislation in due form, must, of necessity, presuppose and determine all the facts prerequisite to the enactment. That the courts could not go into an inquiry as to the truth or falsity of the facts upon which the legislation is supposed to be predicated, where the legislature has sole jurisdiction of the subject. In Rumsey v. People, 19 N. Y. 41, it was held that the question whether the territory of a new county contained a sufficient representative population, such

question involving the legality of its organization, was one which the legislature determined as a question of fact, and that its determination was not reviewable elsewhere; and in De Camp v. Eveland, 19 Barb. 81, the decision was that the presumption that the legislature acted on good and sufficient evidence of there being the population required by the constitution was conclusive. See, also, Advisory Opinion, (Matter of Impeachment,) 14 Fla. 289; People v. Hurlbut, 24 Mich. 44; Day v. Stetson, 8 Me. 365; McClinch v. Sturgis, 72 Me. 288; Cooley, Const. Lim. p. 163, note 2.

If there is any defect in the notice or in its publication, or in the proof thereof, we have no jurisdiction to consider it. That jurisdiction is in the legislature, and has been exercised, and that department of the government has, by the passage of the act under consideration, the validity or formality of which passage is not otherwise questioned, pronounced its judgment, evidenced by the journals and the act, a record of the highest character, that the special or local legislation clause of the constitution, and of the legislation thereunder, have been fully complied with, and we are concluded by that judgment. Charges in a bill in equity, and the admission of them by demurrer or otherwise, that these constitutional and statutory provisions have not been complied with, cannot extend our jurisdiction. The legislature, not the courts, is the guardian of the interests which the fundamental law has sought to protect by requiring notice of local or special legislation, and that department is responsible to the people for the due protection of these interests by seeing that the constitution and the law are complied with.

As to the objection that the records of the proceedings of the legislature do not show that evidence of the publication of the notice was established in the legislature before the act was passed, it is enough to say that the constitution does not require that the legislature should make its record do so, and the courts are without jurisdiction to require it. Cooley, Const. Lim. 163, 164; Const. Fla. 1885, §§ 12, 17, 21, art. 3.

V. There are also certain objections concerning the election held under the statute, the canvass of the votes, and the resolution as to the issue of the bonds, which can be more satisfactorily dealt with after stating certain provisions of the statute and the averments of the bill as to such matters.

The act (section 1) authorizes and directs the board of county commissioners to call an election to be held by the registered voters of said county, at which the registered voters are authorized to vote for or against the issuing of the bonds provided for; such election (section 2) to be held at indicated places, provision being made for the appointment or selection of inspectors. It then (section 3) provides that "the election shall be conducted and returns made thereof in the manner prescribed by law for conducting elections, and canvassing and making returns of votes cast," and (section 4) that any person "whose name is not already enrolled as a registered voter in said county, and who is entitled to be registered as a voter," shall be allowed to register at the office of the supervisor of registration at any time after the ordering of the election, and until the third day prior to the holding of the election; and directs that the supervisor of registration shall deliver to the sheriff a paper book for each election district, containing, in alphabetical order, the names "of all persons registered as voters of such districts, including the names of all persons previously registered whose names remain upon the registration books in the office of said supervisor;" and makes it the duty of the sheriff to deliver these books to the inspectors, and the duty of the supervisor to keep open his books daily except Sunday, from the day of the ordering of the election, to and including the third day previous to the day appointed for the election, and to "register as voters all persons who apply to be registered and are entitled thereto, and to deliver to each person registered a certificate of such registration, as provided in the law on that subject, free of expense to persons registered." It also enacts (section 5) that "every person whose name shall appear on the registration books, and every person holding a certificate of registration showing that he is a registered voter, and who has not lost the right to vote for any cause as provided by law, shall have the right to vote at such election." The sixth section of the statute enacts that the board of county commissioners, at "any regular or special meeting" after the passage of the act, shall, by resolution to be recorded in their minutes, appoint a day for the holding of the election, such day to be not less than ten days after the first publication of a copy of the resolution in three or more newspapers in the county; and that the board shall appoint the inspectors "to conduct the election, and make returns of the votes cast;" and that such returns shall show the whole number of votes cast at the election, and how many of them were cast "For bonds," and how many "Against bonds;" and that said returns shall, within two days after said election, be delivered to the clerk of the circuit court, to be laid before the board of county commissioners, which board shall publicly canvass the same at their next regular or special meeting, and declare the result of the vote, which vote shall be recorded by the clerk. The seventh section declares what words, viz., "For bonds" or "Against bonds," shall be printed or written on a ballot, and that every such ballot shall be counted as lawful without regard to the form or size of the paper, or the color thereof, "to the end that the true expression of the will of the voter may be ascertained;" and the eighth section provides that, if a majority of the electors vote "For bonds," the county commissioners shall issue the bonds, as provided by subsequent sections of the statute.

The bill, including the records of the county commissioners made part thereof as an exhibit, shows that "the board met

this 12th day of November, in special session, called by the chairman for the purpose of ordering an election" as to issuing bonds under the act in question, and that there were present three members, Powell, the chairman, Baer, and De Cottes, but the other members, Kelly and Pickett, were absent, and the board, in consequence of their absence, adjourned to the 14th day of the same month; on which day it met again, all the members, except Kelly, being present, and passed a resolution calling an election to be held Thursday, December 3, 1891, and appointed inspectors of the election.

Notice of the election was given, and the election was held on the day appointed. The bill states that the total number of votes cast was 2,198, of which 1,455 were "For bonds," and 714 "Against bonds," and 20 "Not for bonds," and 8 blank. That on December 2, 1891, the full board met in regular session, and adjourned to the 9th day of the same month, on which day they met in adjourned session for the purpose of canvassing the vote of such election, at which adjourned meeting only four commissioners, Powell, De Cottes, Kelly, and Pickett, were present, and at such adjourned meeting proceeded to canvass the returns, which were presented by the clerk under seal, from every election district in the county except one, at which no election had been held, and declared the result of the election as set forth above; and at the same meeting a resolution, reciting the law and the facts and the result of the election, and directing the preparation and issue of $300,000 of bonds in accordance with such act and election, was passed.

With the above statement we will present the objections made in the bill and brief, and our views of the same.

It is objected in the bill that the minutes of the board of county commissioners do not show "what notice was given" of the special meeting of November 12th, and also that the commissioners were not authorized by the statute in question, or other law, to take the action had at the meetings of November 14th and December 9th. And it is said in the brief of appellant's counsel that the ground mentioned in the bill is that the meetings of November 14th and December 9th were not "regular or special" meetings, and that the action taken at the meeting of November 14th, calling the election, was unauthorized and void; and it is further said that the proceedings of the commissioners attached to the bill show that on November 12th, and without any record or showing of a previous call of the board, three commissioners, Powell, Baer, and De Cottes, met in an alleged "called" meeting of the board, and that they adjourned this called meeting to November 14th, but that their record does not show that notice of the call or adjournment was given; and that on the 14th of November they met and issued the call for an election. "The question here presented," says counsel for appellant, "is, had these three commissioners power to adjourn the alleged called meeting, and at the adjourned meeting to order this election?"

In Douglass v. County Com'rs, 23 Fla. 419, 2 South. Rep. 776, it was held that a special or called meeting of county commissioners, in which all the members participated, the same having been held before the day to which the board adjourned at a preceding session, was valid. If it be that personal notice to each commissioner of both the time of the meeting and the subject-matter to be considered is necessary to the legality of a special or called meeting, (a proposition which we do not mean to deny,—Dill. Mun. Corp. § 236; Smyth v. Darley, 2 H. L. Cas. 789,) or if it be, as implied by the objection, that the record of the commissioners must show such notice as an essential to the validity of the meeting, (a point not affirmed by the authorities found in our investigations,—Sargent v. Webster, 13 Metc. (Mass.) 497, 504; Insurance Co. v. Sortwell, 8 Allen, 217; Chosen Freeholders v. State, 24 N. J. Law, 718,) our opinion still is that the statements of the minutes of November 12th, quoted above, is sufficient evidence of such notice having been given, where, as here, it is not charged and proved that notice was not given. The board having then met legally or upon due notice to all the members, the three members, a majority of the board, then present had authority to adjourn the meeting to a subsequent day, which it seems a majority could have done. People v. Common Council, 5 Lans. 142. Each member present had notice of the adjournment, and those not present at the adjourned meeting were charged in law with notice thereof. Smith v. Law, 21 N. Y. 296. The adjourned special meeting was a continuation of the former one, and anything done at it concerning the election was as legal as if it had been done before the adjournment. Scadding v. Lorant, 5 Eng. Law & Eq. 16; City of New Orleans v. Brooks, 36 La. Ann. 641; Ex parte Mirande, 73 Cal. 365, 14 Pac. Rep. 888; Chamberlain v. Dover, 13 Me. 466. The power of adjournment is incident to special meetings, (Dill. Mun. Corp. § 285,) as it is to regular meetings, (People v. Martin, 5 N. Y. 22; Goodel v. Baker, 8 Cow. 285; Chamberlain v. Dover, supra,) and it is from this power that adjourned meetings arise.

As to the meetings of November 14th and December 9th not being either "regular or special" meetings, within the meaning of the statute, it is, of course, entirely clear that the former was an adjourned special meeting, and the latter an adjourned regular meeting, as is shown by copies of the minutes of the commissioners annexed to the bill. In Ex parte Mirande, supra, it was held that an ordinance passed at an adjourned meeting was not invalidated by the fact that the clerk of the board described the adjournment, in the record of the proceedings, as a "recess." So, of course, the use of the word "session," instead of "meeting," in the record of the proceedings, does not invalidate the meetings. Besides this, the canvass of the returns and the adoption of the resolution on the 9th of December were at a regular or special meeting, within the meaning of the statute; or, in

other words, the adjourned meeting of that day was a lawful meeting for such purposes. It is to be observed by the minutes that the "regular monthly session" of December 2d was attended by all the members, and, after transacting all the regular monthly business, they adjourned to meet on the 9th day of the same month, at 10 o'clock A. M. The minutes of December 2d do not show the purpose of the adjournment, but the presumption is that it was for a lawful purpose. Moreover, each member was charged with notice of any action lawful to be taken at such adjourned meeting; and anything done at such adjourned meeting which it was within the power of the board to do was as lawful as if it had been done by a full board, instead of only four members. Smith v. Law, 21 N. Y. 296. Each member was as much charged with notice of lawful action to be taken at such adjourned meeting as he would have been had the meeting not adjourned, but had continued in session from day to day until the last day mentioned; and the public are as much bound as if a full board had been present on that day. By the adjournment each member was in law charged with the official duty of being present at the time to which they adjourned, to attend to any business within the power of the board; and if it was within the power of the board to act on these returns, or to pass the resolution as to the bonds, the absence of one of the commissioners, Mr. Baer, from the adjourned meeting, does not impair the legality, for he and the other members adjourned to the time for the purpose of doing any lawful business. The remaining inquiry, under this head, consequently is whether the statutory grant of power is so limited as to preclude the board from exercising the authority at a meeting originating prior to the election, but extended by a full board beyond the receipt of the returns. We do not think the purpose of the provision that the board "*shall, at its next regular or special meeting*, canvass the returns, and declare the result of the vote," was, even in so far as the words italicised can be taken to indicate a legislative intent, to exclude from a meeting originating before, but continuing after, the election, or the receipt of the returns by the clerk, the power to make the canvass; but, in our judgment, the purpose was to secure promptness of action in the matter, and the law made it the duty of the clerk to lay the returns before the board as soon as it should be in session after he received them, and made it the duty of the board to canvass them whenever they should be in session, whether it should be a regular or a special meeting, and it charged each member with notice that such duty would be incident to any meeting, whether regular or special, at which the returns might be received, regardless of the fact that the meeting may have originated before the election or receipt of the returns, or, if a special meeting, may have been called for another purpose. The power to canvass was given to the board, and the mere fact that a meeting originated before the election or the receipt of the returns is not made the ground for excluding the exercise of the power. Had the board remained in session till after the election, and then received the returns, they could have canvassed them, and the power to do it was not lost by the adjournment. Dill. Mun. Corp. § 287. In view of the fact that, having finished all the regular monthly business, yet they adjourned to the day stated, and on that day took up these matters, is of itself presumptive evidence that they were the purpose of the adjournment, and this presumption is aided by the statement upon the minutes of the adjourned meeting that they met for the purpose of canvassing the returns, which statement is not sufficient to exclude the idea that the cognate and dependent matter of issuing the bonds was within the purpose of the adjournment. This adjourned meeting was certainly tantamount to a subsequent special meeting, of whose time and purpose all the members were notified.

The result of the election, as ascertained by the canvass, was that 2,198 were the whole number of votes cast, and that for bonds there were 1,455, and against bonds 714, not for bonds 21, and blank 8, votes. The third objection, as stated in the bill, is that 1,772 of the voters had not paid the capitation or poll-tax for the year 1890, and only 426 voted who had paid it for that year, and 2,132 voted who had not paid such tax for the year 1891, and 60 persons voted who had paid it, "as shown by comparison of the poll-lists with the record of payment of poll-taxes." That no person was entitled to vote at said election who had not paid the poll-tax for 1890 and 1891, and that by reason of the above-stated number of votes having been cast at said election for bonds by persons who had not paid said poll-taxes, and were not entitled to vote, the alleged majority was obtained in favor of issuing said bonds, and, if said votes had not been received, a majority of votes were not cast for bonds. That the public records in the office of the tax collector of Duval county show that, of the persons who voted at said election, only 426 had paid their poll-tax for 1890, and only 60 had paid it for 1891.

The question presented by this objection is whether or not the payment of the poll or capitation tax was a qualification for voting at the election.

The constitution (section 8, art. 6,) provides that the legislature shall have power to make the payment of the capitation tax a prerequisite for voting. The legislature of 1889 passed a statute (chapter 3850, approved May 25th) enacting that a capitation tax of one dollar shall be assessed against all male citizens of the state, of 21 years and upwards, and that, 30 days prior to any general, special, or municipal election to be held in this state, the collectors of revenue of each county shall furnish to the supervisors of registration in each of their respective counties a list of all persons who have paid their capitation taxes for two years next preceding the year in which any general or special or municipal election is to

be held, and that the supervisors shall note, on the registration books now required by law to be furnished to inspectors of elections, the names of all persons who have paid their capitation or poll taxes, and only such persons shall be deemed qualified electors and authorized to vote at any general, special, or municipal election; it being provided, however, that no person who was not a resident of this state for any years for which a poll-tax is by this act required to be paid, but is otherwise a qualified voter, shall be prevented from voting by reason of not having paid such taxes; and, further, that all persons who may have arrived at the age of 21 years after the year for which a poll-tax is required by this act to be paid shall not be prevented from voting by reason of not having paid such poll-tax. There is also a provision that the poll-tax of 1889 alone need be paid, in so far as the general election of 1890 is concerned. It also directs the preparation of tax-receipts, to be issued by the collectors of taxes to all persons upon payment of taxes hereinbefore required, and the presentation of such tax-receipts, obtained at least 30 days prior to any general, special, or municipal election, by a registered voter whose vote is challenged on the ground that his name does not appear on the lists provided for above as having paid his capitation tax, is made an answer to such challenge.

Recurring to the act for the improvement of the St. Johns river, as it is set forth in the first part of this subdivision of the opinion, we find that it is a complete system of itself, and that there is in it no requirement that the payment of any poll-taxes shall be a qualification or prerequisite to voting, nor any provision that the collectors of taxes shall furnish supervisors of registration with the names of persons who have paid their capitation taxes, or that the latter officers shall note on the registration lists or paper books furnished inspectors the names of such persons. There was no previous law providing for an election of this kind; neither the general election law of 1889, c. 3879, nor the county bond act of 1877, (McClel. Dig. 129-132,) do so. This election is not one within the meaning of that provision of the poll-tax act which directs the supervisors of registration to note on the registration books, "now required by law to be furnished to inspectors," the names of persons who have paid the tax. The notice of election prescribed by either of these acts, nor the time for registration provided by the act of 1889, or by the other, if it makes any provision, nor the mode of making and canvassing returns of election under either, in so far as the officers to whom they are to be made, or by whom they are to be canvassed, or as to requiring duplicate returns, have not been adopted by the statute under consideration. It is a perfect system within itself, and adopts no provision of any other statute, except in so far as its third section appropriates, for supplying any deficiency in its own provisions as to the conduct and returns of the election, the existing law on those subjects. When we consider this, and the fact that the legislature, though it made it the duty of the supervisor of registration to furnish inspectors with lists of registered voters, but did not require that he should note the names of persons who had paid the poll-taxes as is required by the act of 1889, as to special or other elections to which it is applicable, and, further, that it made no requirement that the collector of taxes should furnish him with the information necessary to the performance of that duty, the only reasonable conclusion is that the law-makers did not intend to make the payment of the tax a prerequisite to or qualification for voting at such election. There is in the act nothing inconsistent with this conclusion; but, on the contrary, there is apparent upon its face the intent that persons duly registered as voters, and retaining the qualifications which preserve the legality of their registration, should vote independent of any question of paying the poll-tax. This is the result of the provisions of the first, fourth, and fifth sections of the statute, supra; and when, in the last of these sections, it is said that "every person whose name shall appear on the registration books, and every person holding a certificate showing that he is registered *as a voter*, and who has not *lost the right to vote for any cause as provided by law*, shall have the right to vote at such election," the meaning of the words last italicised is the loss of the qualifications which preserve a person's right to have his name kept on the registration list; or, in other words, any of those which would, had they existed at the time of his registration, have rendered it illegal. Sections 1, 4, 5, art. 6, Const.; section 1, c. 3879, p. 88, Laws 1889. Legal registration, with a retention of the requisites therefor, is the qualification, and nothing not essential to it is a disqualification. Payment of the poll-tax is not such an essential.

Another objection is that certificates of the above election were returned to the county judge, supervisor of registration, and the clerk of the circuit court, and the oaths of inspectors and poll-lists of persons who voted were returned to the supervisor of registration, together with the ballots in the ballot-boxes used. That the canvass of the votes was made by the county commissioners from the returns made to the clerk of the circuit court and county judge, and no canvass was made by the county judge and supervisor of registration, and a member of the board of county commissioners, or in any manner pointed out by the acts "to provide for elections generally, and for returns of elections," (chapters 3879, 4040, St. Fla.,) and that the canvass was therefore illegal.

It was unnecessary for the inspectors to send certificates of the result of the election to the county judge and supervisor of registration, but entirely immaterial that they did so. The provision of the general election law requiring certificates to be sent to them was rendered inapplicable to this election by the provision of the act in question requiring the return or certificate of result should be delivered

to the clerk of the circuit court. That the oaths of inspectors and poll-lists were sent to the supervisor of registration, with the ballots and ballot-boxes, is entirely immaterial, if irregular; yet we are not prepared to say that the general election law did not require that this disposition should be made of the poll-lists and oaths of inspectors. Such irregularities do not affect a canvass of returns by a body authorized to perform the function, and doing it properly. It was the duty of the board of county commissioners to canvass the returns, and the county judge and supervisor of registration had nothing to do with it, and the fact that the commissioners had before them a return made to the county judge, as well as that made to the clerk, was immaterial.

VI. The only point to be noticed is that involved in a statement made in the bill to the effect that the statute provides that the bonds "shall bear the seal of the aforesaid county of Duval," and that at the time the act was passed the county had no seal, but that the defendants on their meeting of December 9th attempted to adopt the seal of the circuit court for the county as the seal of the county, and intend to attach the impression of this seal to the bonds. The action of the board on this subject was a resolution "that the seal of the circuit court for Duval county and of this board now in use is hereby adopted as the common seal of Duval county."

The constitution of 1868 provided for circuit courts, dividing the state into seven circuits, and directing that at least two terms should be held every year in each county, and for a clerk of the circuit court in each county; and for county courts in such county, and for a county judge, who was judge of the county court; and these county courts were given criminal jurisdiction, civil jurisdiction in certain cases at law, and surrogate or probate powers. The same organic law also made the clerk of the circuit court in each county "clerk of the county court, and of the board of county commissioners, recorder, and *ex officio* auditor of the county." The legislature of 1868 (McClel. Dig. pp. 931, 932) made it the immediate duty of the attorney general to devise suitable seals for the use of the circuit courts, and county courts in each county, or to approve and adopt the seals then in use in any county where the same might be appropriate, and to deposit in the office of the secretary of state, and that of the clerk of the supreme court, immediately after he should devise or adopt the same, a true description of each of such seals, with an impression thereof in wax, wafer, or other material. The act also authorized the attorney general, whenever it should be necessary to devise a new seal for the circuit court of any county, to cause to be manufactured the necessary seal and press for using the same, and directed that he should cause to be manufactured the necessary presses and seals for the several county courts, and that he should transmit to the clerks of the courts in each county the presses and seals devised for each county, and that, from and after the day of receiving such seals by the clerk of any county, such seals should be, respectively, the seals of the circuit court and of the county court, as the same should be designated by the attorney general. The statute also enacted that the seal provided for each county court should be the official seal of that court in all criminal and civil, including probate, matters wherein seals are required to be used, and "the official seal of the clerk as clerk of the board of county commissioners." Another provision of the act was that until such seals should be devised and procured, and received by the clerks as aforesaid, the seal heretofore used as the seal of the circuit court in each county shall be continued to be used as the seal of that court, and "the seal heretofore used as the seal of the probate court shall be recognized as the seal of the county court, and of the clerk of the board of county commissioners, until a new seal shall be procured and received as aforesaid."

In 1875 the constitution was so amended as to take from the county courts their criminal jurisdiction, and civil jurisdiction except in probate matters, and county judges were retained and given a limited civil and criminal jurisdiction. In the revision made of the constitution in 1885, circuit courts are retained as a part of the judicial system, and county judges (sections 16, 17, art. 5) are given a limited civil jurisdiction, and general surrogate or probate powers, and jurisdiction of such criminal cases as the legislature may prescribe. The legislature is also authorized to create, in any county where it may be necessary, a county court having jurisdiction in all cases at law, where the demand or value of property involved does not exceed $500, and of forcible entry and unlawful detainer, and of misdemeanors, and appellate jurisdiction in civil cases arising before justices of the peace, and of this court it is provided that the county judge shall be the judge. The same fundamental law ordains (section 15, art. 5) that the clerk of the circuit court "shall also be clerk of the county court, except in counties where there are criminal courts, and of the board of county commissioners and recorder and *ex officio* auditor of the county." Where there is a criminal court of record in a county, its clerk is made clerk of the county court, if there is a county court there. There is no county court in Duval county, although there is a criminal court there. There has been no legislation since the act of 1868, supra, concerning the seal of the county court.

Relying upon the act of 1868, counsel for appellant contend that the seal of the county judge of Duval county is the proper seal to be used, and that the resolution was unauthorized. There is no doubt that the attorney general devised and procured seals for county courts under the above statute, yet without questioning that such seals, where they were received by the clerks of the county courts under the act, are now the seals of county judges, as courts of probate, under the present constitution, and of the clerks of

the board of county commissioners, still such a seal is not now and never was the seal of the county any more than, or to the exclusion of, the seal of the circuit court. Technically speaking, there is not, and has not been, within the period covered by the organic or statutory law referred to, any seal of Duval or of any other county; yet it is true that in a certain sense, and for certain purposes, both the seals of the county court or county judge and that of the circuit court have been and are seals of the counties. They are used by county officers, and in connection with official functions of such officers, and are seals of the county, as distinguished from any other territorial subdivision of the state or of the state itself. The circuit court seal is used by the clerk of the circuit court in all functions whose performance requires a seal, and, among others, those of auditor of the county, which he is by virtue of his office as such clerk. Ray v. Wilson, 29 Fla. —, 10 South. Rep. 813; McClel. Dig. p. 179, § 31, and § 12, p. 317. In our judgment, either of these seals is, within the meaning of the statute under consideration, the seal of Duval county, and might be adopted or used by the commissioners in sealing the bonds; and the resolution, to the extent that it indicates the will of the board of county commissioners that the seal of the circuit court shall be so used, is valid and proper; but that it is effectual for any further purpose, or as establishing a distinctive county seal, we fail to perceive.

We have given to the questions raised by the bill the careful investigation and deliberate consideration merited by their character and by the interests involved, and our judgment is that the decree dismissing the bill should be affirmed. It will be decreed accordingly.

(95 Ala. 96)

GARRETT *et al.* v. JONES.

(*Supreme Court of Alabama.* Feb. 4, 1893.)

WHAT CONSTITUTES HOMESTEAD.

A house built in the business part of a town, and used principally as a store-building, though the owner sleeps in a small back room and takes his meals elsewhere, is not a homestead.

Appeal from circuit court, Tallapoosa county; J. R. DOWDELL, Judge.

Garrett & Sons, having recovered a judgment against L. D. Jones, levied on a lot and store-building. Jones claimed the property levied on as his homestead. Judgment for defendant. Plaintiffs appeal. Reversed.

Upon the levy of an execution issued on a judgment recovered by Garrett & Sons against L. D. Jones, Jones filed his declarations of exemptions, claiming the land levied upon as his homestead; and upon the filing of this claim, the said Garrett & Sons inaugurated a contest of said claim of exemptions, assigning as grounds of said contest that the property so levied upon was occupied as a storehouse, and was not a homestead, as contemplated by the statute. The property levied upon, and which is claimed as the homestead of said Jones, is sufficiently described in the opinion. At the written request of the defendant the court gave the general charge in his behalf. There was judgment for the defendant, and on this appeal, prosecuted by the contestants, the giving of this charge by the court is assigned as error.

H. J. Gillam, for appellants. *W. D. Bulger*, for appellee.

MCCLELLAN, J. Whether the house and lot involved in this case constitute the homestead of the defendant Jones depends upon the character of the building, and the uses to which it is adapted and to which it was devoted. The purposes for which it was erected by Jones, the fact that it was built by him "to be used as his home and residence and for a business house," can exert no influence in determining whether it was "a home and residence," now that it has for long been a completed structure and subjected to whatever occupancy was originally contemplated by the claimant. Its *status* as being a homestead or not must be adjudged by what he did,—by the character of house he built, and the uses to which he in fact devoted it,—and not by what he intended to do. Moreover, the fact that he built it for a home and residence cannot be proved by evidence of his mere purpose to conserve that end, but can only be found inferentially from his visible acts in the premises, and his testimony that such was his purpose must be taken to mean only that he intended to build such a home and residence as he did in fact build; and, however his mind may have been imbued with the idea that he was proposing a home for himself, it will not be held to be a homestead unless, dissociated from his own purposes, the house and lot in question fills the definition of a homestead under our laws. The evidence of his intentions, found in this record, must therefore be wholly disregarded; and the inquiry must proceed with reference solely to the kind of house which is on the lot, and the nature of its occupation by Jones, it being admitted that as to location, area, and value the house and lot is within the exemption secured to Jones against the claim which the plaintiffs seek to enforce upon it. The house is in the business portion of the town of Camp Hill. It is not inclosed, as residences in towns of this class usually are. Its dimensions are about 40 by 20 feet. It is divided by partition walls into two rooms, one of which is in a corner of the building, and is about 16 by 14 feet. The other and larger room covers the remainder of the building, and this is fitted up with counters, etc., as for a business house. Between these rooms there is a door leading from one to the other. Each room has a fire-place served by a stack chimney, constituting a part of the partition between them. Such was the character of the house,—essentially an ordinary business house with the usual smaller room at the back of it. Now as to the uses to which it was put: When the building was completed, about 1887, Jones carried on the business of a retail liquor dealer in the front room, and had an illustrated sign painted on the outside of the

building, proclaiming his business. In 1890, and thence up to the time of the levy and trial, Jones rented the front room, with its bar, fixtures, etc., to one Landrum, who continued the liquor business therein. In 1887, Jones, who is an unmarried man, fitted up the back room as a bedroom, and has continued to occupy it as such ever since. This room was not let to Landrum along with the other, but, since he has been Jones' tenant of the main room, he has, by permission of the latter, also slept in the back room. Jones does not and never has taken his meals in this bedroom or in the house, but boarded at the house of one Dawson situated in another part of the town.

On these facts there can be no doubt that the primary adaptation of the building is to the purposes of business, and that its principal uses are and have always been the uses of trade, and not those of domiciliary occupation. The authorities are by no means uniform as to what will or will not be considered a homestead when the building claimed as such is in part adapted and devoted to business pursuits, and in other part used as a dwelling; but we think it may be laid down as a safe and conservative rule on that subject that where the trade adaptation and use of a building is incidental or secondary only to its habitation as a dwelling, where the chief use of the structure is that of a home for the owner, and some part only, not essential to this end, is fitted up and used as a shop, an office, or salesroom, it is a homestead. But when this state of facts is reversed, and the residence feature is only auxiliary to the business use, where only a relatively small part of the building is devoted to the uses of a habitat, and the chief adaptation and use are those of business, the building is not a homestead, even though the occupant have no other home, and uses this for all the purposes of living. Illustrations will readily suggest themselves. For instance, the owner of an hotel erected for and adapted to the purposes of public entertainment would not have homestead therein, though he resides there with his family; but the owner and occupant of a private house would not be deprived of the exemption through the fact that he rented rooms to lodgers, and entertained them, or even travelers, at table, for a consideration. A professional man would not lose the exemption by reason of devoting some part of his dwelling to the uses of his profession; but if a physician, for instance, should make a public infirmary of his residence, and continue to live there merely as an incident to the conduct of the hospital, we apprehend homestead would be lost. Ackley v. Chamberlain, 16 Cal. 181; Lazell v. Lazell, 8 Allen, 575; Mercier v. Chace, 11 Allen, 194; Goldman v. Clark, 1 Nev. 607; Harriman v. Insurance Co., 49 Wis. 71, 5 N. W. Rep. 12; Laughlin v. Wright, 63 Cal. 113; Pryor v. Stone, 70 Amer. Dec. 341, and notes 348 et seq. Guided by this rule, our conclusion would be against the defendant's right of homestead, even if he had used the house in question for all the purposes of residence. *A fortiori* must that conclusion be reached in view of the fact that the only occupation of the premises by the defendant consisted in the fact that he with another, thereby his licensee, used a small back room of this store-house as a bedroom, and kept his personal effects there, while he ate at another place, situated in a distant part of the town. The case presented, in view of this fact, is the usual one of the occupation of the back room of a store-house for sleeping purposes only; and it would be anomalous to a degree to hold that to be the residence, the home, of the occupant, which is saved to him by our homestead laws. This precise point has been ruled by the supreme court of Texas, and we cannot do better than close this opinion by quoting the language there employed: "We think that the facts in the present case show that the premises in controversy in this suit did not constitute the homestead of the appellee. He used the premises for business purposes, and slept in one of the rooms of the house, but at the same time took his meals habitually at another place. A man's homestead must be his place of residence; the place where he lives; the place where he usually sleeps and eats; where he surrounds himself with the ordinary insignia of home, and where he may enjoy its immunities and privacy. We do not think that the facts in this case show that the appellee used the premises as a homestead at the time of the sale under execution." Philleo v. Smalley, 23 Tex. 498.

The circuit court erred in giving the affirmative charge for the defendant, and its judgment must be reversed. The cause is remanded.

(94 Ala. 91)

FREIBERG v. STATE.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

INTOXICATING LIQUORS—SALES TO MINORS—INDICTMENT—INSTRUCTIONS—EVIDENCE.

1. Under Code, § 4038, as amended by Act 1891, (Acts 1890-91, p. 1209,) which makes certain sales of liquor to a minor unlawful, an indictment charging defendant with such sale to a minor, "without the consent of the parent or person having the management or control of such minor," etc., is good on demurrer.

2. Defendant was charged with selling liquor to N., a minor. There was evidence that defendant had previously done business with N. as manager of an ice company. The court instructed the jury "that the fact of N.'s having done business on his own account, or for the ice company, is not sufficient, alone, to show that he was 21 years old, but may be considered along with the other testimony as a circumstance tending to show whether defendant believed, at the time of the sale, that he was of age." *Held*, the instruction was not within the meaning of Code, § 2754, which forbids a charge on the effect of testimony.

3. In a prosecution for selling liquor to a minor, the burden is on defendant to show the consent of the parent or the person having control of the minor, rather than on the prosecution to show the want of such consent.

4. Whisky is a spirituous liquor, within the common knowledge of all men, and juries may so find, without specific proof.

Appeal from city court of Anniston; B. F. CASSADY, Judge.

Alexander Freiberg was convicted of

unlawfully selling liquor to a minor, and appeals. Affirmed.

Defendant was tried and convicted at the October term, 1891, of the Anniston city court, under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, that Alex. Freiberg, *alias* Alexander Freiberg, sold, bartered, exchanged, or gave spirituous, vinous, or malt liquors to a minor, Samuel Nobel, *alias* Sam Noble, without the consent of the parent or person having the management or control of said minor, and not upon the prescription of a physician, against the peace and dignity of the state of Alabama." There was demurrer to this indictment, on the ground that it failed to charge that the alleged sale of liquor to the alleged minor was without the consent of a guardian. This demurrer was overruled, and the defendant excepted thereto. The state only examined one witness, one Sam Noble, who stated that he bought some whisky, in the city of Anniston, from the defendant, 12 months before the finding of the indictment, and since the amendment of the statute went into effect; that he was between 17 and 18 years of age; that he was superintendent and general manager of the Anniston Ice Company, a corporation doing business in Anniston; that he had done business with the defendant as said superintendent, and had made contracts with the defendant, and with the firm of which the defendant was a member, and had never told the defendant his age. The defendant, as a witness in his own behalf, testified that he did not remember whether he ever sold said Sam Noble any liquor; that he had known said Noble for only a few months, and had done business with him as superintendent and general manager of the Anniston Ice Company; that, from his position and his general appearance, the defendant took said Noble to be over 21 years of age, and that he honestly believed said Noble was 21 years old. The defendant separately excepted to the portion of oral charge given by the court, and to the refusal of the court to give the two charges requested by him, which said charges are stated in the opinion.

McLeod & Tunstall, for appellant. *Wm. L. Martin*, Atty. Gen., and *J. H. King*, for the State.

CLOPTON, J. The ground of demurrer to the indictment is evidently founded on the phraseology of section 4038 of the Code, without observance of, or reference to, its amendment by the act of February 18, 1891. By the amendatory act, the words "or guardian" are omitted, leaving the statute, as amended, to read, "without the consent of the parent or person having the management or control of such minor." Acts 1890-91, p. 1209. The indictment negatives the consent in the language of the amending act. But without the negativing clause the indictment would have been sufficient. The form of an indictment for selling or giving liquor to a minor, as laid down in the Code, contains no such negative averment; and an indictment conforming to that form has been held to be sufficient. Spigener v. State, 62 Ala. 383; Tatum v. State, 63 Ala. 147. In the general charge the court instructed the jury, *ex mero motu*, "that the fact of the witness Noble having been doing business on his own account, or for the Anniston Ice Company, is not sufficient, alone, to show that he was 21 years old, but may be considered along with the other testimony as a circumstance tending to show whether defendant believed, at the time of the sale, that witness was 21 years old." The charge, when considered as an entirety, and construed in reference to the testimony, is not a charge upon the effect of the evidence, in the meaning of section 2754 of the Code. The facts that Noble, the person to whom the liquor was sold, was superintendent and general manager of the ice company, and had often, as such, made contracts with the defendant, were admissible, not for the purpose of showing that he was an adult, but to enable the jury to determine whether he honestly believed that Noble was 21 years old, which if true, though mistaken, would render the act of selling excusable. The charge merely limits the operation of the evidence to the purpose for which it was admissible. Neither is there error in refusing to charge the jury "that it is incumbent on the state to prove that the liquor was sold to the minor, Sam Noble, if they find it was so sold without the consent of the parent or person having the management or control of said Sam Noble, before they can find the defendant guilty." The burden is on the defendant to prove the consent, and not on the prosecution to prove the want of it. Farrall v. State, 32 Ala. 557; Atkins v. State, 60 Ala. 45. Neither is there error in the refusal to charge the jury that they are not to infer that whisky is a spirituous, vinous, or malt liquor, unless it be proved by the evidence. That whisky is a spirituous liquor is within the common knowledge of all men. The courts will take judicial notice of what everybody else is presumed to know, and juries are permitted to find such fact, without specific proof being adduced in its support. Wall v. State, 78 Ala. 417; Adler v. State, 55 Ala. 16.

Affirmed.

(94 Ala. 592)

BRIDGEPORT LAND & IMP. CO. v. AMERICAN FIRE-PROOF STEEL CAR CO. OF ALABAMA.

(*Supreme Court of Alabama.* Feb. 25, 1892.)

VENDOR'S LIEN—ENFORCEMENT.

Plaintiff filed a bill to enforce a vendor's lien for land conveyed by him by absolute deed as part consideration for an agreement by the vendee, which was never fulfilled. The remaining part of the consideration was never paid. No separate value was fixed upon the land by the parties, and there was no *data* from which its relative value could be specifically ascertained. *Held*, that the bill would not lie; the different considerations being so blended that they could not be separated.

Appeal from chancery court, Jackson county; THOMAS COBBS, Chancellor.

Action by Bridgeport Land & Improvement Company against the American

Fire-Proof Steel Car Company of Alabama. Judgment for defendant. Plaintiff appeals. Affirmed.

The bill in this case was filed by the appellant against the appellee, and sought to enforce a vendor's lien. The facts are sufficiently stated in the opinion. The defendant demurred to the bill on the grounds that it does not show that at the time of the filing there was any unpaid purchase money due from the defendant to the complainant; that the bill shows only a claim against defendant for unliquidated damages; that the bill fails to allege that there was any fixed sum of money agreed upon between the complainant and the defendant as purchase money for the land described in the bill; that the complainant has a complete and adequate remedy at law; and that the bill is without equity. Upon the submission of the cause on the demurrers, the chancellor sustained the demurrers. This appeal is prosecuted by the complainant, and the chancellor's decree is assigned as error.

J. E. Brown, for appellant. *Cumming & Hibbard*, for appellee.

COLEMAN, J. The bill was filed to enforce a vendor's lien upon 50 acres of land sold by appellant to the appellee. The court sustained a demurrer to the bill, and from this decree the appeal is prosecuted. Complainant conveyed the land to defendant by absolute deed of conveyance, with covenants of warranty. In such cases the vendor's lien is a mere creature of equity, not founded on contract, as is understood when the legal title is reserved by the vendor as a security for the purchase money. The real foundation for a mere equitable lien of a vendor for the purchase money of lands is that it is against good conscience for one man to get and keep the lands of another man without payment of the agreed consideration. The only consideration expressed in the deed of conveyance, and upon which it was made, when the deed alone is considered, is the "erecting and operating of a car factory, within 12 months from date, by the American Fire-Proof Steel Car Company, of Alabama." The bill avers that the car factory was never completed or operated, and the consideration is averred to be of the value of $100,000. Has a vendor an equitable lien upon land for the enforcement of such a claim, and is a court of equity of competent jurisdiction to enforce it? In Thomasson v. Cooper, 57 Ala. 563, 564, the court uses this language: "To maintain a bill to enforce a vendor's lien there must be a debt due to the complainant, contracted in the purchase of the land, still unpaid, and which the purchaser, either at the time, or at some prior date, was liable to pay as a primary debtor, without condition." The rule has long prevailed in this state, and has been uniformly held, that a vendor's lien attaches to the land when it is conveyed in consideration of the transfer and delivery to the vendor of chattels, choses in action, and the like, which are capable of reduction to a money value, to secure the transfer and delivery or payment, in accordance with the terms of the contract. Coal Co. v. Long, 91 Ala. 542, 8 South. Rep. 765; Neel v. Clay, 48 Ala. 252; Smith v. Vaughan, 78 Ala. 201; Burns v. Taylor, 23 Ala. 255. The authorities are not uniform upon the question as to whether the equitable lien exists as a security for unliquidated and uncertain damages. 4 Wait, Act. & Def. p. 322. In Jones on Liens (volume 2, § 1071) the rule is stated, "that when the sale is not made for a sum of money, but in consideration of a covenant or agreement to do certain things, the covenant or agreement is then itself the consideration, and in obtaining the covenant or agreement the vendor has been paid all he contracted for." "Thus a covenant or agreement to erect buildings on the land creates no lien on it for the performance of the covenant or agreement." The text cites the case of McDonald v. Land Co., 78 Ala. 382. In the same section (section 1071) the remedy given in such a case is: "If the vendor has conveyed the land, his remedy is an action for damages for breach of the covenants; but if he has not conveyed the land, he may refuse to execute a conveyance." In Williams v. Crow, 84 Mo. 298, the facts were that William Baily, Sr., sold and conveyed by deed of warranty to Ann W. Crow, a tract of land for $1,000, which sum was paid. When the deed was executed, the lands were under a lease of 10 years to William Baily, Jr. At the time of the execution of the deed of conveyance, and as a part of said deed, George R. Crow and Ann W. Crow, his wife, consented and agreed "to hold and keep said William Baily, Sr., grantor in said deed, harmless on account of the execution of said deed, and on account of any claim for damages, or otherwise, of said William Baily, Jr., against said William Baily, Sr., on account of a breach of said contract, * * * and will pay any judgment and cost recovered thereon against said William Baily, Sr.," etc. William Baily, Jr., sued William Baily, Sr., on the lease, and, including cost, etc., recovered a judgment for damages, which, with the cost and expenses, aggregated $697.36. The judgment was paid by William Baily, Sr., and he filed a bill in equity to enforce a vendor's lien for this amount upon the land sold to Ann W. Crow, the grantee. It was held that the complainant was entitled to relief; that the agreement to save Baily, Sr., harmless constituted as much a part of the purchase money as if the land had been incumbered by a mortgage debt which Crow assumed to pay as a part of the purchase money. In the case of Railroad Co. v. Lewton, reported in 20 Ohio St. 401, the contract for the right of way provided as follows: "For and in consideration of the right of way, and the right to enter upon and construct said railroad, the said railroad company agree to pay the said Lewton fifteen hundred dollars; * * * and also to make a road crossing and two cattle-guards at or near station 600; * * * and also to make a culvert or bridge crossing at a branch at station 615 large enough for a wagon track." The facts

show that the grantor, Lewton, recovered a judgment for $500, as damages for the failure of said company to construct its road in the manner provided in the contract. The court held (1) that a vendor's lien would attach against an easement as well as any other interest in land; (2) that the judgment for damages for not constructing the road in the manner provided for in the contract is as much the price of the interest sold to the railroad company as was the $1,500 agreed to be paid in money. The only difference is that the amount of cash was ascertained and agreed upon by the parties, while the amount of the damages was not ascertained till judgment. Both sums arose in contract, and constituted the compensation the vendee was to return to the vendor for the interest purchased." The principle here stated was reaffirmed in a later case. Elliott v. Plattor, 43 Ohio St. 209, 1 N. E. Rep. 222. In 2 Warv. Vend. p. 706, c. 27, § 14, the reason and the rule is stated as follows: "Inasmuch as the vendor's lien is based upon the theory that it would be unconscionable that the vendee should hold the land, and not pay for it, and as equity regards the substance rather than the form of contracts, it is immaterial, on principle, what shape the refusal or neglect may take. Unless the vendor has evinced an intention, by the acceptance of other security, to release the vendee, it must be presumed that he holds the land in trust to pay what he had agreed as the purchase price; and in the case of conditions annexed to a grant, and assumed by the vendee, if the performance of the condition constituted an inducement to the sale, it is as much a part of the compensation to be paid as if the promise had been to pay the vendor, as part of the purchase money, a sum equal in amount to the damages sustained by their breach; and the equitable lien will, it is held, attach to the land sold, as well for such damages as for the purchase money." In the case of Hooper v. Railroad Co., 69 Ala. 529, the railroad company stipulated in writing to pay the complainant a stated amount in cash, "and to fill, level, or grade every street which leads to or around block A, where George D. Hooper resides, which is cut by said railroad," etc. It was held that the complainant could enforce a lien for the diminished value of the lots because of the obstruction or interruption of access to them, holding in the opinion that the agreement to do this w rk was as much of the compensation to be paid for the right of way as the cash to be paid. In the case at bar, if the plaintiffs had obtained a judgment in a court of law against the respondents for a breach of contract for failing to perform the covenants agreed to as the consideration for the conveyance of the land, and there were no other difficulties in the way, we hold that a vendor's lien could be enforced against the land to secure the payment of the judgment. We are of opinion that a bill for a specific performance would not lie, under the facts, as they appear in the present case. The consideration expressed is the "erecting and operating of a car factory," etc. To carry out this agreement requires the exercise of labor and special skill, judgment, and discretion; and the averments of the bill show that defendant "is unable, from the lack of means, to perform said agreement." A court of equity is powerless to enforce a specific performance of an agreement which the party is unable to perform, and, furthermore, a court of chancery will not undertake to enforce a specific performance "when it involves the exercise of special skill, judgment, and discretion." Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498, 3 South. Rep. 449, and authorities cited; Clark's Case, 12 Amer. Dec. 214; Marble Co. v. Ripley, 10 Wall. 358.

It is unnecessary to further consider this view of the case. There is one feature presented by the averment of the bill in its present condition which seems fatal to plaintiff's right to relief. We have considered the agreement of the parties only as it appears from the deed of conveyance. Exhibit A to the bill, and which is made a part of it, evidences a contract between the parties, executed at the same time as the deed of conveyance. This contract must be construed together with the deed of conveyance. Robbins v. Webb, 68 Ala. 398; Walker v. Struve, 70 Ala. 172. When the two instruments are construed together as parts of the same agreement, it becomes evident that the "erecting and operating of a car factory" did not constitute the sole consideration for the 50 acres of land described in the conveyance. In addition to the land, the complainant agreed to pay to the defendant $40,000 in cash, and also to turn over to the defendant $300,000 of Bridgeport Land & Improvement Company stock. It was in consideration of the cash, the company's stock, and the 50 acres of land that the defendant agreed to erect and operate a car company. No separate value was fixed upon the land by the parties, and there is no *data* from which its relative value could be definitely and specifically ascertained. When, by the contract, the vendor and vendee do not distinguish the considerations, when they are blended and combined, and it is impossible to separate them, the presumption must be that the vendor did not look to the lands for payment, but relied upon the personal responsibility of the vendee. Stringfellow v. Ivie, 73 Ala. 209; Betts v. Sykes, 82 Ala. 380, 2 South. Rep. 648. The judgment must be affirmed.

(44 La. Ann. 166)

KLOTZ *et al.* v. MACREADY *et al.* (No. 10,910.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

VENDOR AND VENDEE—AGREEMENT TO CANCEL OUTSTANDING MORTGAGE—RIGHT TO TRANSFER.

1. The purchaser can compel the vendor to comply with his obligation expressed in the act of sale to cancel the mortgage appearing of record against the property he sells.

2. The purchaser choosing to allow the mortgage to remain and the promise to cancel to continue uncomplied with, his creditor, who has a mortgage on the property, and has caused it to

be seised, can recover judgment to clear the title of incumbrance, and to enforce the cancellation, as required by the terms of the sale.

3. The proceeding is proper, and arises *ex necessitate rei*, in the absence of any law to the contrary.

4. The agreement which plaintiffs seek to have carried into effect gives rise to a real right which can be conferred by the creditor.

5. It is not an obligation strictly personal, which none but the obligee can enforce, but a right of property which can be exercised by those who have a right of mortgage on the property.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Charles Macready and others obtained a judgment against William S. Benedict, Bernard Klotz, and Lee Clark, and to enforce the same the sheriff seized certain land. Bernard Klotz & Co., a corporation, sued out injunction restraining the sale of the machinery and contents of a factory placed on the land. From the judgment Benedict and Klotz appeal. Affirmed.

H. C. Cage, *Lewis Guion*, and *W. S. Benedict*, for Benedict, appellant. *Thos. J. Semmes*, for succession of Margaret, appellee. *Bayne & Denegre*, for Lee Clark, appellee.

BREAUX, J. The defendant having obtained a judgment against the plaintiff for the sum of $31,341.65, with interest, subject to a *remittitur* of $624.42, and the sheriff, in enforcing it, having seized certain parcels of land, with the buildings and improvements thereon, Bernard Klotz & Co., a corporation, limited, sued out an injunction restraining that officer and the defendants from proceeding further to dispose of the machinery and contents of a factory, placed thereon, by them while lessees. The injunction was maintained, except as to machinery and certain implements stated in the judgment, which were not placed on the said land by the lessees. The evidence maintains the correctness of that judgment. It will be affirmed.

The defendants, in the proceedings before us, sued William S. Benedict, Bernard Klotz, and Lee Clark, and aver that their judgment has been duly recorded. That in an act of sale dated the 9th of January, 1889, the price at which the property was sold to Bernard Klotz by W. S. Benedict was $50,000, of which $10,000 was paid in cash, and the remainder was to be paid in notes of $1,000 each. Nine of these notes have been paid. The mortgage securing them has not been canceled. They further aver that there was a note of $10,000, secured by mortgage on the property at the time of the sale, which the vendor to Klotz promised to have canceled. It was his indebtedness, and an incumbrance on the property, which he promised to cancel. This note was held by Lee Clark, one of the defendants. The plaintiffs, in their suit, claim the right to have the amount of the vendor's mortgage ascertained and fixed, and to compel the defendant Benedict to extinguish the note for $10,000, and cancel the mortgage on the property under seizure. The defendants have filed separate answers. Prior to answering, one of the defendants (Benedict) filed the plea of no cause of action. In his answer he avers that the claim for $10,000 is valid, and that a tender of the amount due was made. It was not accepted. The exception and merits were tried together. Klotz, the vendee, denies the right claimed; and Lee Clark, in his answer, alleges that he is the holder of the note for $10,000, secured by privilege and mortgage, and prays to be paid by preference over all others. Judgment was rendered in favor of plaintiffs, overruling the exception, and decreeing the mortgage in favor of W. S. Benedict, resulting from the act of sale by him to Bernard Klotz, dated January 9, 1889, be reduced to the extent of $9,000, being the nine notes paid of $1,000 each. He was also condemned to pay to Lee Clark the amount of the two notes and interest, and other charges secured by privilege and mortgage on the property as before mentioned. The defendants Benedict and Klotz appeal.

The facts needful to the decision of the case are sufficiently set forth by the statement that the amounts are due and secured as alleged, and that it is declared in the act of sale of January 9, 1889, that Benedict, the vendor to Klotz, "promised to cancel the mortgage for $10,000 resting on the property he sold." It is not alleged in the pleadings, nor was it contended in argument, that there were any equities between Klotz and Benedict. Having sold the property, and promised to cancel existing incumbrances, there can be no question as to the right of the purchaser to require compliance. The agreement made was certain, fair, and just. It cannot be renounced by Klotz to the detriment of the interest of his creditors, whose claims are secured by mortgage on the property. Having a right which he does not choose to enforce, the question arises as to whether his creditor, whose claim is secured by mortgage, can compel compliance. The Civil Code does not, in express terms, authorize creditors to exercise all the rights and actions of their debtors. This court has not heretofore decided that only such rights and actions of creditors may be exercised as are expressed. In Morris v. Cain, 35 La. Ann. 759, the proceedings were in the nature of a bill of interpleader in chancery practice, not provided in our Code of Practice; "but under article 21, Rev. Civil Code, and on general principles, this court has often held that the Code of Practice does not exclude all other remedies than those therein provided for, and that the courts will afford other appropriate remedies where not prohibited; and they have repeatedly enforced remedies identical with the one here invoked." If not maintainable on equitable grounds, "there is a principle of the civil law obtainable in Louisiana, by the aid of which there can be no doubt of its being maintainable." New Orleans v. Gaines' Adm'r, 131 U. S. 213, 9 Sup. Ct. Rep. 745; Fortier v. Slidell, 7 Rob. (La.) 399. There are rights, says the Code, which the creditor cannot exercise even should the debtor refuse to avail himself of them. Article 1991. The excepted rights do not include such a right as the one involved in this suit, for it is not similar. The Revised Civil Code expressly reserves

to a creditor the right of intervention in all suits which may arise between usufructuary and the owner. Article 623. He may cause to be annulled any renunciation made by his debtor of the usufruct to his prejudice. Article 624. He may accept an inheritance the debtor refuses or neglects to accept. Articles 1021, 1990, Rev. Civil Code. Despite the debtor, he may plead prescription his debtor declines to plead or may choose to waive; the property of the debtor being the common pledge of his creditors; the obligation being attached to immovable property. Privity being the "mutual or successive relationship to the same rights of property," it is consistent with the articles referred to to include among the rights of creditors that compelling the vendor of property to his debtor to cancel a mortgage on property mortgaged to secure his claim, and which the vendor promised and obligated himself to cancel, instead of classing it as a strictly personal obligation which the creditors cannot exercise; such as requiring the separation of property between husband and wife, or compelling him to accept a donation *inter vivos*, etc. Rev. Civil Code, art. 1991.

It is not alleged nor is it claimed by defendants Benedict and Klotz that specific performance is an issue involved in this case. The defense is a denial of any right of the debtor against Benedict which the creditor can have enforced; in other words, they contend that a creditor cannot exercise the rights of his debtor when the latter, to the detriment of the former's interest, fails to exercise them. That being the defense, to that extent we decide the issue, and hold that it is not a strictly personal obligation, but one the creditor can exercise.

A question of tender of an amount to take up the $10,000 note secured by the mortgage the vendor promised to cancel comes up as one of the issues. The tender was made in the name of a third person, not shown to have had any interest. The tender was made to the attorney of Lee Clark. A question arose between the attorney and the party making the tender about distinguishing the payment from a sale or transfer. The attorney was without authority to transfer the note and merely change the creditor. It was a matter of payment *vel non*. Payment consists in the discharge of an obligation. The attorney of the holder could, before accepting the amount, insist upon payment. Judgment affirmed, at appellants' costs.

(44 La. Ann. 178)

NEW ORLEANS, FT. J. & G. I. R. Co. v. RABASSE. (No. 10,915.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

REMOVAL OF CAUSES — LOCAL PREJUDICE — RIGHTS OF ALIENS — CONDITIONS OF BOND — VERDICT — EXPROPRIATION.

1. Act Cong. Aug. 13, 1888, authorizing the removal of causes to the circuit court of the United States on the ground of local prejudice, makes no provision for a removal by an alien.

2. One of the conditions of the bond for removal is that the principal shall pay all costs that may be awarded if said court should hold that the suit was wrongfully or improperly removed.

3. A bond without that condition is defective.

4. The verdict of a jury is responsive to the issues when rendered with reference to the pleadings.

5. The verdict is presumed to be correct.

6. The party who wishes it set aside has the *onus* of establishing that it is incorrect.

7. In expropriation proceedings, the jury of freeholders have to some extent the character and authority of experts.

8. Although their finding is not conclusive, it must be given due weight.

(*Syllabus by the Court.*)

Appeal from district court, parish of Plaquemines; A. E. LIVAUDAIS, Judge.

Suit by the New Orleans, Ft. Jackson & Grand Island Railroad Company against Eugene Rabasse to expropriate a road over his land. On application by defendant for a removal of the cause. From a judgment denying the application defendant appeals. Affirmed.

Charles Louque, for appellant. *James Wilkinson*, for appellee.

BREAUX, J. This suit was brought to expropriate a road over the land of defendant. The land sought to be expropriated is part of a tract measuring 5 arpents front, on the Mississippi river, by 40 arpents in depth. Plaintiff avers that it measures 25 feet in width, and in all contains 83-100 of an acre, for which the company offered $50, and claims the increased value to defendant's property, resulting from the building of the railroad, as an offset for any damages sustained by him. Plaintiff, in the petition, sets forth that the improvements on the right of way consist of 30 orange trees. The defendant, alleging that he is a citizen of the republic of France, applied for the removal of the cause. He avers in his brief "that before going on with the trial defendant filed his petition for the removal of the cause to the circuit court, on the ground of local prejudice, as is provided for by the act of congress of 1888." 25 St. at Large. In a supplemental brief it is argued that there is no good reason why an alien should not be included in the denomination of "a citizen of another state." Extract from the said statute reads: 'Any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which said defendant, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause." The conditions of the bond for removal are that the principal shall file full and complete copies of all pleadings and other proceedings in the case in the circuit court of the United States at its next session, and shall pay all costs that may be awarded. The plaintiff controverts defendant's application for removal on the ground that he has not alleged that he could not obtain justice in the court a

qua, or in any other court; that the bond for removal is not framed in compliance with law; that evidence was taken, without objection, on the trial of the application to remove, which disproved the affidavit. The application for removal was overruled.

The act of congress of August 13, 1888, authorizing the removal of causes on the ground of local prejudice, requires the affiant to state that he could not obtain justice in the court *a qua*, or in any other state court to which the defendant had a right under the present state law. Sections 3901, 3902, Rev. St., provide a change of venue in civil cases. Evidence was heard, as alleged.

On the subject of removal we limit our decision to the following: In the several laws relating to the removal of causes from the state to the circuit courts, the words "citizens of a state" are used as designating citizens of the commonwealths of the federal republic. The word "state" is used as distinguishing the states of the American Union, and do not designate foreign countries. The act adopted in 1888 is similar to that adopted March 2, 1867, in so far as relates to the citizenship of the applicant. With reference to the latter, we find in Spear on the Law of Federal Judiciary, p. 469," that there is no provision for a removal by an alien under this act."

In the second place, the bond furnished does not secure the payment of costs. This, by the act in question, is made one of the conditions of the transfer. On that subject, in Meyer v. Construction Co., 100 U. S. 457, it was held that "nothing was, therefore, to be secured by the bond but the filing of the transcript in the circuit court, * * * and the payment of any costs, as required by statute." Field, Fed. Prac. § 177. The amount of the penalty and the required conditions should be inserted in the bond. Until then, there is no right of removal. Id. We affirm the overruling of the application for removal.

The plea in reconvention is referred to in argument, and it is urged that the defendant's evidence in its support should have been admitted. The records do not contain any bill of exceptions, or any proof that evidence was offered to sustain that plea, or that the court made any ruling whatever in the matter. The plea is, therefore, not before us for decision.

In compliance with an order issued under section 2148 of the Revised Statutes, a jury was drawn, and the case was tried. The verdict was for plaintiff, expropriating the right of way, and for the defendant for the sum of $50, value of the land, and the further sum of $200 and costs. From the verdict and the judgment of the court defendant prosecutes this appeal. The road is 25 feet in width, and the area sought to be expropriated is 83-100 of an acre. It passes in the rear of the dwelling, at a distance between 100 and 200 feet, through the stable lot, changing its dimensions, and touching the stable. From the upper line of defendant's place the road curves to the rear. This direction was followed to avoid the unsafe, caving banks of the river. The records do not disclose that the jury have overlooked the fact that the said course gave an irregular shape to the front of the place, or that they have overlooked the allegations of the damage it occasions, and the evidence on the subject. The plaintiff contends that the law of expropriation is such that a railroad company cannot expropriate lands through a yard, garden, and other appurtenances, unless the jury shall find by their verdict that the line of the proposed railroad cannot be diverted from that proposed by the company without great public loss or inconvenience. Rev. St. 1870, § 1486. The plea authorized by this section of the statutes was clearly presented by the defendant. The testimony shows that there was a caving point, which made it necessary to leave the river, and run further to the rear. To reach their conclusion, the jury must have accepted this testimony as true. While the verdict does not set forth, in so many words, the finding in the terms of the law, it does in effect, by returning for the expropriation as proposed. Construed with reference to the pleadings and the testimony, the verdict is responsive to the issues. Downes v. Scott, 3 Rob. (La.) 88.

The value of the orange trees within the road's limits is one of the issues. The following is a summary of the testimony, both as to the value of the trees and of the land expropriated. The superintendent of the road testifies that there were on the land 29 or 30 trees, large and small, valuable and valueless; of the valuable there were only 4 or 5. The second witness, a notary public, employed in that capacity by the defendant, testified that the value of property in the vicinity of the defendant's place has been enhanced 25 per cent. or 30 per cent. by the building of the road of the plaintiff company. He states that the number of trees cut down were 35; that 17 of them were not bearing, and were worth about 45 cents each; that the land sought to be expropriated was worth $50. The third witness, a manager of a plantation near the defendant, testifies that the value of lands in the vicinity has been enhanced by the building of the road. The fourth witness, a surveyor, called by the defendant, testifies that there were 74 trees of different sizes on the road lines; some measuring in diameter as many as 12 inches; others 1 inch. The fifth witness only knew that there were some large and some small orange trees on the place. The sixth witness, a dealer in oranges, testifies that he offered $1,500 for the orange crops on this and another of defendant's places, or $2,000, if he would consent to deduct whatever damages to the crop would be made by the railroad company by the expropriation. The offer was not accepted. This testimony loses importance in establishing the value by the additional statement of the witness that he at the time made a rough calculation, and did not know the number of trees that would be cut down. The defendant testifies in general terms in his behalf, and at most corroborates the allegations of his petition. Such being the testimony, we have not reached the conclusion that the verdict is erroneous.

A verdict is presumed to be correct. The party who wishes it set aside has the *onus* of establishing its incorrectness. We have not concluded that there is error in the finding. The members of the jury, it is fair to presume, knew something of the value of orange trees. The question is one of fact, of which they should be competent judges, after hearing the testimony of witnesses.

In a recent case, we have had occasion to hold: "It has long been held in this state that the jury of freeholders authorized by our laws to act in expropriation proceedings have to some extent the character and authority of experts, supposed to have some personal knowledge of the matters submitted to them, and authorized to rely on their own opinions as well as on the testimony adduced before them. Their verdicts are, indeed, subject to review by appeal, and may be amended when manifestly inadequate or excessive; but they are entitled to great respect, and will not be interfered with except in case of gross or manifest error." Postal Telegraphic Cable Co. v. Louisville, N. O. & T. Ry. Co., 43 La. Ann. 525, 9 South. Rep. 119. As in the case from which we quote, we deem it proper to rely upon the verdict of a jury, who, in the discharge of their functions, from their personal knowledge were enabled to decide as to the weight of the testimony of the witnesses who appeared before them.

Judgment affirmed.

(44 La. Ann. 209)

PUGH v. MOORE et al. (No. 10,870.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)

FACTORS AND BROKERS—FAILURE TO DISCLOSE PRINCIPALS — LIABILITIES — ASSIGNMENT OF NEGOTIABLE BOND — FRAUDULENT ISSUE OF STATE BONDS—BONA FIDE PURCHASERS.

1. If a broker or other agent transfer paper by delivery without disclosing who is his principal, he is himself to be regarded as a principal in the transaction, and the party responsible to refund money paid for bonds which were valueless.

2. The term "assignment" is applied to the transfer of instruments which are negotiable without indorsement. If a bond is not a valid subsisting obligation according to its purport, the assignor is liable in a suit to recover the amount paid him as the price, because it was not that which it was held to be, and the assignee did not receive any consideration.

3. A state bond in negotiable form, which has come into the hands of innocent holders, after having been fraudulently reissued from the treasurer's office, is subject to defense.

4. An officer cannot ratify an irregular issue of securities of the state, or give value to paper issued *ultra vires* or fraudulently, as he could not originally issue the paper.

5. The state is not liable for its paper promises fraudulently issued and put into circulation, not even when put in circulation by its treasurer.

WATKINS, J., dissenting.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit by Sallie C. Pugh against Moore, Hyams & Co. to recover the amount paid for certain alleged worthless bonds. From a judgment for plaintiff, defendants appeal. Affirmed.

Bayne, Denegre & Bayne, for appellants. *Charles F. Claiborne*, for appellee.

BREAUX, J. Plaintiff sues to recover of defendants the amount paid them for five state bonds she alleges are worthless. They were bought by her on the 24th of April, 1889, for the sum of $4,443.75. She subsequently discovered that these bonds were not valid, and that the state claimed them, as they had been fraudulently reissued. Four of them are numbered 742, 842, 866, and 883, and are part of the consolidated bonds held by the treasurer of the state of Louisiana for the use of the Agricultural and Mechanical College, and which are null and void, since the 1st day of January, 1880, under article 233 of the constitution. In addition to their nullity, this article prescribes that the general assembly shall never make any provision for their payment and that they shall be destroyed. Another of the bonds bought is numbered 5,611, and is a consolidated bond, which had been exchanged under Act 121 of 1880 for a constitutional bond. The act just quoted orders in matter of the exchange of constitutional for consolidated bonds that the treasurer, before delivering the former, shall designate in blank, kept for the purpose on the face thereof, the number of the old consolidated bond for which the new was given in exchange, and shall stamp the consolidated bond received, after having detached from it the coupon which fell due on the 1st of January, 1880. Reports were to be made by the treasurer to the auditor at the end of each quarter, showing the number and denomination of all the consolidated bonds stamped, as required. They were to be destroyed. It was under the provisions of the said act that this bond—5,611—was received by the treasurer. Plaintiff tendered the bonds to the defendants, and demanded valid bonds in lieu, or the price. The defendants, in their answer, plead that they acted as brokers, and not as vendors; that these bonds were negotiable instruments, not yet due, transferable by delivery, and did not entail any liability or warranty upon the vendor; and that they had been issued by the state, and put in circulation by its officers, for full value; and that their rights are protected by the constitution and laws of the United States and the law-merchant, by which they must be decided. There was judgment for plaintiff, and the defendants have appealed.

With reference to the capacity in which the defendants acted,—whether as brokers or principals,—we summarize the evidence as follows: That defendants are brokers by occupation, and that at the date of the sale of these bonds to the plaintiff they were engaged in buying bonds for themselves and others. That plaintiff's agent asked a member of the defendant firm to let him have some of these bonds for his principal at cost price. That this was declined unless a broker's commission was paid. That this the agent finally consented to pay. This is corroborated by another member of the firm. The agent

corroborates these statements in some particulars, but denies that he dealt with the defendants as brokers, and that there was any brokerage compensation. It appears that no statement of the purchase was made and handed to the purchaser, as is customary when brokers act for third parties. That the defendants did not at any time make known to plaintiff who was the principal and owner of those bonds, if they were not. With reference to the fraudulent reissuing of the Mechanical and Agricultural College bonds, Nos. 742, 842, 866, and 883, and the possession of the state, the facts are that they were designated in Statement E of the report of the state treasurer to the governor for the year 1879, from which we copy: "To his Excellency, F. T. Nicholls, Governor of the State of Louisiana—Sir: In accordance with the requirements of law, (Act No. 96, Extra Session, section 80, of 1877,) I respectfully submit the following report of the financial operations of this department of the past fiscal year, commencing the 1st day of January, 1879, to the 31st day of December, 1879, inclusive, embracing its receipts, disbursements, etc., from the various funds, as provided by existing laws. The treasurer's report consists of Statements A, B, C, D, and E. Statement A shows an account * * *. Statement B shows an account * * *. Statement C shows an account * * *. Statement D shows an account * * *. Statement E shows a detailed statement of the bonds held 'by the state treasurer in trust for the Mechanical and Agricultural College, and the bonds belonging to the Louisiana State University; also of the bonds returned by A. Luria, cashier Louisiana National Bank, on June 7, 1878, in exchange of warrant No. 2,222, as per judgment of the third district court of New Orleans, No. 25,115, and of the supreme court of Louisiana, No. 7,149, and pledge of the lessees of the Louisiana state penitentiary, etc.' [The residue of the report is a compilation of the monthly reports of the banks, banking institutions, savings banks, etc., published in accordance with the provisions of Act 91, section 6 of 1877.] All of which is respectfully submitted. [Signed.] E. A. BURKE, State Treasurer." Extract from the said report: "Statement E. Description of bonds on hand in the state treasury, held by and belonging to the Agricultural and Mechanical College and to the Louisiana State University, etc. Mechanical and Agricultural College: 196 bonds, of $1,000 each, issued by the state of Louisiana under Act No. 8 of 1879, Nos. 710 to 905, inclusive, $196,000."—necessarily including the bonds involved in this suit, viz., Nos. 742, 842, 866, and 883. Other official reports, of subsequent dates, were offered in evidence. They were objected to on the ground that they were not the best evidence which could be produced. The court overruled the objection, and admitted the testimony.

The first report—that of 1879—shows that the bonds were in the treasury at the time it mentions; and, while those made subsequently do not, from personal knowledge, establish that they were in the treasury in 1879, nevertheless they tend to prove the correctness of that of 1879. The records of the state make proof of the verity of their contents, unless proven incorrect. Best, Ev. p. 454. The fact that the treasurer was indicted in 1888 for alleged criminality in the fraudulent reissue of these bonds, and that he is a fugitive from justice, will not destroy the effect of records as evidence, accepted at all times as correct previous to 1888. With reference to the consolidated bond, (5,611,) it is proven that in 1883 it was presented to the state treasurer, to be changed for a constitutional bond. It was exchanged and extinguished. The state claims its return, and refuses to recognize it as a debt.

The Brokers' Responsibility in Transferring Bonds by Delivery. The first proposition presented by the defendants is that they acted as brokers, and are not indebted for the amount claimed. In considering this defense it is necessary to determine what are the functions of a broker. He is an intermediary, employed to negotiate a matter between two parties, and for that reason is considered a mandatary of both. When he is the mandatary of the purchaser, and buys from a third party, the agency must be disclosed, either at the time of the contract or on the trial, in order that he may be considered the broker, and relieved from all responsibility as principal. If the plaintiff has a right of action, it cannot be defeated, as in this case, by withholding the name of the principal, and pleading the exemption of a broker. We quote from 1 Daniel, Neg. Inst. p. 684: "It is quite clear that if a broker or other agent transfer property by delivery, without disclosing who his principal is, he is himself to be regarded as principal in the transaction, although the party dealing with him may have known that he was the broker or agent for some person." "And this doctrine has been applied to compel a broker to refund money paid for notes sold by him to the plaintiffs, although he had paid over the money to his principal."

Liability of the Assignor of Bonds Payable to Bearer. In the order of the defense the defendants next contend that it is well established that the buyer has no cause of complaint if he gets the exact thing he buys; that each had the same means of information; neither had any suspicion that there was anything wrong with the bonds; that it was an ordinary case of bargain and sale, but essentially a transaction in which both took their chances of loss; that these bonds were current in the market as Louisiana state bonds. The representations made by vendors were in good faith, and believed by both parties to be true, that they were selling valid bonds of the state of Louisiana. The unquestioned intention of the plaintiff was to buy valid obligations of the state. Instead she received five bonds that were null and void. For these she paid a price for which she did not receive any consideration. The question for our decision on this point is whether a purchaser who buys bonds in the market must lose the price if he receives fraudulent reissues of bonds, instead of valid and binding obli-

gations upon the state, which he intended to buy. This question involves the necessity of deciding what are the liabilities of assignors of instruments payable to bearer. The assignor of such an instrument guaranties that he has a good title to the instruments, and has a right to sell them. The illegality of the instruments constitutes a failure of consideration. Knowledge of the illegality on the part of the vendor is not essential to make him liable for the price received. "We think whoever gives negotiable paper, transferable by delivery, warrants that the signatures are genuine;" and Mr. Justice Story, in his work on Promissory Notes, lays it down that there is a warranty of title. Prom. Notes, par. 118. He warrants "by implication, unless otherwise agreed, that its face is a true description of its character, both in respect to its genuineness, to its validity and legal operation, to the competency of the parties; and also that he is the lawful holder, having a valid title and right to transfer it; and that he has no knowledge of any facts which prove the paper, if originally valid, to be worthless, either by the insolvency of the principal or by having been paid, or otherwise by having become void and defunct." Daniel, Neg. Inst. (3d Ed.) par. 737. The assignor engages that the instrument is what it purports to be, *i. e.*, the valid obligation of those whose names are upon it. The rule, says Judge Parsons, is of universal application that the vendor, without indorsement, warrants that the paper is of the kind and description it purports to be. This is a well-settled principle of commercial law, *i. e.*, implied warranty in sales, as applicable to negotiable instruments transferable by delivery. An exception arose under a decision of the United States supreme court, and a different rule was announced as applying to assignors and assignees of government securities, *i. e.*, that the assignor does not impliedly guaranty that the officers had authority to issue the securities he transferred by delivery. In Otis v. Cullum, 92 U. S. 447, a city bond issued in Kansas was sold to plaintiffs. The court held the bond void on the ground that the legislature had no power to adopt the act authorizing its issue. The transferees sued to recover back what they had paid for the invalid bond. The court held that in such cases there is only an implied warranty of title and genuineness, and that, if there was no guaranty, and no fraud or misrepresentation on the part of the vendor, the transferees were without right to recover. This case followed Lambert v. Heath, an English case, (15 Mees. & W. 486.) The rule is the same in both. In the last case the defendant bought for the plaintiff certain certificates of Kentish Coast Railway scrip. The directors repudiated the scrip on the ground that the secretary had acted without authority in issuing them. An action was brought to recover back the money paid for these invalid scrips. The court said: "The question is simply this Was what the parties bought in the market Kentish Coast Railway scrip? It appears that it was signed by the secretary of the company; and, if this was the only Kentish Coast Railway scrip in the market, as appears to have been the case, and one person chooses to sell and another to buy, then the latter has all he contracted to buy." In both of these cases all the securities were null and void. In the case at bar only comparatively few bonds were worthless, and it happens that in buying a large number these sued on were of the worthless. In a Nebraska case the distinction was made that there were two sets of securities in the market of the same general description, one legal and the other illegal; proof of which fact entitled the purchaser of the illegal securities to recover back the purchase money on the ground that he had purchased something very different, viz., the legal security of the same description. Rogers v. Walsh, (1881,) 12 Neb. 28, 10 N. W. Rep. 467. Judge Daniel, referring to the case, says, (1 Neg. Inst. par. 734*a*:) "The distinction is a clear one; and the decision of the supreme court, limited to the facts of the case before it, is not irreconcilable with the general principles stated in the text," which we have had occasion to refer to as applying to this case. While an assignment is not equivalent to an indorsement, a transfer without indorsement is of the same force as a sale of goods, and does not fall under mercantile law. 2 Rand. Com. Paper, p. 442. The principle of implied guaranty by the assignor of securities payable to bearer is but slightly removed, if at all, from those laid down in the Rev. Civil Code respecting the liability of the vendor. The seller is bound to warrant the thing which he sells, to maintain the buyer's peaceable possession, and to guaranty against the hidden defects of the thing sold. He who sells a credit or incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned in the deed. Rev. Civil Code, art. 2646. The authorities agree that the assignor of a security transferable by delivery warrants that it is not fictitious.

The defendants contend that plaintiff had the knowledge they had with reference to these bonds; each had the same means of information; neither had any suspicion that there was anything wrong about these bonds. That is undoubtedly true. Against each of the parties to the suit the same presumption arises,—that they had knowledge of the laws relating to these bonds. They had the notice every one is presumed to have of the law. The fact remains that in an intended purchase plaintiff has paid an amount for which she did not receive anything in return.

The State is not Responsible for Bonds Fraudulently Reissued in Violation of her Laws. The third and last ground of defense is that the defendants were holders for value before maturity of negotiable paper of the state of Louisiana; and that, applying the law governing commercial paper, she is liable, and has incurred all the responsibilities of private persons under the same circumstances. While this is in the main true, the state is not lightly exposed to pay its securities twice. These bonds could not have any legal validity

after they were withdrawn from commerce. The theft committed in reissuing them, and the flagrant violation of the law, made them valueless in any hands. It is settled that debts unlawfully contracted by a municipal corporation are not binding upon it, although negotiable in form. If there is no authority to issue its bonds or commercial paper, there can be no *bona fide* holder, in the commercial sense of the term. Township of East Oakland v. Skinner, 94 U. S. 255; Marsh v. Fulton Co., 10 Wall. 676; School Directors v. Fogleman, 76 Ill. 189; Cecil v. Board, 30 La. Ann. 34. In Chisholm v. City of Montgomery, 2 Woods, 594, it was held that the negotiable form of the security did not preclude the defendant from denying the authority of the officers by whom the faith of the city had been pledged. That the officers and agents of private corporations, intrusted by them with the management of their own business and property, may subject their principals to the consequences of their unauthorized act, but that the body politic is not thus bound by the acts or declarations of its agents. "If it could be, unbounded scope would be given to the peculations and frauds of public officers." That third persons, holders of the bonds, were bound to take notice of the defects. These and other exceptions have led us to the conclusion that all the responsibilities of private persons do not form part of the obligation of a municipal corporation on its bond, nor of the state. In Cagwin v. Town of Hancock, 84 N. Y. 532, it was held that there can be no *bona fide* holder of town bonds within the meaning of the law applicable to negotiable paper, as they are only binding upon the town when issued in the way pointed out by statute. In Moffat v. U. S., 112 U. S. 25, 5 Sup. Ct. Rep. 10, the court decided that the United States do not guaranty the integrity of its officers, and hold themselves bound by their misconduct or fraud. Says the court in that case: "The position that, as the frauds charged were committed by officers of the United States, the court erred in not holding their acts to be binding, and in not giving to the patents the force of valid conveyances, is certainly a novel one. The government does not guaranty the validity of the acts of its officers. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud; but there its responsibility ends. They are but the servants of the law, and if they depart from its requirements the government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties." District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. Rep. 694. The state government required similar formalities to be complied with by its officers. The required oath was taken, and bond furnished. The criminal statutes provide punishment against their frauds. If, with these requirements, the responsibility of the United States ends, for similar reason that also of the state ends. "It has been held in England in recent cases that a corporate bond in negotiable form, which has come into the plaintiff's hands for value after having stolen from the rightful owner, was subject to defense." Rand. Com. Paper, par. 327. Free-school bonds were sold by the auditor and treasurer under Act 81 of 1872. The court declared the act unconstitutional, and denounced it as an act of spoliation, intended and designed to deplete the treasury of every available asset or fund. State v. Board, 29 La. Ann. 81. The Sun Mutual Insurance Company became the owner of 11 of these bonds before maturity for valuable consideration. Suit was brought by the company against the board of liquidation to have them funded. The court decided against the application to fund, and held that the laws of 1855 and 1857, setting aside these bonds for the schools, took them out of commerce, and that third persons, however innocent, could not hold them as owners. These bonds were sold under some color of law. The sale had legislative sanction, and the auditor and treasurer acted in compliance with a statute which was subsequently declared unconstitutional. In matter of the bonds now under consideration, their reissue from the treasurer's office was an outrageous fraud, which absolutely vitiates them in any hands in which they may be found.

By taxation private property is appropriated to public ends and legitimate purposes. The element of negotiability of bills, notes, and bonds makes a contract, founded upon paper adopted for circulation, different in many important particulars from other contracts known to the law. That element loses all force when paper has been placed in commerce in violation of law to perpetrate a fraud upon the state. The holder of a bond of a municipal corporation is bound to look to the action of the officers, and ascertain whether the law has been so far followed by them as to justify the issue. The right of a state cannot be less. The decisions relating to private corporations and to persons do not apply against the state. The state's authority to issue bonds is founded on law of which every one is presumed to have knowledge. These who deal in state securities will be presumed to have examined them, and to have known whether they could be in commerce. The dealer in bonds of private corporations, or in bills and notes of individuals, has not the same opportunity of examination, and the same presumption of law does not arise. The by-laws of corporations are not open to inspection by those who deal in securities issued by them, and therefore the reason for distinction. Those who deal in state securities had opportunity to know whether the treasurer had any lawful right to issue them, for the reason that his authority, if any existed, was to be found in public statutes; and, if they did not in fact examine, as it was their privilege to do, before buying, they will be presumed to have done so, and to have known that they were issued without author-

ity of law, and therefore void in the hands of any holder either with or without notice. The bonds sued upon are the property of the state, and were within her reach and in her possession when they were ordered to be destroyed. In argument it is urged that the state is estopped by the information given by one of her officers that the bonds sued upon were valid bonds. If that plea were maintained, it would be equivalent to maintaining a ratification. No such ratification could be made. We have found no grounds to reverse the judgment appealed from. Judgment affirmed, at defendants' costs.

FENNER, J., (*concurring.*) The case presents two questions, viz.: *First.* Are the bonds in controversy valid and subsisting obligations of the state of Louisiana? If so, plaintiff has received all that she bought or intended to buy, and has nothing to complain of. *Second.* Even if said bonds are invalid, are the defendants bound to reimburse the price they received for them?

1. It is shown that four of the bonds are consolidated bonds of the state, which, on and prior to the 1st day of January, 1880, were held by the state "for the use of the Agricultural and Mechanical College Fund." As to these bonds, the constitution of the state (article 233) declares: "The consolidated bonds of the state, now held by the state for the use of said fund, shall be null and void after the 1st day of January, 1880, and the general assembly shall never make any provision for their payment, and they shall be destroyed in such manner as the general assembly may direct." The remaining bond in controversy is a consolidated bond, which had been surrendered to the state in exchange for a constitutional bond, in pursuance of the provisions of the state debt ordinance, which, by virtue of its ratification by the people, became a part of the constitution. At its first session after the adoption of the constitution the general assembly passed an act providing for the cancellation and destruction of the bonds so surrendered and exchanged. Act 121 of 1883. Instead of retaining, canceling, and destroying these bonds, which had thus been conclusively extinguished and rendered null and void by the mandate of the constitution, it appears that the then treasurer of the state fraudulently abstracted them from the treasury of the state, and placed them on the market. The proposition that such fraudulent act could have effect to revive the extinguished obligation of the state upon these bonds or could confer upon the existing government of the state any right or power to make provisions for their payment, in the teeth of the positive prohibition of the constitution, seems, to me at least, to involve the assertion of nothing less than an extravagant impossibility. What function or power has this court except to administer and apply the constitution and laws of the state? We have quoted the provisions of constitution and law bearing on this case. Are they ambiguous? No. Are they beyond the legislative authority which adopted them? No. Then whence can this or any court derive the power to nullify them? We might rest our conclusion with absolute security upon two prior decisions of this court, rendered in cases absolutely analogous to the instant one in every feature save that in those cases there was no intended fraud, but that the bonds had been emitted in virtue of authority conferred by an act of the legislature, regularly passed, but which the court held to be unconstitutional; and surely no one could contend that the illegal act of an executive officer could have greater effect in defeating the constitutional rights of the state than a like act of the general assembly, approved by the governor. In the cases referred to, as in this, the bonds were originally valid bonds of the state. They belonged to a series of bonds of which many were still rightfully outstanding, and from which they were indistinguishable in any respect except as to the numbers which they bore. They were negotiable in form, and were held by purchasers in open market and before maturity, and with no other notice "than would result from their presumed knowledge of the acts and proceedings of the state and its officials." The same arguments, based upon the law of negotiable instruments, were addressed to the court then as now; but the court, after reciting the constitutional and legal provisions which prohibited the emission of those particular bonds, said: "These laws, to all intents and purposes, took these bonds out of commerce. They were placed in the special and joint custody of the secretary of state and treasurer, who were required to execute duplicate receipts therefor, and to be and remain a perpetual fund, inviolably appropriated to support of public schools. They ceased to be negotiable by virtue of these positive declarations of legislative will, and the usages and laws of commerce relative to negotiable paper are superseded by these positive enactments, and are inapplicable to the case. We follow the commercial law only when it does not conflict with statute laws of the state, but no further. It is within the power of the state to destroy the negotiability of all paper, and to withdraw from commerce such things as it may deem proper." Sun Mut. Ins. Co. v. Board of Liquidation, 31 La. Ann. 175; State v. Board, 29 La. Ann. 77. These decisions are, for us, the highest of all judicial authority as to the subject-matter of which they treat; higher even than that of the supreme court of the United States, unless it can be shown that they involve some federal question, on which we acknowledge the paramount authority of that high tribunal. We can discover no federal question in those cases or in this. Nobody would seriously question the power of the state to modify, repeal, or abrogate the law-merchant, except, at least, in so far as such action might impair contract rights existing at the date of such legislation; and, inasmuch as the rights here involved necessarily arose after the date of the legislation, and after the facts which gave effect thereto, this possible exception

cannot apply. In absence of any federal question it may be confidently asserted that in such a case, involving simply the interpretation and application of the constitution and laws of the state, the supreme court of the United States, in accordance with its conservative and settled policy, would adopt and follow the decisions of this court. Such, nevertheless, is my respect for that court, and my desire to maintain harmony between federal and state jurisprudence, that any clearly conflicting decisions rendered by it would arrest my grave attention to the merits of such a conflict as determining whether we should maintain or overrule the prior decisions of this court. I fail to find anything in the federal decisions referred to which conflicts with the decisions above referred to. The supreme court of the United States has emphatically repudiated the doctrine that the government can be bound by the frauds of its officers. We quote its language: "The position that, as the frauds charged were committed by officers of the United States, the court erred in not holding their acts to be binding, and in not giving to the patents the force of valid conveyances, is certainly a novel one. The government does not guaranty the integrity of its officers, nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud; but there its responsibility ends. They are but servants of the law, and if they depart from its requirements the government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it." Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. Rep. 10. From this doctrine it has never deviated by a hair's breadth save in one case, viz., Cooke v. U. S., 91 U. S. 389. That case, like the case of State v. Wells, 15 Cal. 337, involved no question of constitutional prohibition, and none of the power of the government to pay. Both were cases in which the government had actually paid the obligations, and was seeking to recover the amount so paid to *bona fide* holders. In Cooke's Case, the instruments which had been illegally issued, and had been actually redeemed by the United States, were treasury notes, printed by the government, perfect in form, complete, and ready for issue, intended to circulate and take the place of money, not differing, as the court said, "from coins of the mint when fully stamped and prepared for issue," and made a legal tender for the payment of government dues. We can well understand the vast importance to the government of preserving the circulating money of the country from all taint of possible doubt or suspicion; and under the stress of that motive the majority of the court denied the right of the United States to recover. But even in that case Justice MILLER took no part, and Justices CLIFFORD, FIELD, and BRADLEY dissented on the trenchant ground "that the United States are not liable for its paper promises, fraudulently or surreptitiously put into circulation; not even if the fraudulent act was perpetrated by treasury officials." A like question came before the court in a later case, and reference was made to the decision in Cooke's Case, and the unanimous court there referred to the particular circumstances presented therein, and which I have recited above, and said, "We are not prepared to extend the scope of that decision." The court then held that the District of Columbia could not be held bound to even a *bona fide* holder of its negotiable paper not due, which had been redeemed and canceled by the district, and had thereafter been abstracted, the cancellation mark erased with detersive soap, and fraudulently put in circulation. District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. Rep. 694. Although, in the instant case, the fact of cancellation is wanting, I fail to perceive any distinction between a fraudulent failure to cancel when the law required it and a cancellation so made that it could be fraudulently effaced. In both cases the instruments found their way into circulation through the fraud or fault of the officers, and the *bona fide* taker was no better protected by an inefficient cancellation, the evidence of which had been destroyed, than by the absence of any cancellation at all. I consider, therefore, that the decision in Cooke's Case, restrained as it is by the later decision referred to, has no application to the facts of this case, and that the last decision does apply to the facts here, and confirms the decisions of our own court. The instant case, however, presents one feature which separates it by an impassable gulf from the Cases of Cooke and Cornell, viz., the fact that the constitution of the state extinguished these obligations, and forbids the general assembly from ever making any provisions for their payment.

2. On the question of the obligation of the defendants to refund the price received for these invalid bonds, I consider it incontestable.

First. The views above expressed and the decisions quoted hold that the bonds in question had lost the character of negotiable instruments. It follows that defendants' obligations are governed not by the law-merchant, but by the provisions of the Civil Code regulating the contract of sale of non-negotiable incorporeal rights. A mere reference to the articles of the Code clearly shows that the vendor of such a right warrants its existence and validity. Rev. Civil Code, arts. 2474–2476, 2500, 2520, 2646.

Second. Even were it admitted that the bonds retained the characteristics of negotiability as between the parties to dealings in them, I consider that, under the law-merchant, the assignor warrants the genuineness, the validity, and legal operation of the negotiable instruments assigned by him. Benj. Sales, (4th Ed.) p. 695; Daniel, Neg. Inst. § 730 et seq.; Tied. Com. Paper, § 244 et seq.; 2 Pars. Notes & B. pp. 87, 42; Young v. Cole, 3 Bing. N. C. 724; Westropp v. Solomon, 8 C. B. 345. This question also has been decisively settled

by this court, in a case where the assignor held in good faith a treasury note of the United States, which, it subsequently appeared, had been redeemed and canceled by the United States, but had been fraudulently purloined, the cancellation erased, and put in circulation. His assignee, after discovering these facts, sued him to recover the price, and this court awarded it. Knight v. Lanfear, 7 Rob. (La.) 172. The court said: "It is clear that the sale must be rescinded on account of the error of the plaintiff [and, we believe, of defendant also] as to the substance of the object of the sale. * * * If the character of the note, and all the circumstances attending its redemption, the purloining of it, and the conduct of the officers of the United States before and after the purloining, had been disclosed to the plaintiff when he purchased the note, it is clear he would not have bought. He wished to purchase, and believed he was purchasing, an unadulterated treasury note, receivable in payment of duties, and salable at the market price; one which he could not be compelled to take back after he had sold it. He was in an error when he received the note which is the subject of the present suit. His error prevented his consent, and the absence of his consent deprived the sale of all its effects and consequences." The case of Otis v. Cullum, 92 U. S. 447, which is relied upon as counter to the doctrines above enunciated, is clearly distinguishable, and rests upon an entirely different principle, viz., that "the plaintiffs in error got exactly what they intended to buy and did buy." The facts showed that they bought bonds of the city of Topeka, which had been issued under certain laws of the state of Kansas, which were subsequently decided to be unconstitutional, and the bonds annulled. All the bonds issued under these laws stood in the same case. It was not a case where some were good and some bad. The plaintiff simply bought bonds issued under these laws, and he received bonds so issued, and just as good as any other bonds so issued. He got what he bought and intended to buy, and could not complain; his information as to the matter being the same as that of his assignor. But here the bonds sold are part of the consolidated bonds of the state of Louisiana, all of which are valid and binding obligations of the state except those which have been annulled or redeemed. Obviously the plaintiff here intended to buy good bonds; not worthless similitudes, which had been extinguished by constitutional mandate or by valid redemption. She did not get what she bought, and her assignor cannot keep the good money which he received for bad bonds. The supreme court of Nebraska has, in a forcible opinion, shown the inapplicability of Otis v. Cullum, to cases like this. Rogers v. Walsh, 12 Neb. 28, 10 N. W. Rep. 467.

Yielding the utmost force that can be claimed to the equitable considerations which might influence the state in assuming responsibility for the wrongs inflicted on third persons by the fraudulent acts of its own chosen officers, the stubborn fact remains that the existing government is not bound, and even lacks the power, to make any provisions for the redemption of these bonds. This leaves the case within the inexorable grasp of the authority of the decision in Knight's Case, where the court went much further than we can go in this case, and said: "We have considered the defense in the most favorable view in which it can be placed for the defendants. We have assumed, for the sake of argument, that the conduct of the officers of the treasury department, of the custom-house, and of the bank at which the interest was paid, had been such as to entitle the fair holder of the note to demand its amount from the United States." But even on this hypothesis the court said the purchaser did not buy "the chance of a successful application at Washington for the reimbursement of what he advanced. He wished to purchase, and he believed he was purchasing, an unadulterated treasury note, receivable in payment of duties at the custom-house, and salable at the market price; one which he could not be compelled to take back after he had sold it. He was in error when he received as such the note which is the object of the present suit. His error prevented his consent, and the absence of his consent deprived the sale of all its effects and consequences." It is apparent that plaintiff intended to buy, and defendants to sell, untainted and unquestioned bonds of the state, the redemption of which in principal and interest is provided for in the existing constitution and laws; not bonds which the government of the state, as organized under that constitution, cannot and will not provide for, and which can never be recognized or redeemed by any power short of an amendment of the constitution. For these reasons, as well as for those more elaborately stated in the principal opinion, I concur in the decree, and Justices MCENERY and BREAUX also concur in this opinion.

WATKINS, J., (*dissenting.*) It appears that on April 24, 1889, the plaintiff bought of defendants five bonds of the state of Louisiana, of $1,000 each, for which she paid $4,443.75; and, alleging her subsequent discovery of the fact that said bonds were not valid, and that the state had refused to recognize them, she demands of defendants restitution of the price paid therefor. The grounds of nullity assigned are, viz.: *First.* That four of said bonds —those numbered, respectively, 742, 842, 866, and 883, which heretofore formed a part of the consolidated bonds held by the state for the use and benefit of the Agricultural and Mechanical College—were, by the 233d article of the state constitution, declared to be null and void after the 1st day of January, 1880, and for the payment of which the legislature was, in terms, prohibited from making any provisions; and that it also commanded that same should be destroyed in such manner as the general assembly may direct. *Second.* That the bond numbered 5,611, being one of the series of consolidated bonds which had been exchanged under Act 121 of 1880 for constitutional bonds, is, quoting from plaintiff's brief, page 3, "paid and ex-

tinguished." Against this action three defenses are set up, viz.: *First*, that defendants acted as brokers, and are only liable for frauds or faults, and are free from both; *second*, that, if the transaction is deemed a sale, it was of a specific thing, and defendants delivered exactly what the plaintiff bought; *third*, that the bonds in question are valid outstanding obligations of the state.

1. On the first proposition, my opinion is in accord with that of the majority of the court, for the reasons stated, that, if defendants acted as brokers in the transaction, and sold the bonds to plaintiff for other persons than themselves, their liability is that of vendors, for the reason they failed to disclose the fact of their having acted in that capacity, or the names of their principals. Brokers buy and sell on their own account, customarily, as well as upon the account of others. If they sell on their own account, they are evidently responsible; and to avoid such responsibility they must show who their undisclosed principals are.

2. On the second proposition I am also in accord with the majority of the court, —that is to say, if the transaction is to be viewed as one of sale or assignment, and therefore governed by the precepts of the Civil Code, and not as a transfer of negotiable instruments, and therefore controlled by the principles of the law-merchant; for, as vendors of bonds as articles of merchandise, defendants are bound, under the law of warranty, to protect plaintiff; while as *bona fide* holders and transferrers of negotiable securities a different rule obtains; for, say the supreme court, speaking through Mr. Justice SWAYNE, in Murray v. Lardner, 2 Wall. 110: "The general rule of the common law is that, except by a sale in market overt, no one can give a better title to personal property than he has himself. The exemption from this principle of securities transferable by delivery was estab lished at an early period."

3. But on the third proposition I cannot agree with the majority of the court. The proof is clear to the effect that the bonds in question are genuine consolidated bonds of the state of Louisiana, regularly and properly issued under and in pursuance of the funding laws and the corresponding constitutional amendment; that they were duly signed by the governor, auditor, and secretary of state, and the interest coupons thereto attached were signed by the state treasurer and auditor, as required by the provisions of section 3 of the funding act of 1874; that they were apparently issued by the board of liquidation, provided by section 2 of that act, and were by said board regularly exchanged for "valid outstanding bonds of the state," and possessed, primarily, a good consideration; that they were payable to bearer at 40 years from the 1st of January, 1874,—regularly numbered, and bear interest at the rate of 7 per cent., payable semi-annually; that they composed and represented a part of the bonded debt of the state, the amount of which was fixed in the funding act of 1874 at $15,000,000, and which was intended to "constitute a systematized issue of bonds, having uniformity in date, maturity, and form." Hope v. Board, 43 La. Ann. 763, 9 South. Rep. 754. These facts are not questioned by the opinion of the majority, nor by counsel for the plaintiff; the theory of the latter being that said bonds heretofore formed a part of the consolidated bonds of the state, but, for reasons assigned as subsequently happening, same had ceased to be legal and valid obligations of the state. It is this latter proposition that the defendants deny. In order to test the validity of said bonds in the hands of defendants as holders thereof, on the 24th of April, 1889,—the date plaintiff purchased them,—the *status* of the bonds, primarily, must be ascertained and first determined. For on the foregoing state of facts the defendants' contention is that they were *bona fide* holders of the negotiable paper of the state of Louisiana, maturing at a date in the future, and are entitled to the protection of the law-merchant, on the theory that a state, like the United States, when she makes herself a party to negotiable instruments, through her duly-authorized officers, acting under constitutional and statutory warrant, incurs all the risks and responsibilities of an individual maker or indorser of such instruments under like circumstances. While, on the other hand, counsel for the plaintiff, admitting "that, as between holders of said bonds, they are governed in all particulars by the jurisprudence applicable to negotiable instruments," denies that, "as regards the state, the principles can be so sweeping;" for, says he, "to admit such a proposition would concede the power of an officer charged with the mission of certain state or municipal securities to overwhelm the state or municipalities with an unlimited and incontestable debt." Therefore the first question to be solved in the effort to test the primary validity of the bonds under consideration is the capacity and character of the state as maker thereof.

(*aa*) Apparently these bonds are invested with the fullest sanction that could be given to any piece of paper which a sovereign state could issue and put upon the markets of the world. They have the fullest possible sanction of the legislature of the state, as expressed in the funding statutes. At the same session of the general assembly whereat the funding laws were enacted, a constitutional amendment was proposed, which declared, *inter alia*, that "the issue of consolidated bonds authorized by the general assembly of the state at its regular session in 1874 is hereby declared to *create a valid contract between the state and each and every holder of said bonds, which the state shall by no means* impair; and that "the said bonds shall be *valid obligations of the state in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof*, or the levy and collection of the tax therefor," etc. (Italics are mine.) Act 8 of 1874; Act 4, p. 42. This amendment was adopted as a part of the organic law, prior to the date of the issuance of said consolidated bonds,

and constituted and remained a part thereof until the 1st of January, 1880. Hence the whole series of consolidated bonds was not only authorized by statute and constitutional amendment, but in said amendment the bonds are declared to be "*valid contracts* between the state and each and every holder thereof," and also "*valid obligations of the state in favor of any holder thereof.*" It were, in my opinion, a vain effort to search out words of more evident and emphatic import with which to clothe a statutory or constitutional mandate, authorizing certain designated state officers to bind the state to a solemn contract, than are those I have just quoted from the funding statute and constitutional amendment. Manifestly, it was upon the faith of these laws—statutory and constitutional—that the public creditors of the state accepted such consolidated bonds, and gave in exchange therefor other warrants and obligations of the state. Then, what is the position the state occupies in such a contract towards its creditors and other persons who acquire possession of such paper in market overt? An examination of the authorities will attest the truth of the rule to be that the government of a state, like that of the United States, when she makes herself a party to negotiable paper, incurs all the risks and responsibilities of an individual maker or indorser of such instruments under like circumstances. One author states the rule to be that "government bonds, payable to bearer, or otherwise negotiable in form, are negotiable instruments, and may be transferred as such." Rand. Com. Paper, p. 449, § 348. "The government of the United States, it has been held, may, by its authorized officers, become a party to negotiable paper, with all the rights and liabilities of an individual, except the liability to be sued." Id. § 350. Another states it thus: "Except in so far as the power of the government may be restricted by constitutional limitation, there can be no doubt that both the state and federal governments may, by their duly authorized agents, become parties to any species of commercial paper." Tied. Com. Paper, p. 129, § 132. Another author puts it thus: "There is no doubt that when an officer of the government, federal or state, who is authorized to bind the government as drawer, maker, or acceptor of a negotiable instrument, draws or accepts a bill, or makes a note, in behalf of the United States or the state which he represents, its validity cannot be questioned when it has passed into the hands of a *bona fide* holder for value, without notice of any defect. The government would then be bound by its negotiable paper, just as an individual would." 1 Daniel, Neg. Inst. p. 330, § 436. The foregoing opinions of text-writers are founded, in the main, on the authority of U. S. v. Bank of Metropolis, 15 Pet. 377, and Floyd's Acceptances, 7 Wall. 666. And, in my opinion, I cannot do better than quote a single paragraph from the former case, as presenting in the clearest light the view entertained by the supreme court on the question. They say: "When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibilities of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued. But if the United States sue, and a defendant holds its negotiable paper, the amount of it may be claimed as a credit, if, after being presented, it has been disallowed by the accounting officers of the treasury; and, if the liability of the United States upon it be not discharged by some of those causes which discharge a party to commercial paper, it should be allowed by a jury as a credit against the debt claimed by the United States." Citing Peters v. Insurance Co., 1 Story, 464; Bank v. Dunn, 6 Pet. 57; U. S. v. Barker, 12 Wheat. 561. And one selected from the latter case puts the governing rule in even a stronger light, for in that case the court, speaking through Mr. Justice MILLER, said: "It must be taken as settled that when the United States becomes a party to what is called 'commercial paper,'—by which is meant that class of paper which is transferable by indorsement or delivery, and between private parties is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation,—they are bound in any court to whose jurisdiction they submit by *the same principles that govern individuals in their relations to such paper.*" (Italics are mine.) Those two cases involved time-drafts, or bills of exchange, drawn, one by a contractor, for army supplies, on and accepted by the secretary of war, and the other by a mail contractor, on and accepted by the postmaster general, and in possession of third holders for value, before maturity. But in Vermilye v. Express Co., 21 Wall. 138, the court dealt with United States treasury notes, and in the course of its opinion said: "We cannot agree with counsel for the appellants that the simple fact that they were the obligations of the government takes them out of the rule which subjects the purchaser of overdue paper to an inquiry into the circumstances under which it was made, as regards the rights of antecedent holders;" thus reaffirming the same doctrine as that announced previously. This principle has been announced in many recent cases, and notably in Murray v. Charleston, 96 U. S. 432, in which the court employed this emphatic language, viz.: "The truth is, states and cities, when they may borrow money, and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being, in the undertaking of a state or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." In Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. Rep. 128, the supreme court, in speaking of the identical issue of consolidated bonds we are now considering, said: "Whatever

may be, ordinarily, the effect of a promise or a pledge of faith by a state, the language employed in this instance shows unmistakably a design to make these promises and these pledges so far contracts that their obligation would be protected by the constitution of the United States against impairment."

I have gone into this question very thoroughly on account of its overshadowing importance, in my opinion, in this case; and in so doing I have confined myself to the views of text-writers and opinions of the supreme court; not because I was dealing with a federal question, but because I regarded them as the best exposition of the law-merchant, with respect to negotiable securities of the governments of the United States and of the states. Having, as I confidently submit, made a demonstration of the proposition that prefaces this paragraph,—that is to say, in the execution of negotiable instruments, payable at a future date, governments come down to the level of ordinary persons, and incur all the responsibilities of individuals who are parties to such instruments, while possessing all of their rights,—I will next address myself to the charges of nullity and illegality which the plaintiff assigns as the ground she relies upon for recovery of defendants; and, at the risk of being tedious, I will restate the case, as presented by the pleadings, and then analyze the evidence that is furnished us in the transcript of the nullity and illegality of the bonds in suit. We will first examine the case as applicable to the four bonds which are denominated "Agricultural and Mechanical College Bonds," of $1,000 each.

(*bb*) The plaintiff alleges that she purchased of the defendants, as brokers in bonds, doing business as such in the city of New Orleans, 20 bonds of the denomination of $1,000 each, "known commonly as four per cent. bonds of the state of Louisiana," with interest coupons attached, and for which she paid 88⅞ cents on the dollar; that being the marked price therefor at that date. That said bonds have since remained in her possession, and "she discovered only recently that four of said bonds, numbered, respectively, 742, 842, 866, and 883, are not legal bonds of the state of Louisiana; that they have never been lawfully issued; that they were not, at the time of said sale, and have never since been, valid and legal obligations of the said state; and that they are a part of the consolidated bonds which were formerly held by the treasurer of the state of Louisiana for the use of the Agricultural and Mechanical College fund, and that said bonds were declared by the 233d article of the constitution of Louisiana to be null and void after the 1st day of January, 1880, and that the general assembly of Louisiana was prohibited by said article from ever providing for the payment of said bonds." In addition, her petition contains the distinct admission that she collected the interest coupons on said bonds maturing on the 1st of July, 1889, subsequent to her acquisition of them from defendants; and avers that she presented those coupons maturing on the 1st of January, 1890, to the fiscal agent of the state for payment, but payment thereof was refused. It thus appears that plaintiff's charges are founded exclusively upon the nullity resulting from the declaration of the constitution, and not upon any specific charge of fraud upon the part of any officer of the state government, or upon any averment of embezzlement or theft of said bonds from the custody of any state fiduciary or depository. There is no averment that defendants acquired said bonds, or any one of them, *male fide*, or with knowledge of the alleged nullities, other than such as may have been conveyed to them by the said constitutional provisions. Defendants' answer alleges that they are, and have been, large dealers, as brokers and otherwise, in the bonds of the state of Louisiana, which are negotiable securities, not yet due, and customarily bought and sold in open market, here and elsewhere; and that, as such, they passed daily from hand to hand, without other warranty than that the signatures thereto are genuine. They aver that these bonds are such negotiable instruments as were put in circulation by and through the duly-appointed officers of the state for value; and that, in their hands, same are and were good and valid obligations of the state, and unimpeachable as to all equities existing between the state and her officers, and consequently plaintiff is without any right of complaint. Now, what is the evidence furnished by the transcript on the issues thus presented?

Taking the facts chronologically, I find the following, viz.:

(*a*) That on the 30th of November, 1874, there were presented to the board of liquidation 327 Agricultural and Mechanical College bonds of $1,000 each, for exchange in consolidated bonds, under and in conformity with the provisions of the funding act of 1874.

(*b*) That up to and inclusive of the date March 11, 1889, the following is the exact *status* of the bonded indebtedness of the state of Louisiana, viz.:

Whole amount of consolidated.....	$12,110,500 00
Less constitutional bonds.....	290,200 00
Difference.....	$11,820,300 00

And that of that amount there had been issued consolidated bonds of the denomination of $1,000; bonds numbered from 1 to 10,000. To this effect was the report of the present state treasurer to the secretary of the New York Stock Exchange on the date specified.

(*c*) A like statement is contained in the auditor's report for the years 1888 and 1889, from which is deducted the sum of $196,200 as representing Agricultural and Mechanical College bonds.

(*d*) The official report of the treasurer, made for the year 1879, shows that there were, in general terms, on hand at that date, viz.: "196 bonds of $1,000 each, issued by the state of Louisiana under Act 8 of 1874, numbered 710 to 905, inclusive; 2 bonds of $100 each; * * * total held for account of Agricultural and Mechanical College, $196,200.

(*e*) The present auditor and treasurer—

the former having been the incumbent for eight or ten years consecutively—state, as witnesses, that they "have never seen any of these bonds until recently, and that all of their knowledge in that respect is derived from official documents."

(*f*) The treasurer states that the interest coupons upon the bonds in question maturing on the 1st of July, 1888, and the 1st of January, 1889, were paid by the banks in New Orleans, that were acting as fiscal agents of the state; and the plaintiff's agent states as a witness that he collected the interest coupons falling due on the 1st of July, 1889, but that those falling due on the 1st of January, 1890, were refused payment.

(*g*) The treasurer states that there is in his office no evidence of his predecessor having made any report under Act 121 of 1880, in reference to the surrender of consolidated bonds.

(*h*) While there was a joint committee of the general assembly of 1880 appointed, and which, in a general way, represented in its report that the Agricultural and Mechanical College bonds, *inter alios*, were on hand, and recommended the appointment of a committee with authority to destroy them, this appears never to have been done. House Jour. 1880, p. 472.

(*i*) Another joint committee of the general assembly of 1882 adopted a resolution authorizing the auditor and treasurer to destroy the bonds referred to in the resolution of 1880, but no action seems to have been taken under it. Resolution of 1882, No. 127.

(*j*) Up to July, 1888, all the coupons carried by the banks, as stated in paragraph *f*, were subsequently destroyed by a joint committee of the general assembly.

(*k*) On the 20th of September, 1889, the said treasurer sent to the secretary of the New York Stock Exchange a communication, stating that "the following consolidated bonds of the state of Louisiana were declared null and void after the first day of January, 1880, by article 233 of the constitution of 1879, viz.: College and seminary funds, 196 bonds of $1,000 each, Nos. 710 to 905;" but he failed to state that said bonds were on hand, and then concluded his letter thus, viz.: "The foregoing bonds are null and void, and, as coupons of some of them have been presented for payment, it would appear that [some of the] bonds were on the market."

(*l*) On the 7th of September, 1890, previously, the auditor had given formal notice to the treasurer, and to the fiscal agents of the state, of suspicions he entertained in reference to these bonds of the Agricultural and Mechanical College.

(*m*) Contemporaneously an investigation was put on foot by the auditor and treasurer, which disclosed that a number of interest coupons corresponding with these bonds had been paid by the banks.

(*n*) At page 16 of the joint report made by said officers I find the following, viz.: "Only since the adoption of the report of the joint committee appointed under concurrent resolution No. 5 of 1888, have coupons, paid by the state's agents in London, New York, and New Orleans, been turned over to the auditor for cancellation, *and it was when entering these coupons, taken up between January 22nd and July 30th last, (1889,) that numbers corresponding with the numbers of several of said bonds on the coupon-books which were marked 'Canceled' were found.*" (Italics are mine.) "A further investigation disclosed the fact that these coupons are not counterfeit, but coupons clipped from bonds which are supposed to have been destroyed as required by Act 121 of 1880, and concurrent resolution 127 of 1882."

(*o*) The treasurer, in answer to a further communication from the secretary of the New York Stock Exchange, making inquiry "as to the *days and dates* when the information contained in his previous letter was *promulgated, designating the numbers of the bonds* which were declared null and void," stated on the 29th of October, 1889, that "the information had been previously published in the New Orleans daily papers, and had been obtained from the banks which represent the state in the payment of the current coupons. The official report to the governor of the state, which was published on the 29th ultimo and copied in the daily papers, was the *first official publication of the numbers of the illegal issue of bonds.*" (Italics are mine.)

(*p*) The purchasing agent of the plaintiff, as witness, states that he collected the interest coupons on July 1, 1889, "previous to any suspicions about the invalidity of the bonds;" adding that his first intimation as to their invalidity was in August or September, 1889, and that it was obtained from the newspapers.

(*q*) One of the defendants' firm states as a witness that the first intimation he had of any of the bonds his firm had been dealing in being fraudulent was in September, 1889, while he was in New York, and that "up to that time they had passed unquestioned from hand to hand," and that same "had been dealt with by the stock exchange like bank-notes." "They looked at the signatures, and, if they were all right, the bond passed." Both Moore and Wheeler circumstantially state that the defendants purchased said bonds on the same day and date on which they sold same to the plaintiff.

This analysis of the evidence clearly and indisputably demonstrates that there is no proof of any particular fraud or act of embezzlement on the part of any one in the emission of the four consolidated bonds in question, either alleged or proved. A comparison of these four bonds, made with bond 5,611,—which is not alleged to be one of the series of Agricultural and Mechanical College bonds,—will show them all to be of identically the same tenor and physical appearance; the four possessing no *insignia* of their being specially dedicated to said college fund. They are parts and parcels of the whole systematized series of the state's consolidated debt of $11,820,300. Aside from the report of the treasurer in 1879, there is no evidence tending to show that the $196,000 of Agricultural and Mechanical bonds were at any time physically in the possession of the state treasurer since they were issued by the board of liquida-

tion in November, 1874, though the proof is abundant that they have been extant since 1880. The fact that they were not destroyed by the officers designated by legislative committees of 1880 and 1882—the bonds being in the original before the court, and in no manner defaced—definitely suggests their absence from the treasury then. That same have been in circulation is evidenced by the payment of interest coupons by the state's fiscal agents,—even to the plaintiff herself. Since the passage of the act of 1888 all interest coupons have been destroyed by legislative committees, apparently without examination or question. Not until the 20th of September, 1889,—subsequently to the plaintiff's purchase,—was official notification furnished by the treasurer to the New York Stock Exchange that the $196,000 of Agricultural and Mechanical College bonds of $1,000 each, bearing the numbers 710 to 905, had been declared null by the terms of the constitution of 1879. Not until the 7th of September, 1889, did the treasurer himself and the fiscal agents receive any notification of their supposed illegality. It was only by careful scrutiny of the coupon-book, and a comparison of the numbers of the coupons thereon registered as canceled with the numbers of the bonds in circulation, that the auditor made the discovery at all, and the fraudulent bonds were identified by their numbers. The treasurer officially states to the New York Stock Exchange, over his signature, under date October 29, 1889, that the "first official publication of the numbers of the illegal issue of bonds" was made to the governor on the 29th of September, 1889. The proof is clear that at the date of the defendants' acquisition of these bonds and their sale to the plaintiff, and antecedent to that time, neither party to this suit entertained the slightest suspicion of them; that they passed from hand to hand in market without question, and had been theretofore dealt with by the stock exchange in New Orleans like bank-bills.

The following is an extract from the 233d article of the constitution of 1879, which is relied upon as annulling the Agricultural and Mechanical College bonds, viz.: "The debt due by the state to the Agricultural and Mechanical College fund is hereby declared to be the sum of one hundred and eighty-two thousand three hundred and thirteen and 3-100 dollars, being the proceeds of the sales of lands and land scrip heretofore granted by the United States to this state for the use of a college for the benefit of agriculture and the mechanic arts. Said amounts shall be placed to the credit of said fund on the books of the auditor and treasurer of the state as a perpetual loan, and the state shall pay an annual interest of five per cent. on said amount from January 1st, 1880, for the use of said Agricultural and Mechanical College. The consolidated bonds of the state now held by the state for the use of said fund shall be null and void after the first day of January, 1880, and the general assembly shall never make any provision for their payment, and they shall be destroyed in such manner as the general assembly may direct." Let me for a moment consider this constitutional mandate in reference to the bonds in question, and see what it is. *First.* It fixes the amount of the debt of the state at $182,313.03, and directs that that sum shall be placed to the credit of the Agricultural and Mechanical College fund on the books of the auditor and treasurer of the state, as a perpetual loan at interest. *Second.* It declares that "the consolidated bonds of the state now held by the state for the use of said fund shall be null and void after the first day of January, 1880." *Third.* It declares that "the general assembly shall never make any provision for their payment." *Fourth.* It further declares that said bonds "shall be destroyed in such manner as the general assembly may direct." The first thing that strikes my mind is that there is a marked inconsistency between the 1879 report of the state treasurer, that is so much relied upon, and the article of the constitution, in this: the constitution fixes the debt of the state to the Agricultural and Mechanical College fund at a little over $182,000, whereas the treasurer's report fixes the amount of the Agricultural and Mechanical College bonds at $196,000,—the amount of the bonds exceeding the amount of the debt recognized by $14,000. What has become of the surplus of bonds, which did not come within the reach of the constitutional fiat? Who is to venture the assertion, *ex gratia*,—for there is no evidence on that subject in the transcript,—that the bonds in suit are not of that surplus. Keeping in mind that in the treasurer's official announcement to the secretary of the New York Stock Exchange on 29th of October, 1889,—several months subsequent to the defendant's acquisition of their bonds, in open market,—"the first official publication of the numbers of the illegal issue of bonds" was made to the governor of the state on the 29th of September, 1889, and how can it be possible for any one to have known, in anticipation of that event, that these bonds did not form a part of the surplus of $14,000? even conceding for the argument that the remaining $182,000 were annulled. In the second place, as the article in question treats them as "the consolidated bonds of the state," and only declares that they "shall be null and void after the first day of January, 1880," they were admittedly and necessarily valid antecedent to that date. And if they went into circulation while esteemed to be valid by the terms of the constitution,—and nothing is shown to the contrary,—any attempt to annul them, in the hands of innocent third persons, would justly be considered an attempted impairment of a protected contract. Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. Rep. 128. In the next place, it is perfectly plain that the general assembly has failed to carry out the constitutional mandate to destroy said bonds, and thus left it in the power of others to put them into circulation, and thus practice a fraud upon the state. For one of two propositions is clear: (1) The bonds were not in the state treasury in 1880 or subsequently, and therefore were

unaffected by the article of the constitution; or (2) if they were, the general assembly was at fault in not having caused them to be destroyed, and thus put out of the reach of the thief and embezzler. In the last place, it is also plain that the failure of the general assembly to cause these bonds to be destroyed has resulted in the payment of their interest coupons during the years since 1880, and thus accomplishing, by indirect means, a violation of the constitutional prohibition that "the general assembly shall never make any provisions for their payment," as well as to induce the commercial world to put its trust in them as valid state securities, relying on the knowledge and good faith of the state's fiscal agents in paying the coupons. And just here a question arises as to the effect the public records and other official *data* hereinbefore mentioned have as matter of law upon dealers in such public securities; and I will, *en passant*, express my views upon it. My belief and deliberate conviction are that they do not affect them with any notice at all. Mr. Daniel states the rule thus: "Parties negotiating for negotiable instruments are not bound to take notice of public records and litigation which would affect them with notice were they dealing with the subject-matter. And therefore, when there is nothing on the face of the bill or note giving notice of any defects, the fact that the deed of trust securing its payment contains recitals which show the equities or offsets existing between the original parties does not weaken the position of a *bona fide* holder without notice." 1 Daniel, Neg. Inst. § 880. This doctrine has been accepted and approved by this court in Morris v. Cain's Adm'rs, 39 La. Ann., at pages 731, 732, 1 South. Rep. 797, and 2 South. Rep. 418. In a previous case this court also took occasion to announce the same principle in a different form of expression, thus: "Had the note been paraphed to identify it with the act of pledge, the defendant might, perhaps, have charged that the pledgee was thereby put on his guard, notified of the declaration contained in the act of sale, and bound thereby, etc. * * * What he was bound to know was what he could have known, and, in point of fact, did know." Schepp v. Smith, 35 La. Ann. 3. These are matters a purchaser of negotiable instruments is not bound to know, as they appertain to matters *dehors* the instruments themselves, arising subsequent to their execution and issuance by competent authority.

(*cc*) I will now retrace my steps, and take up the consideration of bond 5,611. The treasurer and auditor state, as witnesses, that there are no reports or other evidence in either of their offices of the surrender of any consolidated bonds in exchange for constitutional bonds under and in pursuance of Act 121 of 1880, and consequently there is none in reference to this particular bond 5,611, against which the plaintiff brings the charge of nullity, because of its surrender under the provisions of the debt ordinance. There is, however, some parol testimony tending to show that this bond was surrendered for exchange on the 6th of July, 1883. In the communications of the treasurer to the New York Stock Exchange in 1889, it is stated that there were 21 consolidated bonds of the denomination of $1,000 each, surrendered for exchange in constitutionals, under Act 121 of 1880, and among the numbers furnished is found that of 5,611; and then it is announced that they are all null and void. But there is no proof that any legislative or other proceeding was undertaken, subsequent to the date specified, looking to the destruction of such surrendered bonds as the statute required. Then it is perfectly clear that this bond must be treated, in this discussion, just as it was evidently dealt with in market,—as a valid consolidated bond,—appearing, as it does here, in the original, without a mark or blemish of any kind upon it, and possessing all apparent *indicia* of a negotiable state security not yet due. This bond does not come under the nullifying ban of the constitution. Therefore all five of the bonds in suit (or under consideration in this suit, to speak more accurately) may be put on the same basis, and disposed of similarly.

(*dd*) What are the defenses that can be successfully urged against negotiable state securities in the hands of an innocent holder for value before maturity? That is the precise question we have confronting us here. The general rule, as formulated by Mr. Daniel, in reference to individuals, is as follows, to-wit: "By 'purchaser' or 'holder' of a negotiable instrument is intended any one who has acquired it in good faith, for a valuable consideration, from one capable of transferring it * * * in the ordinary course of business, * * * without notice of facts which impeach its validity as between antecedent parties." Such a holder possesses a title "unaffected by those facts, and may recover on the instrument, although it may be without any legal validity as between antecedent parties; as, for example, even though it was originally obtained by fraud, theft, or robbery." 1 Daniel, Neg. Inst. p. 556, § 769. He extends that doctrine still further, and says: "It is to be observed, as a general rule, the purchaser can never be placed on a worse footing than his transferrer, although he himself could not, in the first instance, have acquired the vantage ground occupied by such transferrer. And therefore, even if he have notice that there was fraud in the inception of the paper, or that it was lost or stolen, or that the consideration had failed between some antecedent parties, or the paper be overdue and dishonored, he is nevertheless entitled to recover, provided his immediate vendor was a *bona fide* holder for value, unaffected by any of these defenses." Id. § 803. That principle was announced upon the authority of numerous adjudicated cases by the highest courts in many states,—our own among the number,—and of the supreme court, in Commissioners v. Clark, 94 U. S. 285. That section was quoted from Daniel with approval in Levy v. Ford, 41 La. Ann. 870, 6 South. Rep. 671,

and upon the correctness of that principle I feel that I may rest with confidence. Thus it is that the possession of a negotiable instrument by such a holder carries with it a title that is fully protected against charge of fraud or theft or failure of consideration between antecedent parties; and that rule of property in such paper is so strong that such holder can convey to another a valid and indefeasible title, although the latter knew of its inherent defects. Not only so, but any one charging *mala fides* in such holder has the burden of proving it put upon him. Daniel, Neg. Inst. § 769. Having announced the general rule as above, the author then proceeds to deal with other grounds of defense, and says "that suspicion of defect of title, or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title, * * * subject to the following modifications or qualifications, viz.: (1) That where it is *shown* by the defendant that the instrument *originated* in fraud or illegality, the burden of proof will be shifted to the holder, and he must then prove that he is a *bona fide* holder for value. (2) Where it is *shown* that the instrument was *given* for a consideration which by statute is declared void, the *original taint* follows it, and it is void in the hands of *every holder, however innocent*. And that *no party* can enforce a negotiable instrument, if it be not *genuine*, or if it be *executed* by a party *incapable of entering into the contract on which it was given.*" (Italics are mine.) Id. p. 557, §§ 769, 806. Then he generalizes the principle, and says: "But the rule of the text is, we think, in conformity with the current and weight of authority, and the law-merchant. The fraud which shifts the burden of proof must be in the consideration or representations used in obtaining the execution of the instrument, and not in the after-breach of trust in diverting it from the uses for which it was intended." Id. p. 596, § 792. This precise distinction has been taken substantially in many cases decided by our predecessors. Oliver v. Andry, 7 La. 495; Dick v. Leverich, 11 La. 576; Jackson v. Bank, 2 Rob. (La.) 128; Bank v. Bank, 16 La. 457; Laborde v. Association, 4 Rob. (La.) 190; Bullit v. Hewitt, 11 La. Ann. 327. It finds complete sanction in the recent jurisprudence of the supreme court, as attested by the following cases: Murray v. Lardner, 2 Wall. 110; Orleans v. Platt, 99 U. S. 676; Shaw v. Railroad Co., 101 U. S. 557; Collins v. Gilbert, 94 U. S. 753; Cromwell v. County of Sac, 96 U. S. 59; and numerous other decisions. Mr. Randolph, in his treatise on Commercial Paper, says: "In order to constitute a valid security, any bond or negotiable obligation of the state must be issued on authority of the constitution and statute law." 1 Rand. Com. Paper, p. 494, § 348. And he lays down the general proposition that the powers and duties of officers and agents "of the government, whether federal or state, are defined by statute, which is notice to the world of the limitations to their authority." Id. § 440. The same author states the rule with regard to the negotiable instruments of a municipal corporation thus: "It may be laid down as a general principle that debts unlawfully contracted by a municipal corporation are not binding upon it. * * * So a municipal bond issued without authority is invalid, although it be negotiable in form. And the defense of original want of authority to issue the bond is available against all holders." Id. p. 488, § 343. Mr. Dillon, in treating of the same question, says: "And it is a general and fundamental principle that all persons contracting with a municipal corporation must, at their peril, inquire into the *power* of the corporation and its officers to make the contract; and a contract *beyond the scope of the corporate* power is void, although it be under the seal of the corporation." 1 Dill. Mun. Corp. §§ 372, 381. Against such a contract the plea of *ultra vires* may be successfully interposed. Id. § 381. "In favor of *bona fide* holders of negotiable instruments, the corporation may be estopped to avail itself of *irregularities in* the *execution* of the power conferred; but it may always show that under no circumstances could the corporation *lawfully make* a contract of the character in question." (Italics mine.) Id. §§ 381, 416. After announcing the foregoing rule, the author proceeds to state what I conceive to be the proper line of demarkation that is to be drawn between the authenticity of state and municipal bonds in respect to the protection of the holder against latent equities, that is, as to when the power does exist; there being embarrassments and difficulties in respect to the evidence of compliance on the part of the officers of a municipal corporation that do not exist in respect to the acts of officers of a state. He says: "Such a power is frequently conferred, to be exercised in a special manner, or subject to certain restrictions, conditions, and modifications; but if it appears that the bonds show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations, and pursuant to those conditions and qualifications, proof of non-compliance with same will be unavailing to the corporation." Citing, as the leading authority on the question, Commissioners v. Aspinwall, 21 How. 539, the author then proceeds as follows, viz.: "Obviously, then, the most important inquiries to be considered are those which relate to the question, when the power exists or arises, who is to decide whether it existed or had arisen, when the bonds were issued, and what will estop the corporation which issued them to set up in defense a non-compliance with antecedent or preliminary conditions." Id. § 416. This was, in my opinion, necessary to be observed, because of what I deem to be the inapplicability of very many decisions that are cited, in reference to defenses urged against municipal bonds in the hands of third holders. In respect to state bonds, no such embarrassment exists, inasmuch as the law authorizing the issuance of bonds is an exercise of sov-

ereignty, only restricted by constitutional limitation; and to ascertain the authenticity of their issuance a simple inspection of the act will ordinarily suffice.

Having examined the enabling statute, and the constitutional authority for its enactment, a mere casual inspection of the state bond will readily disclose compliance therewith on the part of the officers intrusted with the duty of its confection; and nothing further is necessary to make it available as a negotiable security. And just here I deem it important to note what I conceive to be the inapplicability of Otis v. Cullum, 92 U. S. 447; Orleans v. Platt, 99 U. S. 676; and Insurance Co. v. Middleport, 124 U. S. 545, 8 Sup. Ct. Rep. 625,—to the case at bar, and it is this: Those cases proceed on the theory that, admitting the illegality of the bonds in their inception, the last taker has no recourse against his predecessor under the principles of subrogation in equity, founded on the civil law; while this case proceeds on the theory that, bonds having a valid original existence being fraudulently dealt with since, the state is relieved from responsibility thereon, and the defendants' obligation of reimbursement rests upon the Louisiana law of warranty, the law-merchant not controlling the outlawed paper of the state. The theory of my dissent is that, it being first ascertained that the bonds were valid originally, no after act of fraud or illegality on the part of the state treasurer can be regarded as defeating the title of an innocent holder, under the principles of commercial law. So in the instant case, as there was manifestly no want of authority to issue the bonds in question, and no question of the authority of the board of liquidation to issue them, the defenses set up against them are clearly unavailing. No after-breach of trust in diverting the bonds, once regularly issued and put in circulation, from the uses for which they were intended, can affect their validity in the hands of innocent holders.

In Cooke v. U. S., 91 U. S. 389, the question was the right of the United States to recover of Jay Cooke & Co. the money paid to them by the assistant treasurer in redemption or purchase, before maturity, of, as stated by the court, "what purported to be eighteen 7-30 treasury notes, issued under the authority of the act of August 12, 1863, but which, it is alleged, were counterfeit." The defense was that Cooke & Co. honestly believed them to be genuine, and, so believing, in good faith received and paid for them, and there can be no recovery, even though they may have been counterfeit; and the court held that, as the notes were ascertained to be genuine, though unlawfully and *surreptitiously put into circulation*, the government was bound for their payment to a *bona fide* holder; and, consequently, there could no recovery in that case. (Italics mine.) That decision proceeded upon the theory that the notes were perfect and complete, and in no manner canceled or defaced; just such as the instruments we have here. But in District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. Rep. 694, the court, while recognizing the doctrine of the Cooke Case, stated that they were not "prepared to extend the scope of that decision." The facts of that case were very different from those of the Cooke Case, as it appears from the opinion of the court that "the certificates in suit, after they had been redeemed according to law, were canceled by the proper officers by distinctly stamping in ink, across the face, words stating that fact," etc. Had the state of Louisiana caused the same or any similar acts to have been done, as directed by the article of her constitution, I should certainly not find occasion to express this dissent.

Strong reliance is placed by counsel of plaintiff, as well as in the opinion of the court, on Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. Rep. 10, as stating a doctrine altogether at variance with that of the Cooke Case. In this I entertain a different opinion also from that of the majority. In the execution and issuance of treasury notes as commercial instruments, the United States made herself a party thereto as an individual, and not as a sovereign. But in the Moffat Case her relations with the register and receiver of the United States land-office were strictly governmental. The case cited was one instituted by the United States for the cancellation and revocation of two patents for land, granted under the pre-emption laws of congress; and it proceeded upon the theory that the persons named as patentees were fictitious, and that no settlement or improvement had been made on the land, which was, under the law, a condition precedent. The only question in that case was that of the binding force and efficacy of the acts of those public officials upon the government while in the discharge of the general duties of their offices, and not with regard to third persons, who had acquired, under exceptional circumstances, rights protected by apparent *bona fides* of such public officers under the law-merchant. In my opinion the government does not undertake to become responsible for the consequences of the non-feasances and misfeasance of her agents and officers towards third persons who may deal with them. On that question the court said in reference to the fraudulent and illegal acts of the register and receiver in issuing the patent certificates in question, viz.: "The government does not guaranty the integrity of its officers, nor the validity of their acts. * * * They are but the servants of the law, and if they depart from its requirements the government is not bound. There would be a wild license to crime if their acts in disregard of the law be upheld to protect third parties, as though performed in compliance with it." But to show conclusively that that decision was not intended to affect the question here, it is only necessary for me to cite the concluding portion of the opinion in that case, viz.: "There is, in such case, no room for the application of the doctrine that a subsequent *bona fide* purchaser is protected, etc. * * * To the application of this doctrine of a *bona fide* purchaser, there must be a genuine instrument, having a legal existence, as well as one

appearing on its face, to pass the title. It cannot arise on a forged instrument, or one executed to fictitious parties,—that is, no parties at all,—however much deceived thereby the purchaser may be. Even in the case of negotiable instruments, where the doctrine is carried furthest for the protection of subsequent parties acquiring title to the paper, it cannot be invoked if the instrument is not genuine, or if it is executed without authority from the supposed maker." Citing Floyd's Acceptances, and other cases.

(*ee*) The final question on which I deem it necessary to present my views is in regard to the applicability of the cases of Sun Mut. Ins. Co. v. Board of Liquidation, 31 La. Ann. 175, and State v. Board, 29 La. Ann. 77. While I concede the similarity of the questions discussed in those cases to the one under consideration here, and also concede the correctness of the principles therein announced, yet, in my view, they are inapplicable to this case. Those were suits against the state; and creditors of the state therein appearing as plaintiffs, and submitting themselves to the operation of the funding statutes, demanding the right to surrender obligations of the state in exchange for consolidated bonds, are conclusively presumed, and must be held bound, to have accepted the grace of those statutes as it was extended to them, coupled with the right of the state to question the validity of the tendered obligations under the terms of those laws. Hope v. Board, 43 La. Ann. 763, 9 South. Rep. 754; State v. Board, 42 La. Ann. 651, 7 South. Rep. 706, and 8 South. Rep. 577; State v. Board, 39 La. Ann. 395, 1 South. Rep. 910; State v. Board, 32 La. Ann. 318. In another recent case we said: "The state has given permission for a certain class of obligations to be presented by the holders of them to Louisiana courts for determination as to their validity; and thus, in authorizing suit against herself, she has pointed out the channel through which it must reach the courts; and it must be followed." Hope v. Board, 41 La. Ann. 535, 6 South. Rep. 819. In Lord Cecil v. Board, 30 La. Ann. 43,—a suit similar in all respects to those cited,—certain bonds of the state were denied the right of exchange under the amended funding statute of 1875, on the ground that same had been, in terms, declared by that statute of doubtful validity; hence, under the terms thereof, the board was without power to fund them into consolidated bonds until they had been first declared "to be legal and valid obligations of the state" by this court. Act 1875, p. 110. Of the issue thus presented this court very correctly expressed the following opinion, viz.: "Of what avail is an inquiry touching the validity of a bond, or its issuance in conformity to law, if the fact that it was not issued in conformity to law will not affect the right of the holder? Clearly this rule of commercial law does not apply here. The state can be sued in her own courts only by her permission, and in the manner and for the purposes indicated by her. The supplemental funding act required parties to resort to an action against the state, through a board of liquidation, to establish the good consideration and valid issue in conformity to law of the bonds offered for funding, and restricted this court to an ascertainment of these requisites by those bonds. It is that law, therefore, that must be our guide, and not the general commercial law, in actions like the present." This is no such case as that one was. The bonds which were surrendered to the board of liquidation in exchange for the consolidated bonds in controversy were of unquestioned validity, being state bonds, which were held in trust for the public school funds. The exchange was made without suit against the board of liquidation, and in the month of November, 1874, prior to the enactment of the supplemental funding act of 1875, under which the Durant and the Sun Mutual Insurance Company Cases were brought and decided. Under no circumstances can those cases be accepted as authorities controlling this case. And it would be clearly a *non sequitur* to argue from that jurisprudence as a premise that, after the board of liquidation had acted on the claims of creditors, and issued consolidated bonds, and they had gone into free and unrestrained circulation in the channels of commerce, the state can, by an exercise of sovereign power, destroy the negotiability of those obligations to which she had voluntarily, and for adequate consideration, made herself a party as an individual debtor. It will not do for this court to say that the state is only bound for such bonds as were physically and actually put into circulation by some authorized officer of the government, in pursuance of law. The supreme court says in the Cooke Case, "This, we think, is too narrow a construction of the act;" for they say: "In this [the treasury] department the secretary represents the government. His acts and his omissions within the line of his official duties are the acts and omissions of the government itself; and in all commercial transactions his negligence will be deemed to be the negligence of the government." Pages 401, 404.

It appears to me from every point of view that that case is an exact parallel to the instant one; and taking, as I have before remarked, the utterances of the supreme court as the epitome of jurisprudence on the law-merchant in this country, I must adhere to it, and, so doing, I feel constrained to dissent from the views expressed in the opinion of the majority of the court.

ON REHEARING.

FENNER, J. We have attentively considered this application. Whatever may be said as to the correctness of our interpretation of the decisions of the supreme court of the United States in the cases of Otis v. Cullum, 92 U. S. 447, and Cooke v. U. S., 91 U. S. 389,—from which, however, we see no reason to depart,—our decision in this case rests upon germinal principles, which are not, from any point of view,

within the grasp of those cases. They are based exclusively upon the law-merchant. We hold:

First. That the law-merchant is only applicable in the state of Louisiana in so far as it has been embodied in, or is not in conflict with, the laws of the state; and that, while it has been long recognized as part of the law of the state, nothing prevents the state, in the exercise of the legislative power, from abrogating, repealing, or modifying it, provided such legislation operates prospectively, and does not impair contract rights existing prior to or at the date of such legislation.

Second. That the true meaning and effect of the constitutional provisions herein cited were to repeal and abrogate the law-merchant so far as it applied to the instruments in question; this judicial construction being not a new one, but resting on precedent decisions of this court in cases entirely analogous to the instant one.

Third. That the rights asserted by the defendants here all arose after the adoption of the constitutional provisions referred to, and after the conditions which gave effect to those provisions had occurred; and, therefore, that those rights must be governed, not by the law-merchant, but by the special laws thus enacted and interpreted by this court.

Fourth. That thus the instrument in controversy lost the qualities of negotiable instruments, and became subjects to the laws of this state governing the rights and obligations of parties in the transfer of non-negotiable incorporeal rights.

Fifth. That this court, being the creature of the constitution, is bound to obey, to apply, and to enforce the mandates of that constitution, in so far as they do not conflict with the paramount authority of the constitution of the United States.

Sixth. That the supreme court of the United States has never extended the principles suggested by even the broadest interpretation of Otis v. Cullum and Cooke v. U. S. to a case in any degree resembling the instant one, where the nullity of the instruments has been denounced by the constitution of the state, and where the state, as constituted, not only cannot be forced, but lacks the power, to recognize or provide for them, and where the law-merchant, so far as applicable to them, has been repealed.

Seventh. If the instruments involved in Cooke v. U. S. had belonged to a class which the constitution of the United States had stricken with nullity, and had forbidden the government from paying or providing for, that case would have been more germane to the instant one, and the decision would have been different.

Eighth. While Otis v. Cullum contains general expressions of apparently broader import, the true and sufficient principle on which it rests is clearly stated, viz., the purchaser got what he bought and intended to buy.

We can discover no principle of law under which, in a contract of sale intended by both parties to be the sale and purchase of valid bonds of the state, of which there were many subject to no question, the vendor could discharge his obligation by delivering worthless similitudes of such valid bonds, and could throw upon the innocent purchaser the loss, instead of looking to his own transferrer to make him whole. Rehearing refused.

WATKINS, J., adheres to his dissenting opinion.

(44 La. Ann. 173)

CALDER v. POLICE JURY OF TERREBONNE.

(No. 10,963.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

EMINENT DOMAIN—COMPENSATION—POLICE JURY—AUTHORITY—TRACING ROAD.

1. Although police juries have no right to trace a line of road, as it is a duty which must be intrusted to a jury of freeholders, they have certain authority as to its width and direction. Unless it is shown that the police jury have absolutely dictated the line to be followed, it will not be held that they have exceeded their authority.

2. An ordinance which authorizes the taking of private property for public use must provide for compensation. Private property cannot be taken for public use without securing to the owner the compensation the jury of freeholders find allowable.

WATKINS, J., dissenting.

(*Syllabus by the Court.*)

Appeal from district court, parish of Terrebonne; A. C. ALLEN, Judge.

Suit by David R. Calder to enjoin the police jury of Terrebonne from laying out a certain road. Verdict and judgment for defendant. Plaintiff appeals. Reversed, and the injunction made perpetual.

L. F. Suthon, for appellant. *L. C. Moise*, for appellee.

ON MOTION TO DISMISS.

BREAUX, J. A number of residents of the parish of Terrebonne presented a petition to the defendant police jury, asking that steps be taken by that body to expropriate a road over certain designated lands. A resolution was adopted, appointing 12 freeholders to trace and lay out a public road in accordance with the requirements of the statutes authorizing such expropriation. The police jury directed that the road be laid out from Bayou Terrebonne to Bayou Point au Chien; thence down the right descending bank of said bayou to Dupre's bridge; from this bridge to other points stated in the ordinance. The committee of freeholders reported that they had laid out a road in compliance with the ordinance. In the report describing the road it is stated that the point of beginning is the lower line of the Aragon plantation, belonging to plaintiff. The committee further report that $200 will be ample compensation to plaintiff for his property sought to be expropriated, and for all damages. The report was received by the police jury and accepted, and that body ordered that the road as stated and traced in the report be declared to be a public road, and that due publication be made for 30 days in the official journal.

Before the 30 days had elapsed plaintiff sued out an injunction, alleging that at an expense of $3,000 he built a road and causeway through a marsh on his place, in order to make the rear portion accessible to cultivation. That the settlement seeking a right of way over the road to the public road passing in front along the Bayou Terrebonne should seek their way to the front over another plantation, named, as owing them a servitude of way. He alleges that the ordinance of the police jury and the action of the committee of freeholders are illegal and void for the reason that the road was laid off by the police jury, and not by the committee. He further urges that no appropriation was made and no ordinance was adopted with the view of compensating him, and that the declaration that the road is public, made without any action to secure an amount for his property, is void. The case was tried by jury. The judgment dissolves the injunction, declares the road public, and allows $500 to the plaintiff. He prosecutes the appeal.

The defendant charges that the total claimed, viz., $5,000, is fictitious, and that this court is without jurisdiction. The alleged value of the property is stated, and the damages claimed. These allegations are sworn to by the plaintiff. "The amount in dispute is the highest sum for which judgment can be rendered." This court has jurisdiction. Forstall v. Larche, 39 La. Ann. 287, 1 South Rep. 650.

ON THE MERITS.

Although there is some similarity between the ordinance of the police jury and the report of the committee of freeholders recommending the expropriation, it is not complete. In the ordinance no reference is made to defendant's place. In the report of the committee the road is traced over the place of the defendant. It is not made apparent that only one line could be followed by the committee. The petition in compliance with which the ordinance was adopted and the committee appointed was for the purpose of expropriating right of way to the Bayou Terrebonne. The isolated condition of the settlement, and the reasonable desire of the inhabitants to secure a needed road preclude the inference that they sought an expropriation over defendant's place only, and were unwilling to secure another elsewhere, although equally as advantageous. Although police juries have no right to trace a line of road, it must be laid out by a jury of freeholders. The police juries have some power intrusted to them "as to their proportion and direction." Section 2743, Rev. St. The ordinance did not, in this respect, exceed their power.

The declaration making the road public, without adopting any measures towards paying therefor, presents a question for our determination. Police juries can act only in the mode prescribed by the law creating them. In ordering this road to be opened they incurred a pecuniary liability, for the payment of which provision should have been made. Section 2786, Id. In proceedings for expropriation of private property all the formalities required by law must be strictly observed. An ordinance which authorizes a taking must provide for compensation. Lewis, Em. Dom. § 452. The tender of the compensation may be readily waived. The least act manifesting intention not to accept, and showing that the offer would be useless, has been held as justifying the omission of the tender. But in making an expropriation it should appear of record that provision has been made for the payment of the value which the expropriating authority admit as that of the property expropriated. The failure to make the required appropriation vitiates the jury's verdict. Although the testimony makes it obvious that petitioners have good reason to petition for a road, and that its advantages would prove considerable, the constitution and the statutes have placed safeguards around private property, which must be upheld; and one of the safeguards is that appropriation must be made to compensate the owner for the value of the property and the damages found. Provision must be made for compensation. Potter's Dwar. St. p. 378. Private property cannot be taken for public use without securing the owner just compensation. Elliott, Roads & S. p. 179; Watson v. Trustees, 21 Ohio St. 667. "If we are right in the view of this question, it would follow, if the act of 1834 had made provision for compensation for the land taken for the right of way, the act would have been constitutional." Brewer v. Bowman, 9 Ga. 41. It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled, avoided, and reversed, and that the injunction is made perpetual in prohibiting the police jury from enforcing an ordinance expropriating said road without appropriating the amount recommended by the jury of freeholders as a compensation for the expropriation.

WATKINS, J., (*dissenting.*) (a) I doubt plaintiff's right of appeal to this court in any event, because the law is that "whenever any individual through whose land a road laid out as aforesaid shall pass may be dissatisfied with the decision of the freeholders laying out the same, either as to the course the same is to take, or to the damages to him assessed, he may have an appeal to the district court for the parish in which the road lies: provided, he prosecute the same at the next session of the said court after the laying out of the said road or the assessment of the damages; and no appeal shall be set aside for want of form in bringing the same before the courts. Injunction to stop proceedings may be issued in said case, when the case requires the same." Rev. St. § 3370. In such case the appeal is *sui generis*, and altogether informal, and an injunction operates as a restraining order in that case. It is not a new suit or proceeding; and no new, separate, and distinct trial and judgment is contemplated in the statute. The whole question is one of police administration, and of a purely political character, and not judicial. Of such a class of proceedings this court has been given no jurisdiction.

(*b*) I am of the opinion that damages are only contemplated in cases where roads are actually laid out in pursuance of an ordinance of a police jury, because the law is that for "all roads to be hereafter opened and made * * * it shall be the duty of said freeholders * * * to assess such damages as any person may sustain." Id. § 3369. In this case a new road was not traced and laid out through the complainant's premises and plantation, but a road already in existence was adopted, and declared, *pro hac vice*, a public road.

(*c*) I am of opinion that the one in question is, in no proper sense, an expropriation proceeding, because it does not contemplate the condemnation of the property, but simply and only the creation of a servitude of way. It is in the nature of an appropriation, though, in certain cases, entitling the proprietor over whose property it is laid to damages, because the law is that "nothing in this section shall be so construed as to * * * prevent any owner of the soil on which a public road shall pass to resume the use and possession of such soil whenever the said road shall have been abandoned by the public, or shall have been transferred elsewhere," etc. Id. § 3369. Entertaining these doubts in respect to the law controlling this case, I feel constrained to dissent.

(44 La. Ann. 334)

CITIZENS' BANK OF LOUISIANA v. WEBRE *et al.*

WEBRE *et al.* v. BOURGEOIS, Sheriff, *et al.*

(No. 10,970.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)[1]

EXECUTION—INJUNCTION AGAINST—MORTGAGES.

1. The defendants in execution, who have retained the free use of the property seized, have not sustained any injury, and are not entitled to an injunction.

2. The order of seizure and sale, in so far as relates to the surplus of the purchase price, reads: "And the balance, if any, of the price of adjudication, cash;" thus complying with the article which provides that the purchaser shall apply the surplus of the price, if there be any, to paying the special mortgages existing on the property subsequent to that of the suing creditor. The advertisement issued in compliance with the order does not read so as to preclude the purchaser from thus retaining the price, and, when construed with reference to the order of seizure and sale, is plain.

3. A purchaser of property subject to a mortgage containing the pact *de non alienando* stands, with regard to the mortgagee, in so far as relates to the mortgage, in the position of the mortgagor, and can make no objection to the seizure and sale, on the ground of its non-acceptance, which the mortgagor could not make. The form of acceptance is not sacramental. Its conditions concerned the plaintiff, and were intended for its protection. A cancellation of mortgage entered many years since, and an act consenting to a partition and setting forth plaintiff's right on the property and the present, are acts of acceptance. It is no longer possible to sustain the proposition that the mortgage is invalid, as not having been accepted. The defendants are owners of the property, burdened with plaintiff's mortgage. They have been duly notified.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. James; HENRY L. DUFFEL, Judge.

The Citizens' Bank of Louisiana obtained an order of seizure and sale of a plantation in a suit against Marie J. Webre and others to enforce certain stock payments due from the succession of Benjamine S. Webre and others. Marie J. Webre and others sued out an injunction to restrain A. L. Bourgeois, sheriff, and others, from selling the property. From a judgment for defendants in injunction, plaintiffs appeal. Affirmed. Rehearing refused.

Robert G. Dugue, for appellants, Marie J. Webre et al. *S. M. Berault, E. N. Pugh*, and *Henry C. Miller*, for appellee Citizens' Bank.

BREAUX, J. Plaintiff obained an order of seizure and sale of a certain plantation, in the parish of St. James, to pay an alleged stock debt of $708, claimed as due by the succession of Benjamine S. Webre, Marie Webre, widow of E. A. Webre, and Anna Webre, wife of E. Guidry, and as secured by mortgage on the property. The defendants enjoined the sale of the property. They aver that one undivided half of the property belonged to the succession of B. S. Webre, and one-quarter each to the other defendants, who have also accepted the succession of B. S. Webre, with the benefit of inventory; that the sheriff did not seize the property; that there is a junior mortgage on the property; that the sheriff cannot exact from the purchaser the surplus of the purchase price over the amount due the seizing creditor; that it must remain in the hands of the purchaser; that the mortgage sued upon was never accepted or recorded; that it stipulates that the mortgage is executed to secure subscription to bank-stock, and that the mortgagor shall not be a stockholder until the mortgage shall have been accepted by authentic act, and until it shall have been recorded; that, as the mortgage has not been accepted, it did not attach to the property; that they are third persons, and can resist its enforcement. A motion to dismiss the appeal was filed on the ground that the amount involved is less than $2,000.

The plaintiffs in injunction allege the nullity of the mortgage claimed by the bank, amounting to more than $5,000, and ask for its nullity. The matter in dispute is the nullity or validity of this mortgage for an amount larger than the minimum limit of the court's jurisdiction. The suit was brought to enforce calls for payment on stock. The plaintiffs in injunction ask that the mortgage by which they are secured be declared null.

With reference to the allegation that the property was not seized: The question has been passed upon in a number of cases, and must be considered as settled. The notices of seizure were given in accordance with the order of seizure and sale. The defendants in the seizure, who are in the corporeal possession of the

[1] Rehearing refused March 7, 1892.

property, have no ground of complaint if the sheriff did not divest them of that possession while the property was under seizure. If that officer chose to allow them that possession, they cannot, by proving that fact, defeat the seizure which he returned as having been made. For the purpose of the seizure he holds for the plaintiff's benefit. The party allowed to remain in the enjoyment of actual possession cannot maintain that it is an act which authorizes an injunction, under article 298, Code Pr. The testimony offered by the defendant to prove incorrectness of the return and insufficiency of possession was properly excluded by the court *a qua*. Lambeth v. Sentell, 38 La. Ann. 695; Gusman v. De Poret, 33 La. Ann. 337; Deville v. Hayes, 23 La. Ann. 550; Calderwood v. Prevost, 9 Rob. (La.) 182.

Relative to the surplus of the purchase price over the amount due the seizing creditor: The terms stated in the petition and the order are that the purchaser shall pay the amount claimed as due, cash, and assume the residue of the stock mortgage debt, not yet due, and the balance, if any, of the price of the adjudication, cash. There is a mortgage inferior in rank to that of the seizing creditor, as alleged by the defendants. It is argued substantially that the sheriff is without authority to require from the purchaser a larger amount than that of the writ in his hands, and that this officer is the legal agent of the seizing creditor, and is not concerned with the rights of the mortgage creditors, subsequent in rank, to the extent of requiring cash for their payment. The article referred to (707, Code Prac.) is clear: "The purchaser shall apply the surplus of the price, if there be any, to paying the special mortgages existing on the property subsequent to that of the suing creditor." The order of seizure and sale complies with this provision of the law. The adjudication shall be for cash. This does not preclude the purchaser from retaining the surplus of the purchase price, if any there be, to pay the mortgage second in rank. The advertisement is not as plain in this respect. Hastily reading, it may be concluded that the cash refers to a price to be paid, instead of an adjudication for cash of a surplus which may be retained by the purchaser to pay the second mortgage. When construed with reference to the order, the terms are plain.

The acceptance of the mortgage and its record: The act of mortgage contains the declaration that, in order to guaranty her subscription, she mortgages her property. It contains the stipulation that, immediately after the acceptance of the mortgage by authentic act by the president of the bank, and the procuration of a certificate of inscriptions from the parish judge, and of non-alienation of the property, and establishing, in addition, that no new mortgage or privilege had been recorded, the mortgagor was to be a stockholder for 828 shares in the capital stock. The mortgage, in compliance with the charter, was to be executed in the respective parishes in which the property was situated. The bank reserved the right to accept the mortgage. The form of acceptance declared in the act, as a protection to the mortgagee, upon whom devolved the duty of determining as to the value of the title, and value of the property offered as security, was not exclusive of every other mode of acceptance. It was not essential to accept precisely as prescribed in the act. Other modes of accepting may prove equally as effective and binding. On the 3d day of September, 1881, the number of shares secured by mortgage having been reduced from 828 to 237, the bank, by notarial act, acknowledged the reduction, and consented to a partition, as it alleges. The declarations contained in this act have the effect of an acceptance. It makes it manifest that the shares had been issued and were in the possession and control of the bank. On 17th August, 1842, the parish judge made mention of partial release on the margin of the record in his office of the act of mortgage, and noted thereon a partial cancellation and statement of the balance due. The partial release mentions that it was founded on an authentic act before Boudousquie, notary. Article 3385 of the Civil Code provides for noting releases and cancellations on the margin of the record. This reduction and cancellation are confirmed by the act of September, 1881, before mentioned; also by this suit. Their correctness was unquestioned during many years. The mortgagor would have no right to object to its non-acceptance. The defendants are not in a better position, for the act contains the pact *de non alienando*. Barrow v. Bank, 2 La. Ann. 453. It is urged by the defendants that the marginal note was not offered in evidence. It is copied in the transcript as a marginal note of the record, and the clerk certifies to the correctness of the entry. We therefore consider it evidence. Those declarations in the act of 1881 and the cancellation are an acceptance of the mortgage. The bank alleges that the defendants became the owners of a portion of the plantation mortgaged and of 50 shares of the stock. In the *ex parte* act, purporting to accept a partition, the bank declares that by an act passed under private signature, and dated the 17th January, 1871, a partition in kind had been effected among the owners, and that in this partition the defendants became the owners of the said shares, and responsible for the mortgage. The act of partition was not introduced in evidence. Being the independent declaration of the creditor, it cannot bind the defendants to the extent of authorizing executory proceedings. The order of seizure and sale is not grounded upon the act of 1881. This last act limits plaintiff's recourse to those of the heirs who are made defendants, and its mortgage to that portion of the property in the possession of the defendants, and has no other effect. Plaintiff declares upon the act of April, 1835, and avers that the portion of the property owned by the defendants is mortgaged to secure the amount claimed. A copy of this act, annexed to the petition, and a certificate showing that it has been recorded, are in evidence. The right of the bank under that act is complete. One

of the defendants was an heir of the mortgagor; if there had been non-inscription, as to him the administrator of his succession could not raise the question. The act was inscribed, and binds the property in the possession of the defendants. The pact *de non alienando* is secured to plaintiff by its charter. The defendants were the parties to be notified, and were properly notified. Gillaspie v. Bank, 30 La. Ann. 1321. It is admitted that the defendants are the owners of the property. It is subject to plaintiff's mortgage.

Judgment affirmed, at appellants' costs.

(29 Fla. 486)

HUNTER v. STATE.

(*Supreme Court of Florida.* April 6, 1892.)

ASSAULT WITH INTENT TO RAPE — INTENT — EVIDENCE — CREDIBILITY.

1. The *gravamen* of the offense in an indictment charging an assault with intent to rape is the intent with which the assault was made; and this question of intent, throughout the instructions of the court, should be kept prominently before the minds of the jury as being the main subject of their inquiry; and, if there be a reasonable doubt as to the intent, such doubt necessitates an acquittal.

2. The intent in such cases must be shown by the state to have so possessed the accused that his determination was to consummate the rape regardless of resistance and want of consent.

3. The manner, time, place, surroundings, and circumstances under which such an assault is made, and the want of opportunity to consummate the crime, are subjects of material consideration upon the question of intent.

4. The jury, being the sole and exclusive judges of the weight and credibility to be given to any and all evidence, have the right to disbelieve the evidence of an interested witness solely on the ground of interest.

(*Syllabus by the Court.*)

Error to criminal court of record, Duval county; H. B. PHILLIPS, Judge.

Prosecution against Cæsar Hunter for an assault with intent to rape. From a judgment on conviction defendant brings error. Reversed.

John Wallace, for plaintiff in error. *William B. Lamar*, Atty. Gen., for the State.

TAYLOR, J. Cæsar Hunter, the plaintiff in error, at the October term, 1891, of the criminal court of record for Duval county, was tried upon an information and convicted of the charge of "assault with intent to rape," and, being sentenced to 10 years in the penitentiary, after refusal of his motion for new trial, brings his case here upon writ of error. As the evidence for the state is not voluminous, and as we have some comments to make upon its sufficiency for conviction, we will give it in full as it appears in the record.

Lucy Biggs, the prosecutrix, for the state testified as follows: "My name is Lucy Biggs. I live in the city of Jacksonville, Florida. Some time in June last I was committed to the city jail for disorderly conduct in the streets. I was put in there over night, and remained there until next morning. I had taken several drinks of whisky that night, but was not drunk. I was reclining on a bench. Cæsar Hunter came to the door. I rose up. He asked me if I lived in Lavilla. The next morning some one pushed the defendant, Cæsar Hunter, in my cell, and he asked me to give him some; and at the same time ran his hand under my clothes, took hold of my shoulder, and tried to push me over, when I screamed, and he ran out from the cell. I had never seen him before that morning, but I identified him as being the man. This happened in the county of Duval, and state of Florida. My occupation is keeping a house of assignation. My husband, Charley Biggs, was convicted at the last term of this court for highway robbery, and he is to be tried at this term of the court for the same crime. I am also under bond to this court for larceny. The night I was arrested for this was since I was put in jail June last, but I cannot remember the exact date. Biggs is my second husband, and I got divorced from my first husband in New Jersey. The night I was arrested for larceny I paid Captain Dennis—a very black man—two dollars to go with me to Sheriff N. B. Broward's house, to see something about my husband, who was then in jail for robbery. We went down to Sheriff Broward's. I did not know the way down there, and Captain Dennis went with me. Captain Dennis and myself went to several bar-rooms, and took several drinks. Dennis rode on the outside of the carriage with the driver. After the assault on me in the city jail my sentence was suspended. When I returned I was arrested for larceny, and taken to the city jail."

Bartola Canova, for the state, testified: "My name is Bartola Canova. I am the keeper of the city jail of the city of Jacksonville, Florida. I know Lucy Biggs, the prosecuting witness in this cause. I also know Cæsar Hunter, the defendant. Some time in June last, Lucy Biggs, Cæsar Hunter, and some other prisoners were in the city jail for violating some of the city ordinances. Lucy Biggs was in the women's cell. She was put in there over night. Next morning the men prisoners were turned out in the corridor to go to work, or to get their breakfast. The cell that Lucy Biggs was in was so fixed that it could be opened from the outside, but not from the inside. There were several other prisoners in the corridor with Cæsar Hunter, and the same prisoners were turned out when he was turned out. I heard some one scream twice, I think, that morning. I do not know whether the scream was in Lucy Biggs' cell or not. It sounded like it was there. I ran out into the passage, and when I got where I could see I saw Cæsar Hunter come running with a broom in his hand. He was about ten steps from the cell door that Lucy Biggs was in, and several other prisoners were about four or five steps from him. It was not the business of Hunter to sweep."

William C. West, for the state, testified: "I am city recorder of Jacksonville, Florida. I was in the room with Bartola Canova the morning the alleged crime was committed, and heard the screams of some one, who seemed to be in one of the cells. I do not know whether the screams I heard were in Lucy Biggs' cell or not. It

was in that direction. Canova and myself went in the passage together, and when we got in sight I saw Cæsar Hunter about fourteen steps from the door of Lucy Biggs' cell, sweeping the floor as though he was very much excited. There were several other prisoners not a great distance from him. Hunter was not running, but was sweeping the floor."

This comprises the entire evidence for the state.

The defendant introduced as a witness one Capt. Dennis, *alias* Dennis Jenkins, stated in the record to be a very black negro, who testified as follows: "I know Lucy Biggs, the prosecuting witness in this cause. The night she was arrested for larceny she gave me one dollar to go with her outriding. I rode inside the carriage with her. No one was in the carriage but me and her. We went to four or five bar-rooms in the carriage together, and she, myself, and the driver of the carriage drank at each bar-room. We went way out on the shell road driving. I was doing nothing but riding and drinking. We did not go down to Sheriff Broward's house, and she did not ask me or the driver to carry her there that night. I was with her until she was arrested and put in jail. I called at Lucy Biggs' house to take her a note from her husband, when she asked me to go in the carriage."

Paul G. Phillips, chief of police of Jacksonville, testified for the defendant that Lucy Biggs' general character for chastity and morality in the neighborhood in which she lived was very bad.

N. B. Broward, sheriff of Duval county, also for the defendant, testified to the bad character of Lucy Biggs for chastity and morality; and testified, further, that she did not go to his house the night she was arrested for larceny.

This constituted the entire evidence for the state and for the defense. At the trial the defendant's counsel requested the court to give to the jury the following instructions: "*First.* If the jury has a reasonable doubt as to whether the defendant was, at the time he put his hands upon the prosecutrix, trying to get her to consent to an improper intercourse, or commit the crime of rape, they should give him the benefit of the doubt, and acquit him. *Second.* The essential elements of force in an assault with intent to rape are threats or fraud; and, unless some of these is proved, the defendant should be acquitted. *Third.* The request of the defendant to the prosecutrix to consent to an improper intercourse may be taken in consideration by the jury to disprove the fact that the defendant intended to commit rape. *Fourth.* You have the right to disbelieve the evidence of any interested witness, upon no other ground than the fact of interest. You have the right to disbelieve the evidence of any non-interested witness if his evidence appears impossible or improbable." All four of which charges the court refused to give, and to each of which refusals the defendant, by his counsel, excepted; and their refusal is assigned as error here.

The first of these refused instructions should have been given. The *gravamen* of the charge contained in this information consisted in the intent with which the alleged acts of the defendant were committed. The intent of the prisoner should, throughout the instructions of the court, have been kept prominently before the minds of the jury, as being the main subject of their inquiry; and if, as to this,—the main subject of inquiry in this class of cases,—the jury have a reasonable doubt, that doubt most assuredly necessitates an acquittal. From this stand-point, the charge requested became very material to the accused. It stated the law correctly, and error was committed in its refusal.

The second refused instruction above states the rule of law that seems to have been established in the state of Texas by special statutory enactment, (Thompson v. State, 43 Tex. 583;) but we cannot say that the rule announced in the charge is applicable generally, in the absence of such statutory enactment, and therefore see no error in its refusal.

The third refused instruction above bears also materially upon the main question in issue,—the intent of the defendant. It states the law correctly, and for the reasons stated above should have been given, and its refusal was error.

The fourth refused instruction above states the law correctly, and under the proof in this case should have been given. The jury, under our system of laws, being the sole and exclusive judges of the weight and credibility to be given to any and all evidence, have the right, as is announced in this refused instruction, to disbelieve the evidence of an interested witness solely upon the ground of interest. The refusal to give this fourth instruction was error.

As our conclusion is that the judgment must be reversed because of the errors herein already pointed out, we think some comments upon the evidence exhibited in this record will not be inappropriate. The prosecutrix here, who is in reality the only witness to the material facts constituting the alleged crime, is shown to be at present unknown to any other than evil fame, herself a convict of infamous crime, a willing consort of persons of the same caste of skin and morals as the accused defendant. Her evidence, except as to the fact of her outcry, is wholly uncorroborated by any other testimony of fact or circumstance. The cause of her outcry is not corroborated by any evidence whatever. The time, place, surroundings, presence of other persons within a few feet and within the same walls, and, generally, the utter want of opportunity to consummate the crime of rape, all seem to us strongly to repel the idea of such an intent on the part of the accused as would be sufficient to sustain a conviction of the crime. The intent, in such cases, must be shown by the state to have so possessed the accused that his determination was to consummate the rape regardless of resistance and want of consent. In the case of Curry v. State, 4 Tex. App. 574, where the facts of the assault and the language of the assailant were identical with the case here, and where the character of the prosecutrix was not impugned, as here, and where the place and surroundings were much more

opportune for the consummation of the crime than in this, the court held that, taking into consideration the manner, time, place, and circumstances under which the assault was made, however wanton and outrageous the assault, they were not justified in presuming that it was the purpose and intent of the accused to accomplish his design by force, and without the consent of the assaulted female. While we are not called upon at present pointedly to decide whether the proof in this case is sufficient of itself to sustain a conviction for the crime here charged, yet, taking into consideration the character of the prosecutrix, the manner, time, place, and circumstances under which the alleged assault was made, we would suggest the most careful consideration and long hesitancy upon the part of the court below before refusing an application to vacate the verdict in the event a second jury can be found, willing, upon the same evidence, to duplicate the former finding herein.

The judgment and sentence of the court below is reversed.

(29 Fla. 565)

MCKINNY v. STATE.

(*Supreme Court of Florida.* March 19, 1892.)

ASSAULT WITH INTENT TO RAPE—INFANCY OF DEFENDANT.

At common law, a boy under the age of 14 years cannot, in point of law, be guilty of an assault with intent to commit rape; and, if he be under that age at the time of the alleged offense, evidence is inadmissible to show that in point of fact he could commit the offense.

(*Syllabus by the Court.*)

Error to circuit court, Clay county; W. B. YOUNG, Judge.

Indictment against Oscar McKinny for an assault with intent to commit rape. From a judgment on conviction defendant brings error. Reversed.

R. W. & W. M. Davis, for plaintiff in error. *William B. Lamar*, Atty. Gen., for the State.

MABRY, J. The plaintiff in error was indicted at the spring term, A. D. 1891, of the Clay county circuit court, for an assault upon a female child under the age of 10 years, with intent feloniously and forcibly to carnally know and abuse her, and, after arraignment, was convicted of said offense.

The indictment charges, omitting the formal parts, "that Oscar McKinny, of the county of Clay, and state of Florida, on the 21st day of February, A. D. 1891, in the county and state aforesaid, in and upon one Dora Lillian Remesat, a female child under the age of ten years, to-wit, of the age of eight years, feloniously did make an assault, with intent her, the said Dora Lillian Remesat, then and there feloniously and forcibly to carnally know and abuse, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Florida." After verdict, plaintiff in error, by his counsel, made a motion to set aside the verdict and grant a new trial. The grounds of the motion are: (1) "Because the verdict is contrary to law;" (2) "because the verdict is contrary to the evidence;" (3) "because the verdict is contrary to the charge of the court;" (4) "because the uncontradicted evidence in the case was that the defendant was not fourteen years of age at the time of the alleged offense, and yet the jury found him guilty of the offense with which he was charged." This motion was overruled, and defendant excepted. No exceptions were taken to the charge of the court, or the admissibility of any testimony. The assignments of error here cover in substance the same points presented in the motion for new trial. The sole inquiry presented here is the sufficiency of the evidence to sustain the verdict.

The mother of the child testified for the state, in substance, as follows: That the accused was working for her husband, helping in his barber-shop, and working on his place. On the 20th day of February, A. D. 1891, the accused was at work in their garden, and about 5 o'clock in the evening, while witness was up-stairs attending to a fretful baby, she looked out of the window into the garden, and did not see the accused at work. Witness could see from the upper window all over the garden, except down by the side of a fence nearest to the house. She knew that her daughter was in the garden with the accused, and had been playing there. She went down to see about it, and as soon as she opened the garden gate she saw her child lying flat on the ground, with her clothes up, and the accused on top of her. They were lying with their feet towards witness. As soon as the witness entered the gate, the accused jumped up, and commenced to button up his pantaloons, which were unbuttoned. Witness asked the accused what he meant by doing that. He said Lillian made him do it. She had been after him all the week to do it. Witness said if she had a pistol she would kill accused, and that she would have him arrested. She looked for something to hit accused with, and he ran away from the premises. This was in Clay county, Florida. On cross-examination witness stated that when she looked in at the gate she saw them lying on the ground near the fence, and near the chicken-house. The chicken-house was about 10 feet high, and was between the gate where she entered and where they were lying. The chicken-house was joined onto the fence to the right of the gate, and was on her right hand. The accused and the child were on the other side of the chicken-house. The child did not get up when the accused did. She laid on the ground for a little time, and was not fretting or crying, and was not hurt. Witness did not see the private parts of the accused.

J. A. Peeler testified for the state, in substance, that he was sheriff of Clay county. A warrant was placed in his hands for the arrest of Oscar McKinny, for the assault upon the little girl. He tried for two days to find the accused, but could not. He found him on Sunday night at his mother's house, and arrested him.

For the defense, Georgia Cook testified that she was the mother of the accused,

Oscar McKinny, and that he was not 14 years of age; that he would be 14 years of age on the following Tuesday,—the last day of March.

Fonce Miller testified that he knew the general reputation of the accused, and that it was good. He never heard anything bad of the boy.

The defendant's statement, under oath, was, in substance, that he had the headache, and was lying down on the ground. Lillian came where he was, and was playing on him, and he pushed her off. He was not trying to do anything to her. He ran off, because Mrs. Remesat said she was going to have him arrested.

This was, in substance, all of the testimony. Our statute provides that "whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be punished by death, or by imprisonment in the state penitentiary for life;" and whoever assaults a female with intent to commit a rape shall be punished by imprisonment in the state penitentiary for any term of years or for life, or by fine not exceeding one thousand dollars. Chapter 1637, subc. 3, §§ 40, 41, Act 1868, (McClel. Dig. p. 355, §§ 36, 37.) The two clauses contained in the first section of the above statute define the single offense of rape. It is committed on a female over 10 years of age by having carnal knowledge of her by force and against her will, and on a female under 10 years of age by unlawfully or carnally knowing and abusing her, without regard to consent. The object of our statute was to provide a punishment for rape in all cases of the violation of females of any age. Originally at common law rape was defined to be the carnal knowledge of a female, forcibly and against her will. 3 Chit. Crim. Law, 810; 1 Russ. Crimes, 904.

It seems that it was anciently doubted whether rape could be committed upon a child under 10 years of age, and hence the statute, 18 Eliz. c 7, § 4, was enacted, by which it was provided "that, if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, every such unlawful and carnal knowledge shall be felony without benefit of clergy." 3 Chit. Crim. Law, 814. This statute was not intended to create a new and different offense distinct from rape, but was designed to make the carnal knowledge and abuse of a child under 10 years rape, irrespective of consent. And we find in 1 Hale, P. C. 628, written after the passage of the statute 18 Eliz., the definition of rape to be "the carnal knowledge of any woman above the age of ten years against her will, and of a woman child under the age of ten years with or against her will." Our statute makes it rape to unlawfully or carnally know and abuse a female child under the age of 10 years. This construction has been placed upon statutes like ours. Com. v. Sugland, 4 Gray, 7; People v. McDonald, 9 Mich. 150; State v. Storkey, 63 N. C. 7; State v. Johnston, 76 N. C. 209; State v. Dancy, 83 N. C. 608. To charge, then, in an indictment under the statute an assault with intent to unlawfully and carnally know and abuse a female child under the age of 10 years is, in legal effect, to allege an assault with intent to commit a rape. The testimony of the mother of the accused (and there seems to be no contradiction in any way of it) is that he was not 14 years old when the offense is alleged to have been committed. He lacked but a short time of arriving at the age of 14, still the testimony is positive that he had not arrived at this age when the offense is alleged to have been committed. A boy under the age of 14, by the common-law rule, was presumed to be incapable of committing the crime of rape. This presumption, it seems, was not so much on the ground of incapacity of mind or will, but of physical impotency, and was irrebutable. Williams v. State, 20 Fla. 777, and authorities cited. It is also the rule of the common law that a boy under the age of 14 years cannot in point of law be guilty of an assault with intent to commit a rape, and, if he were under that age at the time of the alleged offense, evidence is inadmissible to show that in point of fact he could commit the offense. Regina v. Philips, 8 Car. & P. 736; Rex v. Eldershaw, 3 Car. & P. 396; People v. Randolph, 2 Parker, Crim. R. 174; Id. 213; 3 Lawson, Crim. Def. 145; 1 Bish. Crim. Law, (6th Ed.) § 746; 2 Rosc. Crim. Ev. 899. It was decided in Com. v. Green, 2 Pick. 380, that a boy under the age of 14 years may be indicted for an assault with intent to commit rape; but this seems to be the only departure outright from the common-law rule, and it was dissented from by PARKER, C. J. In Ohio and New York it has been decided that, while the law presumes a boy under the age of 14 years to be incapable of being guilty of attempting to commit the crime of rape, this presumption may be overcome by proof that in point of fact he has arrived at the age of puberty. Williams v. State, 14 Ohio, 222; People v. Randolph, supra. I think there is much good reason in the rule announced in the Ohio and New York cases. The common-law rule had its origin in the nature of man and social life, environed by the then physical development of the race where established, and under certain climatic conditions. The rule might become absurd in more congenial climates, and under conditions of more advanced physical development. The reason of the rule, it might well be said, had ceased under such circumstances. In no case, however, that we have found, except the one in Massachusetts, has any court gone further than to hold that the presumption of incapacity, where the accused is under the age of 14 years, may be rebutted by evidence showing capacity. Under these decisions the burden is on the state to show that the accused had capacity when it was shown that he was at the time under the age of 14. In a later case in Ohio, while the rule in the case of Williams v. State, supra, was adhered to, its correctness seems to have been doubted, and it was held that the rule would not be extended, and the burden was on the state to show capacity. Hiltabiddle v. State, 35 Ohio St. 52.

There is nothing in the testimony making it necessary for us to say whether or not the rule announced in Ohio and New York should obtain in this state. The testimony does not show the capacity of the accused, nor is there anything stated in reference to his physical development from which capacity may be deduced. On the evidence before us, our conclusion is that the conviction was wrong, and the judgment is therefore reversed, and the cause remanded.

(29 Fla. 171)

SPRATT v. CITY OF JACKSONVILLE.

(*Supreme Court of Florida.* March 26, 1892.)

ADVANCEMENT OF CAUSES ON APPEAL—MUNICIPALITY A PARTY—TAXES.

1. The advancement for decision of causes in which the state is not a material party in interest is, according to the practice of the court, controlled by the principle announced in the exception in rule 30 of this court. It must be one in which a county, municipality, or other recognized governmental agency is a real party in interest, and not a mere nominal party, and an immediate or early decision of the cause must be necessary either to the enforcement or protection of the public right asserted therein, or to the avoidance of embarrassment in the operation of such governmental agency; or it must be a case which, though no governmental agency is a real party in interest to it, yet so involves or affects public interests as that its early decision is necessary to avoid embarrassment to the governmental agency whose interest is involved.

2. The mere fact that a suit involves a public question does not give a municipality which is a real party in interest thereto the right to demand its advancement; nor does such fact, and the further facts that the same questions, which have been decided favorably to the city, are involved in several pending suits, or that various other suits may be imminent because of not advancing the particular one, nor that the same questions may arise as to a hundred distress warrants held by the city attorney to be enforced.

3. The fact that the cause is one involving municipal taxes, and to which a municipality and a tax-payer are the parties, is no ground for advancing a cause for decision, on the application of the tax-payer.

(*Syllabus by the Court.*)

Appeal from circuit court, Duval county.

Suit by Leonidas W. Spratt against the city of Jacksonville to test the validity of certain taxes. Judgment for defendant. Plaintiff appeals. On motion to advance the consideration of the cause. Motion denied.

S. E. Foster and *A. W. Cockrell & Son*, for the motion.

RANEY, C. J. The appellant moved to advance the consideration of this cause, it having been submitted on briefs, and the appellee may be regarded as virtually joining in the motion.

The cause is one in which the appellant filed before the circuit judge of the fourth circuit, in October last, a petition praying that the taxes assessed by the city of Jacksonville for the year 1890 be declared illegal. The amount of the taxes sought to be collected of him as assessed against his real and personal property is $300.36. The circuit judge decided the taxes were legal, and from his order to this effect the appeal has been taken.

The grounds of the motion to advance are: (1) The determination of the issues involved is of grave public and general interest; (2) many cases are depending in their final determination upon the decision in this cause.

Three affidavits have been filed in support of the motion,—one by the senior of appellant's counsel, stating that two designated cases, appealable to this court, have already been adjudicated by the circuit court of Duval county, and depend under agreements of counsel for the city, and for complainants therein, upon our decision in this cause, and that other causes set forth in the affidavit of S. E. Foster, appearing below, are severally dependent thereon, and that, in the opinion of the affiant, the interest of the city, and that of many tax-payers, will be promoted by this cause being advanced. Another of the affidavits is by the junior counsel of appellant, and is to the effect that he had on the 4th day of the present month, March, 1892, a consultation with the city attorney of the city of Jacksonville, counsel of record in this cause for such city, and that it is agreed by such attorney and affiant, in several suits pending in the circuit court of Duval county, some under a statutory proceeding for adjudging the taxes unlawful, and others in chancery to enforce tax-liens, and still others at law, for damages claimed for levies under the tax assessment, that all such suits involve the questions of the tax set up in this particular suit; also that various other suits are imminent because of the fact that the questions involved in said tax are not adjudicated in the supreme court, and that said city and its citizens are generally injured by reason of the want of a final and authoritative adjudication in the premises. The other affidavit is that of the attorney of the city of Jacksonville, and it sets out that, as such attorney, he has brought suit by bill in the Duval county circuit court against one Parker to collect taxes for the year 1890, and that Parker, represented by counsel appearing here for appellant, has demurred to the bill on the ground, among others, that the "tax was not levied in pursuance of law." It also states that the question of the validity of such assessment and levy for 1890 is now pending here in the cause before us, and that affiant has in his possession at least 100 distress warrants to be sued on, and in which, or in any of which, the same question of the validity of said levy may arise.

The only rules bearing upon the subject of advancing the decision of causes in this court are supreme court rules 14 and 30. The former of these rules is that "causes in which the state is a party, including criminal causes, may be moved in behalf of the state out of their regular order on the docket at any time, except while a cause is being argued." The other rule is as follows: "No cause of which this court may have original jurisdiction, concurrently with the circuit courts, will be given precedence over appellate causes as to the final decision of the same, unless it be one of public right, or so involving public interests as to require its advance-

ment upon the docket. This rule shall, however, not apply to cases of *habeas corpus.*"

The exception made in favor of cases of *habeas corpus* was necessitated, at least by the statute regulating the practice upon such writs. McClel. Dig. pp, 562-565.

The state is not a party in interest, or even formally, to this suit, nor is the cause of a criminal nature, and of course rule 14 does not apply; nor is the case within the terms or real purpose of rule 30; still it is a fact that the principle announced by the exception contained in the latter rule has controlled for some time the action of the court in advancing appellate causes, and our decision of the motion must rest upon that principle. For a cause to be one within the meaning of rule 14, to which the state is a party, the state must be not only a party in name, but also materially interested; it is not sufficient that she is merely a nominal party. Where the state is a material party to a cause, it may be advanced on her motion under rule 14, but not under rule 30; and, where she is not such a party, rule 14 has no application. The exception in rule 30 was not intended to secure from the other provisions of the rule any cause to which the state was a party, whether civil or criminal. Rule 14 secures this. To secure advancement under the exception contained in rule 30, a cause must be one of public right, or so involving public interest as to require its advancement upon the docket. To be one of public right, within the meaning of the rule, it must be one in which a county or municipality, or other recognized governmental agency, is a material party in interest, and an immediate or early decision of the cause must be necessary to the enforcement or protection of the public right asserted therein, or to avoid embarrassment in the operations of such governmental agency; and, to be one so involving public interest as to require advancement, it must be a case which so involves public interest as that its decision is necessary to avoid embarrassment to the governmental agency whose interests are involved. The principle of the rule is the avoidance of any real embarrassment which will apparently result to public interests from delay in deciding the cause, and to this end an advancement of the cause for decision will be made. The mere fact that a suit involves a public question does not give a county or municipality the right to demand its advancement. There must be an actual embarrassment to governmental operations. It does not appear that the city has not collected the taxes involved here. If it has not done so, there is still nothing before us to excuse the omission. If it has collected them, and appellant is suing to recover them, or to recover damages for trespass in collecting them forcibly and against his will, that case can be dealt with when it reaches us.

In so far as appellant is concerned, the fact that the case is one involving taxes is no reason for its advancement. The amount is no more to him than it would be if it was involved in an action of replevin or *assumpsit* against another individual, nor is it any more to him than other amounts, smaller or greater, are to litigants before us over whom he is asking to be preferred. The concession of the rule whose analogy we are considering, that causes of public right, or so involving public interests as to require advancement, may be advanced, was made to subserve practical public interests, and not for the benefit of the individuals who might be parties to such causes; and even as to the public it can be invoked successfully, only where it is shown that public interests will be embarrassed if the cause is not decided. Where life and liberty are not involved, no individual suitor can claim preference over others.

The fact that the city attorney has seen fit to agree that the decision in two other causes shall depend on our decision here is not ground for advancing this cause, nor is the fact that counsel before us agree that the questions involved here are involved in several suits pending in Duval circuit court, or that various other suits are imminent because of our not advancing this cause; nor that the same question may arise as to a hundred distress warrants which the city attorney holds to be enforced. The question does not appear to have produced embarrassment to the municipal government when it has actually arisen. Certainly mere possibilities cannot justify us in giving precedence upon a crowded docket.

In U. S. v. Fossatt, 21 How. 445, it was said that no cause should be taken up out of its order when private interests alone were involved, and that the only cases in which that court would depart from this rule were those where the question in dispute will embarrass the operations of the government while it remains unsettled. Subsequently congress passed an act that in suits wherein a state is a party, or wherever the revenue laws of any state may be enjoined or stayed by judicial order or process, it shall be the duty of the court, on sufficient reasons shown, to give the cause preference over all other civil causes pending in such court between private parties; and in Miller v. State, 12 Wall. 159, the court refused to advance a cause —a proceeding in *quo warranto* involving the title to the directorship of a railroad company—in which individuals were the real parties, and the state practically only a formal party; and in Davenport City v. Dows, 15 Wall. 390, the decision was that an ordinance of a municipal corporation levying taxes could not be regarded as the revenue law of a state, within the meaning of such statute. In Hoge v. Railroad Co., 93 U. S. 1, the conclusion of the court was it would not, in preference to cases pending between private parties, set down for argument a case in which the execution of the revenue laws of a state had been enjoined, unless it sufficiently appeared that the operations of the government of the state would be embarrassed by delay, and the motion to advance was refused because it was not shown that such embarrassment would result from delay in deciding the case in which an injunction had been granted against the collection of state, county, and municipal taxes against a railroad company whose

property was held to be exempt from taxation.

In the absence of a clear showing that embarrassment will result to the operations of the government of Jacksonville from delay in deciding this case, we do not think it should be advanced over private causes.

We have not found it necessary to invoke the fact that by an act of the legislature of June 9, 1891, the Jacksonville tax assessments and levies for the years 1887 to 1890, inclusive, have been legalized, (Laws 1891, pp. 64-66;) nor do we say what would be the effect of such legislation on this motion.

The motion is denied.

(29 Fla. 543)

BROWN v. STATE.

(*Supreme Court of Florida.* April 1, 1892.)

CRIMINAL LAW—BILL OF EXCEPTIONS—PRESENCE OF PRISONER IN COURT.

1. At common law, a writ of error did not lie to correct an error which was not apparent on the record, and the statute of 13 Edw. I. was enacted to provide a remedy for reviewing decisions of the trial court on matters *in pais*, to which exception was taken; and strictly, at the common law, it was doubted if this statute applied to any criminal case.

2. Our statute (section 1, c. 138, Laws 1848; section 1, p. 454, McClel. Dig.) allows a bill of exceptions in criminal cases, but it does not undertake to point out the matters and things which are proper to appear in a bill of exceptions, or the matters decided by the trial court which may in this way be presented for review to the appellate court; and what is a bill of exceptions, and its true office, are matters left for judicial ascertainment.

3. The true office of a bill of exceptions is to present some objection in point of law to the opinion, judgment, direction, or action of the trial court on matters which do not properly appear of record, and it is not its office to supersede or take the place of any requisite record entries in a cause, but to present exceptions taken during the progress of the trial, to the opinion and decision of the judge on matters which otherwise would remain *in pais*.

4. The record proper should show in cases of felony that the jury was sworn, and an omission in this respect is fatal to a conviction, and it cannot be supplied by a recital in the preface of a bill of exceptions, intended merely to connect the bill with the case tried, that the jury was sworn.

5. In felonies it is necessary that the accused be personally present during the progress of the trial, including the judgment or sentence of the court; but while it is best always to have the record show directly and affirmatively that the accused was personally present at each and every stage of the trial, it will be sufficient if it appear therefrom, by necessary and reasonable implication, that he was present.

(*Syllabus by the Court.*)

Error to criminal court of record, Duval county; H. B. PHILLIPS, Judge.

Prosecution against William T. Brown for perjury. From a judgment on conviction defendant brings error. Reversed.

A. W. Cockrell & Son, for plaintiff in error. *William B. Lamar*, Atty. Gen., for the State.

MABRY, J. An information was filed in the criminal court of record of Duval county on the 2d day of November, A. D. 1891, by the county solicitor of said court, against the plaintiff in error, charging him with the crime of perjury. After an arraignment upon this information, and a plea of "not guilty," the plaintiff in error was tried and convicted on the 14th day of November, A. D. 1891, of the offense of which he was charged, and on the 28th day of said month was sentenced to the penitentiary for the term of three years. On his application the record in this cause has been certified to this court under a writ of error, and the same is before us for review.

No objection was made in the criminal court, nor is any presented here, to the sufficiency of the information, and it is not necessary to set it out in this opinion.

After an examination of the record before us, we have become convinced that the judgment of the lower court must be reversed, and the cause remanded.

We will refer to only two of the objections presented here to the validity of the judgment rendered against the plaintiff in error, and both of these relate to the sufficiency of the record of the proceedings against him in the trial court. It is claimed, in the first place, that the record does not show that the jury who rendered the verdict against the plaintiff in error was sworn. From the record entries, as appears from the transcript before us, we find no mention made of the jury's having been sworn. The minute of the court in reference to the trial of the accused, as made to appear to us, is in this language, viz.: "And now comes the county solicitor, and the defendant in the above-entitled cause. Said defendant, being arraigned, pleaded 'not guilty,' whereupon came a jury, to-wit, [their names are here given,] who, having heard the evidence, argument of counsel, and the charge of the court, retired to consider of their verdict, which, after due deliberation, they brought in in the words and figures as follows," (then follows the verdict of guilty.) It will not be questioned that it was absolutely essential for a proper conviction of the accused that the jury should have been properly sworn before rendering a verdict against him, and it is also essential that this fact should appear upon the record. We held, and we think correctly, in the case of Garner v. State, 28 Fla. ——, 9 South. Rep. 835, that where the record shows simply that the jury was sworn it was sufficient. This is true where no exception is taken to the manner in which the jury is sworn, and in such case the record recital that the jury was sworn is evidence sufficient that it was done as provided by law But the record must show that the jury who tried the accused was sworn. Crist v. State, 21 Ala. 137, Rich v. State, 1 Tex. App. 206; Dyson v. State, 26 Miss. 362. In the case before us the bill of exceptions, made up and signed, in pursuance of a special order for that purpose, some time after the trial, recites that the jury was sworn. This recital is found in the caption of the bill of exceptions in the usual form, and as copied here is as follows: "Be it remembered that at a term of the criminal court of record for Duval county, Florida, held at Jacksonville, Duval county, on the 4th Tuesday in November, A. D. 1891, a cause therein pending,

wherein the state of Florida was plaintiff, and W. T. Brown was defendant, came on to be heard before the Hon. H. B. PHILLIPS, judge of said court, at which day came the said parties by their respective attorneys; and thereupon the said issues, in manner and form aforesaid joined, came on to be tried; and the jurors of the jury aforesaid, whereof mention is made within, being called, likewise came, and were sworn to try the issues in manner aforesaid joined; and thereupon the plaintiff, to maintain the issues on its part, introduced as a witness," etc. Does this recital in the bill of exceptions that the jury was sworn supply the omission in the record? If it does not, there is no sufficient record evidence before us that the plaintiff in error was ever properly convicted.

Our statute provides "that it shall be the duty of the judges of the circuit courts of this state, upon the trial of any person or persons charged with crime or misdemeanor in said court, to sign and seal, upon request, any bill of exceptions taken during the progress of the cause, and tendered to the court, provided the said bill of exceptions, as tendered, fairly state the truth of the matter and the exception designed to be taken; and the same shall, when signed, become a part of the record of such cause." Section 1, c. 138, Laws 1848; section 1, p. 454, McClel. Dig. At common law a writ of error did not lie to correct an error which was not apparent on the record, and therefore, where a party to a cause objected to the decision of the court on matters *in pais*, he was without any legal remedy whereby such a decision could be certified to the appellate court for review. To remedy this defect it was enacted by statute 13 Edw. I.: "If one impleaded before any of the justices allege an exception, praying that the justices will allow it, that, if they will not, and if he write the exceptions, and require the justices to put their seals to it, the justices shall do so; and, if one will not, another shall." 2 Phil. Ev. 996; 2 Tidd, Pr. 862; Proctor v. Hart, 5 Fla. 465. It will be noted that the statute was designed to provide a remedy for reviewing decisions on matters which did not appear on the record. This statute of 13 Edw. I. is old enough to be in force here, and is undoubtedly a part of our law applicable to civil causes. It was said that this statute did not apply to indictments for treason and felony, and it was doubted if it applied to any criminal case. 1 Chit. Crim. Law, 622; 2 Phil. Ev. 997; 2 Tidd, Pr. 862; Ex parte Vermilyea, 6 Cow. 555; Ex parte Barker, 7 Cow. 143. In Wynehamer v. People, 20 Barb. 567, it is said: "Bills of exceptions in criminal cases are unknown to the common law. The right to a bill of exceptions in such a case is given by statute." Our statute, above referred to, gives the right to a bill of exceptions in a criminal case; but it does not undertake to point out the matters and things which are proper to appear in a bill of exceptions, or the particulars wherein the rulings of the trial court may in this way be presented for review to the appellate court. The provision is that the judge shall sign and seal, upon request, any bill of exceptions taken during the progress of the cause, and tendered, provided it fairly states the truth of the matter, and the exception designed to be taken. What is a bill of exceptions, and its office, are left by the statute for judicial ascertainment. The true office of a bill of exceptions, as appears from what has already been said in reference to the occasion of the enactment of 13 Edw. I., is to present some objection in point of law to the opinion, action, or direction of the trial judge on matters which do not properly appear of record. The conception of a bill of exceptions was not to supersede or take the place of any requisite record entries in a cause, but to present exceptions taken during the progress of the trial to the opinion and decision of the judge in matters which otherwise would remain *in pais*. Strictly, at the common law, the bill of exceptions was no part of the record in the trial court, and the original was carried into the court of error, and there annexed to the record. A method for the proof of the judge's signature was provided, in case it was questioned. The bill of exceptions, being for the benefit of the party who tendered it, remained in his possession, and he could use it or not, as he saw proper. Gardner v. Baillie, 1 Bos. & P. 32; 2 Tidd, Pr. 864, 865. Our statute provides that, when the bill of exceptions is signed by the judge, it shall become a part of the record of the cause. This does not, in our judgment, mean that it shall become a record of matters not properly recited therein. The record proper should speak for the matters required to be recorded there, and the bill of exceptions is authoritative evidence of matters which are properly allowed therein. A different rule would tend to confusion, and might result in complication in attempting to reconcile conflicting statements of record in the same case. Our predecessors have all along recognized the special office of a bill of exceptions. Proctor v. Hart, supra. In Cato v. State, 9 Fla. 176, it is said: "The bill of exceptions is a great privilege accorded to a party, to cause that to be made a matter of record which would not otherwise appear in the history of the trial; and it is for him, therefore, to be careful to have incorporated into his bill whatever fact he may desire to rely upon as matter of error." In Gates v. Hayner, 22 Fla. 325, it is said: "Neither an exception nor a bill of exceptions is necessary where the error, if there be any, is apparent upon the record; but the office of a bill is to incorporate into the record matters which would otherwise remain *in pais*." In Gallaher v. State, 17 Fla. 370, the language of the court on this subject is that "the bill of exceptions is a simple history of the case as tried, and should contain nothing more nor less than the facts as they appeared to the court and jury, from the commencement of the trial until the final judgment by the court." The court was considering at the time the necessity of making objections to the introduction of evidence when offered. In reference to the facts or evidence in the case the bill of exceptions is the only

method provided to get them before the appellate court, as they do not, in a trial at law, otherwise appear on the record. In speaking of such a bill of exceptions it is accurate to say that it should be a history of the case, and contain the facts as they appear to court and jury. There was nothing in the facts of this case which will justify the inference that the court intended to hold that the office of the bill of exceptions was to supply the record proper of those matters which should be in the minutes of the court. In a case in Indiana, under a statute which provided that the accused may plead the general issue orally, which shall be entered upon the minutes of the court, the record entry failed to disclose affirmatively that a plea to the indictment had been entered. The bill of exceptions recited that the defendant pleaded "not guilty." It was held by the court that it was no part of the office of a bill of exceptions to supply that which is essential to the validity of, and which the law requires to appear upon, the record of the court, and the judgment was reversed. Bowen v. State, 108 Ind. 411, 9 N. E. Rep. 378. In People v. Rathbun, 21 Wend. 509, it is said that the statute allowing a bill of exceptions in criminal cases makes it applicable to the same extent as it was in a civil cause. There a bill of exceptions was confined to some point of law arising at the trial which could not be made apparent in a course of regular entry on the record. And so we conclude here that the record proper should show in a case of felony that the jury was sworn, and an omission in this respect is fatal to a conviction, and cannot be supplied by the recitals in the preface of a bill of exceptions intended merely to connect the bill of exceptions with the case tried.

We notice another objection urged here to the judgment of the court, and which is that the accused was not present when sentence was pronounced against him.

The record shows that the trial was had and verdict rendered on the 14th day of November, A. D. 1891. On the 16th day of that month it appears that the accused entered into bond for his attendance from day to day on the court, and in reference to the sentence of the court the record entry is as follows: "Saturday, November 28th, A. D. 1891. State of Florida vs. W. T. Brown. Information for perjury. By virtue of the verdict with recommendation to the extreme mercy of the court, rendered on a prior date in the above-entitled cause, it is hereby ordered and adjudged by the court that you, W. T. Brown, be taken by the sheriff for Duval county, Florida, or his lawful deputy, to the state's prison of the state of Florida, and delivered to the principal keeper thereof, and there to be confined in said state's prison, at hard labor, for the period of three years from the date of your incarceration therein. The motion for new trial duly made in the above-entitled cause is hereby ordered overruled and denied. Exception noted." The motion for new trial mentioned in the above order is signed by counsel for plaintiff in error.

In felonies it is necessary that the accused be personally present during the progress of the trial, including the judgment or sentence of the court imposing the penalty of the law. But while it is best always to have the record show directly and affirmatively that the accused was personally present at each and every stage of the trial, yet it will be sufficient if it appear therefrom by necessary and reasonable implication that he was present. Irvin v. State, 19 Fla. 872; 1 Bish. Crim. Proc. § 1180, and authorities cited. The record before us shows that the accused was present at the trial, but after conviction he is discharged on bond. In the copy of the order of the sentence before us there is nothing to show that the accused was present. There is no recital of his presence, nor does it appear that he was asked if he had anything to say why the sentence of the law should not be pronounced upon him. The language, "ordered and adjudged by the court that you, W. T. Brown, be taken by the sheriff," etc., to prison, does not carry any necessary implication of a personal presence. If the accused had been present, however, the failure to ask him if he had anything to say why sentence should not be passed upon him would be no ground to reverse the judgment of the court. See Hodge v. State, 28 Fla. —, 10 South. Rep. 556.

The record in this case has not been properly made up, and in the transcript before us papers are copied without anything to show how they found their way into the case. The reversal here is upon grounds which should not have existed, and they can be avoided by proper attention to the making up of the record, and the preparation of the transcript for writ of error. The jurisdiction of the criminal court of record of Duval county includes the power to investigate charges of gravity involving the liberty of the citizen; and it is not only proper, but essential, that the correct record entries should be made. Their absence cannot be dispensed with, especially when objections are based on them here.

The judgment is reversed, the cause remanded, and a new trial awarded.

(29 Fla. 511)

GOODSON v. STATE.

(*Supreme Court of Florida.* April 6, 1892.)

UTTERING FORGED INSTRUMENT—FALSE PERSONATION—INDICTMENT—PRESENTATION IN OPEN COURT.

1. An indictment charging the utterance and publishing of a forged instrument should state the name of the person, firm, corporation, or company to or upon whom the same was uttered, published, or passed; or else it should account for the omission by a statement in the indictment that such person, etc., is to the jurors unknown. If it fails to do either, it is fatally defective.

2. An indictment charging the procurement of property by falsely personating another, under section 41, p. 864, McClel. Dig., should allege that the property fraudulently obtained by the defendant was intended by the party from whom he got it to be delivered to the party alleged to have been falsely personated, and should further allege that the defendant received the property with intent to convert the same to his own use. If either or both of these material averments are

omitted from such an indictment, it is fatally defective.

3. The only recognized manner in which the findings of a grand jury can be authoritatively presented is in open court; and such presentment should be affirmatively shown by a record entry in the minutes of the court, or else by the file indorsement on the indictment itself by the clerk of the court, showing that it was "presented by the grand jury and filed in open court." The record entry in the minutes is, however, the best and proper evidence of the fact. Where there is no evidence of such open court presentment, a plea in abatement, predicated upon such omission, should be sustained.

(*Syllabus by the Court.*)

Error to circuit court, Washington county; W. D. BARNES, Judge.

Indictment against William Goodson for uttering and publishing a forged order. From a judgment on conviction defendant brings error. Reversed.

W. O. Butler, for plaintiff in error. *William B. Lamar*, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, William Goodson, was indicted at the spring term, 1889, of the circuit court of Washington county, first judicial circuit, as follows, omitting the formal introductory part of the indictment: "That William Goodson, late of the county of Washington aforesaid, in the circuit and state aforesaid, on the 14th day of January, A. D. 1889, with force and arms, at and in the county of Washington, had in his custody and possession a certain false, forged, and counterfeit order for the payment of money, the said William Goodson then and there knowing the same to be false, forged, and counterfeited. The order was of the tenor following: 'Chipley, Fla., January the 14th, '89. Mr. Horn, [meaning one R. C. Horn:] Will you please sir pay $25 to Joseph Goodson for me. GEORGE EVERETT, Orange Hill.' And the said William Goodson did then and there feloniously utter and publish the same as true, with intent thereby then and there to injure and defraud one R. C. Horn, the said William Goodson then and there knowing the said order to be false, forged, and counterfeited, against the form of the statute in such cases made, etc. The grand jurors of the state of Florida, inquiring in and for the body of the county of Washington, upon their oaths present that one William Goodson, of the county of Washington, on the 14th day of January, 1889, in the county of Washington aforesaid, feloniously, unlawfully, knowingly, and designedly did falsely pretend to one R. C. Horn that the said William Goodson was one Joseph Goodson, and that he had an order to pay money, to-wit, twenty-five dollars, sent and signed by one George Everett, in writing, and the said order was in the words and figures as follows: 'Chipley, Fla., January the 14th, '89. Mr. Horn, [meaning R. C. Horn:] Will you please sir pay $25 to Joseph Goodson for me. GEORGE EVERETT, Orange Hill;' the said R. C. Horn believing the said William Goodson to be Joseph Goodson, and that said order was signed by one George Everett, as represented by William Goodson, for said twenty-five dollars, by means of which said false pretenses the said William Goodson did then and there unlawfully, knowingly, and designedly fraudulently obtain from the said R. C. Horn twenty-five dollars, of the value of twenty-five dollars, of the property, money, goods, and chattels of the said R. C. Horn, with intent then and there to cheat and defraud the said R. C. Horn, whereas, in truth and in fact, the said William Goodson was not Joseph Goodson, neither was the order for twenty-five dollars, signed by George Everett, or sent by George Everett, for twenty-five dollars, so the said William Goodson then and there well knew, against the form of the statute in such cases made," etc. On this indictment the defendant was tried on the 14th day of November, 1891, the jury finding a general verdict of guilty, without any specification as to which one of the two offenses charged in the indictment their verdict should apply. The defendant's motion for a new trial being denied, he brings the case here upon writ of error.

Before pleading to the indictment, the defendant moved the court to quash it upon the following grounds: "(1) The first count in the indictment is vague and indefinite, and charges no offense known to the law. (2) The second count in the indictment charges no offense known to the law, and is vague, indefinite, and uncertain." This motion was overruled, and this ruling is assigned as the first error. While this motion to quash does not point out with any definiteness the particulars wherein the two counts of the indictment are vague, indefinite, and uncertain, still we think that the motion should have been sustained, and the indictment quashed. The first count attempts to charge the defendant with uttering, publishing, and passing a false, forged, and counterfeit order for money, but does not allege any person, firm, corporation, or company to or upon whom the same was uttered, published, or passed. Neither does the indictment excuse this omission with any statement that the person to or upon whom it was uttered, published, and passed was to the jurors unknown. The reason for naming in the indictment the person upon whom the forged instrument was passed, consists in the fact that it enters into and becomes a part of the description of the offense, which should be certain, not only that the defendant may accurately know who his accusers are, but that, in case of a second prosecution for the same utterance and passing, he may be able accurately to plead *autre fois acquit* or *convict*, as the case may be. In 1 Chit. Crim. Law, marg. p. 211, we find the rule thus expressed: "But it is, in general, necessary to set forth the names of third persons with sufficient certainty; and therefore it seems to be generally agreed at this day that an indictment for suffering divers bakers to bake, etc., against the assize, when that offense was indictable, or for distraining divers persons without just cause, or for taking divers sums of money of divers persons for toll, cannot be supported." The same rule applies in larceny, in indictments for which the name of the

owner of the stolen goods must be set out as a part of the description or identification of the property alleged to have been stolen, or else its omission must be excused by a statement in the indictment "that the owner is to the jurors unknown." The correctness of this rule was recognized at an early date in the history of this court, in Groner v. State, 6 Fla. 39, and has been adhered to ever since. Sharp v. State, 28 Fla. —, 9 South Rep. 651. As applied to indictments for uttering a forged instrument, the rule has been recognized and enforced in Buckley v. State, 2 G. Greene, 162. In that case the allegation of the indictment as to the utterance and passing of forged and counterfeit coin was exactly like the one under consideration, and the indictment was held bad. In McClellan v. State, 32 Ark. 609, the indictment in this respect was exactly like the one here, and was held bad.

The second count in this indictment is also fatally defective. It seems to be predicated upon section 41, p. 364, McClel. Dig., that provides as follows: "Whoever falsely personates or represents another, and in such assumed character receives any property intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed to have committed larceny, and be punished accordingly." Comment seems hardly necessary. In this second count there is no allegation that the property alleged to have been fraudulently obtained by the defendant was "intended by the party from whom he got it to be delivered to the party alleged to have been falsely personated;" neither is there any allegation that the defendant received the property "with intent to convert the same to his own use;" all of which is fatal to its validity, and the omission of these essential allegations makes it fall far short of charging any offense provided for by law. Jones v. State, 22 Fla. 532. The defendant's motion to quash should have been granted.

After the overruling of his motion to quash, the defendant entered a plea in abatement, the substance of which is that there was no evidence upon the records of the court to show that the indictment was ever returned or presented in open court by any grand jury. This plea was overruled, and such ruling is also assigned as error. The ruling of the court below upon this plea is in the following words: "He [the court] was of the opinion that there was sufficient evidence before the court to sustain the indictment, said entry of the finding and return into court on May the 17, 1889, being in the following words and figures, namely: 'State of Florida vs. William Goodson—Forgery.'" We do not think that this was sufficient evidence, or, in fact, any evidence at all, of the essential fact that such an indictment, or that any indictment, had been "presented or returned into open court by a grand jury." The bare style of a case, accompanied with the technical name of a crime, appearing by itself in the minutes of the court, without any explanation or other statement, cannot be said to prove anything. Had this styling of the cause been preceded with the customary statement, "The grand jury came into court, or into open court, and presented the following indictments," then the evidence would have been sufficient and complete. Turning to the indictment itself, we find the file-marks to be as follows: "Filed May 17th, 1889. W. B. LASSITER, Clerk, by J. R. WELLS, D. C." There is nothing in this to indicate that it was filed or presented in open court. At the beginning of the record before us we find the following statement made by the same clerk who filed that office at the time this indictment purports to have been found: "Be it remembered that on the 9th day of November, A. D. 1891, came the state of Florida, the plaintiff in the case aforesaid, and by an indictment filed with the clerk of the circuit court in his said office on the 17th day of May, A. D. 1891, called upon the defendant to answer," etc. While this preliminary statement by the clerk in the record may not be regarded as affirmative proof that the indictment was filed in his office, as therein asserted, instead of in open court, still it falls far short of affirmatively showing that the paper was presented and filed in open court by the grand jury. This being all there is in the record upon this subject, we do not think that there is sufficient evidence, or any evidence, that this indictment was presented in open court by a grand jury, that being the only recognized manner in which the findings of a grand jury can be authoritatively presented. Collins v. State, 13 Fla. 651. Were the rule otherwise, it would render it possible for a designing or revengeful foreman of a grand jury to ruin any citizen by surreptitiously filing with the clerk in his office an indictment manufactured by himself alone, upon which his fellow-jurors had taken no action. With the lights before us, we think the defendant's plea in abatement should have been sustained.

It is unnecessary, after what has been said, to notice any other questions raised.

The judgment of the court below is reversed, with directions to quash the indictment, and to discharge the defendant from further custody or detention thereunder.

(29 Fla. 128)

TOWN OF ENTERPRISE *et al.* v. STATE *ex rel.* ATTORNEY GENERAL.

(*Supreme Court of Florida.* March 16, 1892.)

QUO WARRANTO—JURISDICTION—PLEADING—USURPATION OF FRANCHISE—MUNICIPAL CORPORATIONS—ORGANIZATION—COLLATERAL ATTACK.

1. Jurisdiction of informations in the nature of *quo warranto* is conferred on circuit courts by section 11, art. 5, Const. 1885.

2. Where usurpation of a public office or a franchise is claimed by the state, and an information in the nature of a *quo warranto* is filed by the attorney general to test the right to hold such office or enjoy such franchise, it is only necessary to allege generally that the person holding the office or enjoying the franchise does so without lawful authority, and in such a case, as against the state, it devolves upon such person to show a complete legal right to enjoy the privileges in question; but if the information states the facts upon which the charge of usur-

pation is based, and those facts show a clear legal right in respondent, it will be insufficient.

3. The qualified inhabitants of a hamlet, village, or town in this state cannot, under the general acts for the incorporation of cities and towns, organize and maintain two municipal governments in the same space at the same time.

4. Under such incorporating acts it is essential that a municipal corporation have ascertained and well-defined boundaries, and where the metes and bounds of such a corporation utterly fail to inclose any area, and are so uncertain as to make it impossible to determine the territory of such corporation, an organization and municipal government thereunder will be a nullity.

5. The inhabitants of a hamlet, village, or town, recognized as a community of persons authorized to form a municipal government under the general act for the incorporation of cities and towns, in force in this state, include persons living on contiguous territory; and, where an attempt is made to incorporate two distinct detached tracts of land as corporate territory under one government, it is unauthorized and void.

6. The rule is well settled that no collateral attack can be made upon the existence of a corporation. Such bodies derive their being from the sovereign will of the people; and, so long as the state does not question their existence, it cannot be controverted in a collateral way, on account of irregularities and defects in their organization.

7. In March, 1884, an attempt was made to incorporate the town of Enterprise, and a transcript of the proceedings was prepared and delivered to the clerk of the circuit court for record. The territory of the proposed incorporation, as appears by the record, consists of two detacned and disconnected tracts of land distant from each other five miles. In 1885 the legislature provided (in chapter 3634) "that all the acts done and performed in the organization and incorporation of the town of Enterprise, in the county of Volusia, are declared to be legal and valid in law and equity, and to be considered valid and binding by the laws of the state of Florida." *Held*, that said attempted organization was not in compliance with the general law in reference to the formation of municipal governments, and said special act, in so far as it seeks to validate the organization of said town, is in conflict with the constitutional requirement, in the constitution of 1868, of uniformity in the organization of municipal corporations.

8. In proceedings in the nature of *quo warranto* instituted on behalf of the state to test the right to hold an office or enjoy a franchise, great particularity is required in the answer or plea, and a complete right must be shown on the part of the respondent, but on demurrer a bad plea is a good answer to a defective information.

(*Syllabus by the Court.*)

Error to circuit court, Volusia county; J. D. BROOME, Judge.

Quo warranto proceedings on the relation of the attorney general against T. B. Biddulph, S. S. Bennett, Andrew Harold, S. A. Donald, George H. Count, and William James to test their right to be a corporation under the name of the "Town of Enterprise." From a judgment of ouster respondents bring error. Reversed.

The other facts fully appear in the following statement by MABRY, J.:

This is a proceeding by information, in the nature of a *quo warranto*, instituted in behalf of the state of Florida by the attorney general, in the seventh judicial circuit, for Volusia county. The information states that T. B. Biddulph, S. S. Bennett, S. A. Donald, Andrew Harold, William James, and George H. Count,—the said Biddulph as mayor, and the said Bennett, Donald, Harold, James, and Count as aldermen,—and others, have usurped, and still do usurp, to be a corporation, under the corporate name of the "Town of Enterprise," in the county of Volusia and state of Florida, as follows: That on the 1st day of February A. D. 1877, the town of Enterprise, with certain metes and bounds, (which are set out in the information,) was incorporated under the name of the "Town of Enterprise," as will appear by a certified copy of the record of the transcript of the proceedings of said incorporation filed with the clerk of the circuit court of Volusia county, and by him duly entered upon the public records of said county, and which copy of the record is attached as Exhibit A to the information.

Further, that on the 24th day of March, A. D. 1884, there having been no surrender of the aforesaid corporate franchise, and no dissolution of said corporation, the town of Enterprise was again incorporated with the following metes and bounds, to-wit. Sections 1 and 2 in township 19, and sections 35 and 36 in township 18, in range 30 S. and E.; section 6, in township 18, in range 31 S. and E.,—Volusia county, Fla.; that a fair and complete transcript of the proceedings was prepared by the clerk of said town, embodying the notice by which the meeting was convened to form said corporation, the number of qualified electors present, the seal, territorial limits of said incorporation, and the names of the officers-elect, to which the mayor and aldermen attached their signatures, attested by the clerk with said seal, and was filed with the clerk of the circuit court for said county, and by him marked "Filed," but before being recorded was lost, destroyed, or abstracted from said office by some one unknown to relator, and cannot now be found; that under each of said incorporations elections were held and officers elected, duly sworn and qualified, and entered upon and discharged the duties of their respective offices; that the said two incorporations, in succession, owing to factional disturbances and petty grievances, were, without any warrant of authority or process of law, ignored, and on the 14th day of May, A. D. 1885, a third incorporation of the town of Enterprise was formed and organized, or attempted to be, the last and third one further contracting and changing the corporate limits, and leaving without the boundaries of said incorporation citizens and qualified voters, who, under the preceding incorporations, lived within the limits of said town; that, notwithstanding such change and contraction of the limits as aforesaid, no action was taken to that end, as provided by law, but the proceedings had and taken in the premises were as though a new or original incorporation was being formed, as will appear by a certified copy of the transcript of the proceedings thereof attached as Exhibit B to the information. The description of the territory of the third incorporation as embodied in the notice for the meeting to incorporate is as follows: Commencing on Lake Monroe, at west line of lot 3, section 1, township 19, of range 30 E.; and running north on said

line to township line dividing townships 18 and 19; thence east, on said line, to the center of half-mile post, in section 5, township 19 south, of range 31 east; thence south, to Lake Monroe; and thence westerly, on the margin of Lake Monroe, to the place of beginning.

That under the last and third incorporation, or pretended incorporation, the said T. B. Biddulph, on the —— day of May, A. D. 1887, was elected, or pretended to be elected, mayor of said incorporation, or pretended incorporation, of the town of Enterprise, and is now acting as such mayor, and S. S. Bennett, S. A. Donald, Andrew Harold, William James, and George H. Count, on the —— day of May, A. D. 1887, were elected, or pretended to be elected, aldermen of said town, and are now acting as such aldermen, and they, said Biddulph, Bennett, Donald, Harold, James, and Count, acting as such mayor and aldermen, respectively, and others residing in said town, do and perform and exercise all the liberties and privileges and franchises of incorporated towns usurping to be an incorporation, to the great damage, prejudice, and wrong of the said state of Florida; wherefore due process of law is prayed against the town of Enterprise, and said mayor and aldermen, and that they be required to answer by what warrant they claim to have, use, and enjoy the liberties, franchises, and privileges aforesaid. Process of subpœna was awarded by the court against T. B. Biddulph, as mayor of the town of Enterprise, and S. S. Bennett, S. A. Donald, Andrew Harold, William James, and George H. Count, as the town council of the town of Enterprise, to answer said information.

Respondents demurred to the said information on the following grounds:

(1) "That said information does not show that either of said incorporations were legally made or formed."

(2) "That said information does show that said two incorporations were illegal, and never had any legal existence."

(3) "That the existence of an illegal and void incorporation does not prevent or preclude the citizens making and forming a legal incorporation under and by virtue of the laws of the state of Florida."

(4) "That the said information does not show that the incorporation of May —, 1885, was not legally formed in every particular, and that the general incorporation law had been complied with in all particulars and requirements."

(5) "That the said information does not show that the corporation of May —, 1885, was not the first and only legal incorporation of the territory therein described."

(6) "That the information is in other respects insufficient, irregular, and informal."

This demurrer, after argument, was overruled, and respondents excepted to the ruling of the court.

T. B. Biddulph filed a disclaimer to the effect that he had long since resigned and ceased to be mayor of said municipal corporation, or to act as such.

The respondents Bennett, Harold, Donald, Count, and James filed an answer, which, in substance, is as follows: They say it is true that they are the board of aldermen of the corporation of Enterprise, but it is not true, as stated in the information, that the name of said corporation is the "Town of Enterprise." They admit that they exercise the duties of aldermen, and claim that they were legally elected and qualified, according to the ordinances of said corporation and the laws of Florida, and as such aldermen perform the duties thereof. They say they are informed and believe citizens, claiming to be 25 in number, did make an attempt to incorporate certain territory described in the information, on the 21st day of February, A. D. 1877, and they are informed that the persons mentioned in the information, as having been elected to office, entered upon and discharged the duties appertaining to each office for a short time, but ceased to act as such about the middle of the year 1877, and have not acted or claimed to be such officers since that time; that corporate government within or over said territory ceased to exist, and was not exercised until the 24th day of March, A. D. 1884, when a number of persons met and attempted to incorporate the territory described in the information, and there were officers elected as alleged in said information, who entered upon the duties of their offices, but they served only a short time, and then refused and failed to act, claiming that the corporation thus formed was not legally constituted and created; that there were no officers exercising, or claiming to exercise, the duties of such offices within the territory described in said information for about a year, and said territory remained without any corporate government for about a year. Respondents say it is true that the citizens of the territory described in the information, on the 14th day of May, A. D. 1885, did enter into and form a corporation, and proceeded thereunder to elect officers to fill the offices provided in the charter of incorporation, and respondents aver that they are their successors in office, and that officers have continually, since the creation of the corporation of 1885, up to the time of filing this answer, been elected.

That it is not true, as alleged in the information, that S. S. Bennett, Andrew Harold, S. A. Donald, George H. Count, and William James were elected in May, 1887. It is true that S. A. Donald, George H. Count, and William James were elected and qualified as aldermen in May, 1887; the other two aldermen held over according to law.

Respondents deny that they, or any one, to their knowledge, ever, for any cause whatever, abstracted any papers from the clerk's office of Volusia county.

It is further stated in the answer that respondents respectfully contend that the two first-named pretended incorporations were never legally incorporated according to and in conformity to the statute laws of the state of Florida, but were void and without legal existence from the beginning thereof; that they contend the incorporation of said territory made and formed the 14th day of May, 1885, was legally made, and that the citizens thereof are a

legal government therefor; that respondents are the officers elected under said last incorporation; and they do not usurp any office, or pretend to hold under a void incorporation. Respondents ask leave to refer to the exhibits attached to the information as often as may be found necessary.

Upon the filing of this answer plaintiff moved the court for a judgment of dissolution against the corporations, or pretended or *de facto* corporations, of the town of Enterprise, or Enterprise, and this motion was granted. A formal judgment of the court on the same day the motion was granted was entered adjudging that the corporations of the town of Enterprise formed, or attempted to be formed, on the 1st day of February, A. D. 1877, and the corporation of said town formed, or attempted to be formed, on the 24th day of March, A. D. 1884, and the corporation of Enterprise formed, or attempted to be formed, on the 14th day May, A. D. 1885, be, each and every of them, dissolved and pronounced void; also that T. B. Biddulph S. S. Bennett, S. A. Donald, Andrew Harold, William James, and George H. Count cease to act in the capacity of mayor and aldermen, respectively, of said town, and that they be ousted therefrom. Respondents bring this decision of the circuit court here for review by writ of error. They assign for error here the granting of the writ of *quo warranto*, the entertaining jurisdiction by the circuit court of the case made by the pleadings, the overruling of respondents' demurrer to the information, and in awarding the judgment of ouster.

John W. Price, for plaintiffs in error.

MABRY, J., (*after stating the facts.*) Counsel for plaintiffs in error makes no claim in his brief that the circuit court had no jurisdiction of the *quo warranto* proceedings.

The constitution of 1885 (section 11, art. 5) provides that "the circuit courts and judges shall have power to issue writs of *mandamus*, injunction, *quo warranto*, *certiorari*, prohibition, *habeas corpus*, and all writs proper and necessary to the complete exercise of their jurisdiction." Under this provision of the constitution, there is no doubt about the jurisdiction of the circuit court in proceedings by information in the nature of *quo warranto*.

Was the demurrer to the information properly overruled? The proceeding here is by information in the nature of *quo warranto*, instituted by the attorney general on behalf of the state, against the town of Enterprise and the plaintiffs in error. It is charged in the information that plaintiffs in error have usurped, and do usurp, to be a corporation under the corporate name of the "Town of Enterprise," in Volusia county, state of Florida, and that they claim to be mayor and aldermen of said town, and as such do perform and exercise all the liberties, privileges, and franchises of incorporated towns usurping to be a corporation, to the prejudice and wrong of the people of the state of Florida. The manner in which, it is claimed, they usurp the functions of municipal government, is set out in the information. The information states that the town of Enterprise was incorporated on the 1st day of February, A. D. 1877, and without any surrender of this corporate franchise, or dissolution of the incorporation, another incorpration was formed on the 24th day of March, 1884, and that under each of these incorporations officers were elected, sworn, and qualified, and entered upon and discharged the duties of their respective offices; that these incorporations in succession were ignored, and without any authority of law a third incorporation of said town was on the 14th day of May, A. D. 1885, formed, or attempted to be formed, with contracted corporate limits, and leaving out citizens and qualified voters who lived within the limits of the former corporations. The three acts of incorporation, or attempted incorporation, as appears from the allegations of the information and the record of the proceedings, copies of which are attached thereto, were in the nature of original proceedings, and not a contraction, in the way provided by the statute, of the corporate limits of any preceding incorporation. The plaintiffs in error are charged with usurpation under the third incorporation.

Where usurpation of a public office or a franchise is claimed by the state, and an information is filed by the attorney general to test the right to hold such office or enjoy such franchise, it is only necessary to allege, generally, that the person holding the office or enjoying the franchise does so without lawful authority and in such a case, as against the state, it devolves upon such person to show a complete legal right to enjoy the privileges in question. People v. Woodbury, 14 Cal. 43; People v. Abbott, 16 Cal. 358; State v. Palmer, 24 Wis. 63; State v. Saxon, 25 Fla. 342, 5 South. Rep. 801. It is contended here that, while usurpation of municipal functions is charged against plaintiffs in error, the information disclosed facts which show their right to exercise them, in this: that it appears from what is therein stated the two first efforts at incorporation are illegal and void, and the third one, under which they claim, is shown to be valid. We concede it to be a correct proposition that if the information states the facts upon which the charge of usurpation is based, and those facts show a clear legal right in respondents, it would be insufficient. It was said in State v. Saxon supra, that the same general principles and rules of pleading enforced in civil actions also govern in *quo warranto* proceedings. If the state alleges a legal right in plaintiffs in error, and no forfeiture or loss of this right is shown, the information is insufficient. State v. Haskell, 14 Nev. 209. If either one of the two first incorporations were valid, and embraced territory included in the third one, under which plaintiffs in error claim, the latter is void, unless there can exist two municipal corporations at the same time over the same territory. We have no hesitancy in declaring that the inhabitants of a given territory

cannot, under the general incorporation law in force in this state for the organization of municipal corporations, inaugurate two municipal governments in the same space at the same time. There is no inherent power in the inhabitants of a town to create a municipal government. This can only be done in pursuance of, and in compliance with, legislative enactment on the subject. One valid organization is necessarily exclusive of another. It was said in State v. Town of Winter Park, 25 Fla. 371, 5 South. Rep. 818, that two legal and effective municipal corporations cannot exist at the same time over the same territory, but in this case it was held that the rule did not apply where there was a *de facto* corporation without right, and a legally organized corporation not in active governmental operation till the former was ousted. *Vide* State v. Dunson, 71 Tex. 65, 9 S. W. Rep. 103; Buford v. State, 72 Tex. 182, 10 S. W. Rep. 401; Dill. Mun. Corp. § 184,—as to existence of two corporations at same time. As to the first corporation, it is alleged that the town of Enterprise was incorporated on the 1st day of February, A. D. 1877, as will appear by a copy of the transcript of the proceedings attached as an exhibit to the information. From this transcript of the record before us we are unable to ascertain what are the metes and bounds of the territory proposed to be incorporated. The description given utterly fails to inclose any area, and it is impossible for us to determine from it the territories or boundaries of the alleged corporation. Under our statute, and in the very nature of the existence of a municipal government, it is essential that it should have ascertained and well-defined boundaries. The organization of a municipal government, under our general law for incorporating towns and cities without defined metes, is unauthorized, and would be a nullity. Gray v. Sheldon, 8 Vt. 402; Pierce v. Carpenter, 10 Vt. 480; Dill. Mun. Corp. § 182. In addition to a void description of the territory proposed to be incorporated in said town, the transcript of the proceedings of incorporation recorded in the office of clerk of the circuit court did not have attached to it the signatures of the mayor and aldermen-elect, and attested by the clerk with the corporate seal, as provided by the statute. Other objections are urged to the validity of this incorporation, but it is not necessary to consider them, as we think it was illegal and void on account of uncertainty in the proposed corporate limits.

A second corporation, it is alleged, was formed on March 24, A. D. 1884. A fair and complete transcript of the proceedings was prepared by the clerk of said town, embodying the notice by which the meeting was convened to form said corporation, the number of qualified electors present, the seal, territorial limits of said town, and the names of the officers-elect, to which the mayor and aldermen attached their signatures, attested by the clerk with said seal, was filed with the clerk of the circuit court, and marked "Filed," but before being recorded was lost, and cannot now be found. The transcript of the proceedings alleged to have been delivered for record complies with the statute in every respect, except it does not embody the name or style of the corporation. This transcript, it seems, in some way disappeared from the clerk's office, and was never recorded. We would not be disposed to pronounce the corporate organization void because of the failure to record the transcript, under the circumstances alleged. If the municipal organization was properly had, and a perfect transcript of the proceedings delivered to the proper officer, whose duty it was to record it, we think the incorporators would then have complied with the requirement of the statute, in so far as the creation of the corporation among themselves is concerned. They had the right to re-establish the lost transcript, and have it recorded. It is not necessary for us to say here what would be the effect of a failure on their part to re-establish the lost record in a direct proceeding by the state to vacate the municipal government thus formed. There is, however, a defect in this second alleged incorporation which demands our consideration. The alleged metes and bounds of this incorporation show that a part of the territory proposed to be incorporated is detached and disconnected from the other. Sections 1 and 2 of township 19, and sections 35 and 36 in township 18, range 30, constitute one contiguous body; but section 6 in township 18, range 31, is a body one mile square, and distant five miles. We have, then, a proposed municipal organization, under our general statute for the incorporation of towns and cities, containing, as corporate territory, two separate and detached localities. The query at once presents itself, can this be done? The statute provides that "the male inhabitants of any hamlet, village, or town in this state, not less than twenty in number," with the requisite qualifications, may establish for themselves a municipal government. It is alleged in the information that the town of Enterprise was incorporated. In Railway Co. v. Town of Oconto, 50 Wis. 189, 6 N. W. Rep. 607, it was held that the word "town," as used in the constitution of that state, denotes a civil division composed of contiguous territory, and, under the power given to county boards by statute to set off, organize, vacate, and change the boundaries of towns in their respective counties, such boards cannot make a valid order changing the boundaries of a town, so that it shall consist of two separate and distinct tracts of land. In Smith v. Sherry, 50 Wis. 210, 6 N. W. Rep. 561, it was said: "The idea of a city or village implies an assemblage of inhabitants living in the vicinity of each other, and not separated by any other intervening civil division of the state." We think that the inhabitants of a hamlet, village, or town recognized as a community of persons authorized to form a municipal government under the general act for the incorporation of cities and towns in force in this state include persons living on contiguous territory, and that an attempt to incorporate two

distinct detached tracts of land, as corporate territory under one government, is unauthorized and void. 1 Dill. Mun. Corp. § 27. The idea of a municipal government, with outlying detached municipal provinces, was not contemplated by the statute. The machinery of government provided by the statute is inapplicable to such a state of affairs. From the allegations of the information our conclusion is that the second attempted incorporation of the town of Enterprise was also illegal.

The third incorporation in question, as appears from the allegations of the information and the transcript of the proceedings, a certified copy of the record of which is filed as a part of the information, was in compliance with the statute. The corporate name is "Enterprise," and the metes and bounds of the incorporation are defined, and all the other requisites of the statute substantially met. It appears from the information that officers were elected, qualified, and discharged official duties under the two first incorporations, but, before the formation of the third, it is alleged that the two former in succession were laid aside, and proceedings were instituted to incorporate again. It is a well-established rule that no collateral attack can be made upon the existence of a corporation. Such bodies derive their being from the sovereign will of the people, and, so long as the state does not question their existence, it cannot be controverted in a collateral way on account of irregularities and defects in their organization. President, etc., v. Thompson, 20 Ill. 197; Hamilton v. President, etc., 24 Ill. 22; 1 Dill. Mun. Corp. § 43a.

When the last incorporation was formed there was no municipal government in existence under either one of the former attempts at incorporation. Whatever might be the effect of an existing municipal government, under a void incorporation, as to the right of the inhabitants therein to organize a new in opposition to it, we think that, after an abandonment of such organization, the former proceedings would not preclude them from proceeding to organize a municipal government in accordance with the provisions of the statute. The allegation in the information that officers were elected and qualified under the two first incorporations, standing alone, would be no objection against the third incorporation, as it is shown that the organizations under the former were void, and the governments under them abandoned before proceedings under the latter. The theory here is that the third incorporation is illegal, and the proceedings instituted are to test the right of plaintiffs in error and others to maintain a corporate government. Our investigation so far has conducted us to the conclusion that, as shown by the information, the formation of the third corporation on May 14, A. D. 1885, is legal; and, unless there is something in the acts of the legislature in reference to the two first that will change the result, the demurrer was improperly overruled.

The legislature passed a special act on the 22d day of February, A. D. 1885, about one month before the third incorporation was undertaken, providing "that all the acts done and performed in the organization and incorporation of the town of Enterprise, in the county of Volusia, are declared to be legal and valid in law and equity, and to be considered valid and binding by the laws of the state of Florida." Chapter 3634, Laws Fla. 1885. The first attempted incorporation, in 1877, was void for uncertainty in the territorial limits and metes and bounds of the incorporation. The second one, in 1884, was void because an attempt was made to incorporate into one municipal government two distinct and detached tracts of land, and which was unauthorized by the general law for the incorporation of cities and towns. The enactment of this statute was before the adoption of the constitution of 1885. The constitution of 1868 (sections 21, 22, art. 4) provides that the legislature shall establish a uniform system of county, township, and municipal government, and shall provide, by general law, for incorporating such municipal, educational, agricultural, mechanical, mining, and other useful companies or associations as may be deemed necessary. Section 17 of same article prohibits special or local laws in certain enumerated cases, which it is not necessary to mention. Under the provisions of the constitution of 1868, the legislature could not, by special act, create a municipal corporation, as the clear mandate of that instrument was that provision should be made by general law for incorporating such bodies. The attempted incorporation of the town of Enterprise on the 24th day of March, A. D. 1884, to which the special act was no doubt designed to apply, was not in compliance with the general law on that subject, in this: that it sought to incorporate two detached territories under one government. This could not be done under the general law. Was it competent for the legislature to validate by special act what had been attempted to be done? We are duly sensible of the rule that an act of the legislature, passed in due form, is not to be held invalid by reason of its being supposed to be in contravention of the provisions of the constitution, in a merely doubtful case, and in such case the doubt should turn the scale in favor of the validity of the enactment. We recognize the well-settled rule that it is only in cases where the act of the legislature is clearly repugnant to the constitution that it will be so declared. In Stange v. City of Dubuque, 62 Iowa, 303, 17 N. W. Rep. 518, a special act of the legislature, attempting to validate a void ordinance of the city of Dubuque granting a street-railway company the right of way for its railroad on certain streets of the city, was pronounced void under a constitution prohibiting the legislature from passing local or special laws for the incorporation of cities and towns. It was said: "As the legislature could not, by special act, have authorized the city of Dubuque to pass the ordinance in question, it follows that it cannot, after the passage of the ordinance, legalize it by

special act. The legislature cannot do indirectly what it is inhibited from doing directly." The following authorities sustain this position: Ex parte Pritz, 9 Iowa, 30; Davis v. Woolnough, Id. 104; Town of McGregor v. Baylies, 19 Iowa, 43; Smith v. Sherry, supra. The twenty-first section of article 4 of the constitution, which provides that "the legislature shall establish a uniform system of municipal government," was construed in the case of McConihe v. State, 17 Fla. 238. It was said: "There is little difficulty in determining the signification of the word 'system,' in this connection. Its general signification is 'plan,' 'arrangement,' 'method,' and, when used in reference to municipal government, it means, simply, rules and regulations for the organization and government of municipal corporations." This being the case, it becomes perfectly clear that the special act in question is in conflict with the constitutional requirement of uniformity in the organization of municipal governments, whatever might be its effect in curing mere defects in the procedure in the organization of a municipal government invested with no new or different powers than those organized under the general law. 'Uniformity' indicates 'consistency,' 'resemblance,' 'sameness,' a 'conformity' to one pattern." For a full discussion of the special laws prohibited, and the uniformity of the operation of the general legislation under the sections of the constitution in question, see, in addition to McConihe v. State, supra, State v. Stark, 18 Fla. 255; Lake v. State, Id. 501; Ex parte Wells, 21 Fla. 280. If municipal corporations can be formed in violation of the general incorporation act on this subject, and then legalized by special act of the legislature, the uniformity of municipal organization demanded by the constitution can be dispensed with by special legislation. No such result as this, we think, can be reconciled with the constitution. We conclude that the special act of 1885 cannot have the effect to make valid what has been done in the attempted organizations of the town of Enterprise. The act cannot validate what was done under either of the first two efforts at incorporation.

In 1887 we find a general act (chapter 3748, Laws Fla.) providing for the legalization of the charters of incorporated cities and towns. This act went into effect after the third incorporation was had. A perusal of this act will show that it has no application to the two first attempted incorporations. There was no municipal government in existence or operation under either at the time the last act took effect. It applies to cities and towns which then, and for 10 years then last past had, exercised municipal government, and which, on account of certain specified defects in organization, had the legality of their incorporation brought in question. The first two incorporations had been abandoned, and there were no municipal governments under them, and hence this legislation had no application to them. The information shows that the incorporation of May 14, A. D. 1885, was in compliance with the statute, and, this being so, we think the demurrer was improperly overruled.

After the demurrer was overruled, plaintiffs in error filed an answer, and, on motion of the state, a judgment vacating all former incorporations of the town of Enterprise, or Enterprise, was rendered, as well as a judgment of ouster against plaintiffs in error. The motion seems to have been considered as a demurrer to the answer. Great particularity is required in an answer in such proceedings, and a complete legal right must be shown, (State v. Saxon, supra;) but, on demurrer, a bad plea is a good answer to a defective declaration. The infirmity in the record here is in the information filed by the state. From the state's showing, there is no good cause why plaintiffs in error, and others residing in the corporate limits of Enterprise, should not inaugurate and maintain the municipal corporation in question. The statute gives them this right.

The judgment of the circuit court is reversed, with directions that the demurrer to the information be sustained.

(29 Fla. 302)

STATE v. MITCHELL.

(*Supreme Court of Florida.* April 2, 1892.)

WRIT OF ERROR IN CRIMINAL CASES—RIGHT TO—EFFECT—SUPERSEDEAS—JURISDICTION OF APPELLATE COURT.

1. A writ of error in a criminal cause is not a writ of right, and does not issue as a matter of course on the application of the party convicted, but only upon the judicial allowance by a court, justice, or judge having authority to allow the same.

2. In allowing writs of error in criminal causes, judicial discretion is always exercised liberally in favor of the defendant.

3. The judge of the criminal court of record of Duval county has power to allow a writ of error in a criminal cause in which the judgment of that court is reviewable by the supreme court, and the clerk may, upon the allowance of the writ, issue both that writ and the writ of *scire facias ad audiendum errores*. These powers are not exclusive of the power of the supreme court, or a justice thereof, to allow the writ of error, nor of that of the clerk of the latter court to issue these writs.

4. A writ of error is a new action, and not a mere continuation of the former suit.

5. An order allowing a writ of error does not compel the complaining convict to prosecute a suit in error; it merely enables him to do it, and, if he wishes to avail himself of this permission, he may do so by applying to either the clerk of the appellate court or of the court which rendered the judgment for the writ, and the clerk should issue it.

6. An order allowing a writ of error is a judicial permission to institute a suit in error to review the judgment complained of; it is not the writ, and, until the writ is actually issued, (if not, it may be both issued and lodged in the court whose judgment is to be reviewed,) there is no suit in error, and the appellate court has no jurisdiction of the cause. The writ is the process by which the record or cause is removed to the appellate court.

7. Though a compliance with the provisions of section 5, p. 455, McClel. Dig., as to payment of costs and entering into recognizance with sureties, operates of itself, without any order declaring the effect of such compliance, to make the writ of error, when issued, stay the further execution of the sentence of the court, as also does a compliance with the several provisions of section 7, p. 456, Id., still this superseding

effect does not, even in a bailable case, authorize the discharge of the defendant if he be in custody; but by the express provision of section 5, p. 455, Id., there must be an order, by the court or judge allowing the writ, for his discharge; which order should always be made as a matter of course, in bailable cases, where all the *supersedeas* provisions necessary to such discharge are complied with.

8. A compliance with the *supersedeas* provisions of the statute will, of itself, give a writ of error in criminal cases the effect of superseding the further execution of the sentence; and no order that a compliance with those provisions shall have this superseding effect is necessary, and the officers of the law must take notice of and act in obedience to the effect of such mere compliance. The practice which obtains, however, of declaring, in the order allowing the writ, that a compliance with the *supersedeas* provisions will have the effect to make the writ operate as a *supersedeas*, though adding nothing to the effect of such compliance, is not harmful, but may aid the ministerial officers of the courts.

9. An order allowing a writ of error in a criminal cause, and a compliance with the provisions of the statute intended to make the writ operate as a *supersedeas*, do not suspend or supersede the execution of the sentence, where no writ is actually issued; nor, where no writ is issued, do such an order and such compliance, and a further order that the compliance shall make the writ operate as a *supersedeas*. There must be, at least, a writ actually issued, (or, it may be, issued and served,) after it is allowed; and it is the writ or suit in error that the statute intends shall operate as a *supersedeas* to the judgment, upon compliance with the *supersedeas* provisions of the statute.

10. Service of a writ of error is made by lodging the writ in the court which rendered the judgment sought to be reviewed.

11. Where an order allowing a writ of error from the supreme court to a criminal court of record is made by the judge of the latter court, and such order directs that the writ shall operate as a *supersedeas*, and it appears that the party convicted has made the oath and furnished proofs which, under section 7, p. 456, McClel. Dig., cause a writ of error to operate as a *supersedeas* in a bailable case if he remains in custody, and at the term of the former court to which such writ, if issued, should have been made returnable, the state moves to dismiss the writ, but no writ of error has in fact issued, the motion must be denied, and for the reason that there is no writ of or suit in error to dismiss, and the court has no jurisdiction of any such suit or writ.

12. Where a writ of error is allowed, but not issued, the warrant for the execution of the sentence should be issued and executed.

(*Syllabus by the Court.*)

Appeal from criminal court of record, Duval county.

Prosecution against George N. Mitchell for assault with intent to murder. There was a judgment on conviction, and the order allowing defendant's writ of error recited that the writ should operate as a *supersedeas*. On motion to dismiss the writ. Motion denied.

William R. Lamar, Atty. Gen., for the motion.

RANEY, C. J. The attorney general moves to docket and dismiss this case. It appears that on May 4, 1891, in the criminal court of record of Duval county, Mitchell was found guilty of an assault with intent to murder one Hubbard. Motions in arrest of judgment and for a new trial having been made and overruled, Mitchell was sentenced on the same day to imprisonment in the state-prison at hard labor for the period of two years. Sixty days were allowed for preparing a bill of exceptions. On the 8th day of the following June the following order was made in the cause by that court: "Upon application made in open court for writ of error and *supersedeas* in the above cause, it is considered and ordered by the court that a writ of error do issue, and that said writ of error be a *supersedeas* upon the affidavit of insolvency of defendant on file; and it appearing to the satisfaction of the court that the allegations contained therein are true." There is, in the informal transcript of the record filed here by the attorney general in support of the motion, an affidavit of Mitchell to the effect that he has no property or other means of payment, either in his possession or under his control, for the payment of costs in the cause, and has not divested himself of his property for the purpose of receiving benefit from this oath, and that he is utterly unable to enter into the recognizance required. There is also an affidavit of James H. Hamilton, S. B. Chapman, and Moses Taylor to the same effect.

The ground of the motion to dismiss is that no other or further step has been taken by Mitchell to prosecute his writ of error and give effect to the same. Mitchell is still in the Duval county jail.

The transcript was filed here on the 23d day of March of the present year, (1892,) of which day the motion as amended is made, though in fact the attorney general had, a few days previously, moved, on a certificate of the clerk of the criminal court, that no writ of error had been issued, and a certified copy of the above order granting the writ of error, and directing that it should operate as a *supersedeas*.

The controlling question is whether or not the actual issue of the writ is essential to our jurisdiction.

The criminal court of record of Duval county was established by an act of June 8, 1887, (Acts 1887, p. 111,) and by the twenty-third section of a statute approved the same day, and entitled "An act prescribing the jurisdiction and powers and regulating the proceedings in the criminal court of record," (chapter 3731, pp. 100–103, Acts 1887,) it is provided that the same rules, practice, and procedure that obtain in appeals and writs of error from the circuit to the supreme court shall obtain in appeals from the criminal courts of record to the circuit court and the supreme court. Though we do not admit that, under our present statutory system, such a thing as an "appeal," as distinguished from a writ of error, obtains for administering our appellate jurisdiction in criminal causes, still our opinion is that the effect of this statute is to authorize writs of error as the proper mode of administering our appellate jurisdiction over the criminal courts of record. Such has been the practical construction of the act for some years, and we think it correct. Wooten v. State, 24 Fla. 335, 341, 5 South. Rep. 39; Houston v. State, 24 Fla. 356, 5 South. Rep. 48. The judge had the power to allow the writ, and the clerk had authority to issue it and a *scire facias ad audi-*

endum errores; their powers coinciding with those of the judge and clerks of the circuit court in cases of convictions in that court. McClel. Dig. p. 455, § 4; Id. p. 456, § 9; Id. p. 843, § 2; Williams v. State, 20 Fla. 391. These powers are not exclusive of the power of the supreme court or of a justice thereof to allow the writ of error, nor of that of the clerk of the latter court to issue these writs.

A writ of error is a new action, and not a continuation of the former suit, the alleged errors in which it is sought to have reviewed and corrected. 2 Tidd, Pr. 1141; Bank v. Jenkins, 104 Ill. 143; Ripley v. Morris, 2 Gilman, 381, 6 Amer. & Eng. Enc. Law, p. 812.

In Mussina v. Cavazos, 6 Wall. 355, where it was held that if the writ of error is served by depositing it with the clerk of the court rendering the judgment, and he makes return by sending to the appellate court a transcript in due form, the latter court has jurisdiction to decide the case, although the original writ may be lost or destroyed before it reaches the appellate court, it is said by Judge MILLER, speaking for the supreme court of the United States: "We have repeatedly held that the writ of error in cases at law is essential to the exercise of the appellate jurisdiction of this court;" and in Crippen v. Livingston, 12 Fla. 638, our own court observed that "the record of the inferior court is not transferred, its proceedings are not affected, and, indeed, but little follows the simple issuing of the writ;" and the settled doctrine of the former court is that a writ of error is not "brought," within the meaning of the statute limiting the period for bringing such writs, until the writ is filed in the court which rendered the judgment, (Brooks v. Norris, 11 How. 204; Cummings v. Jones, 104 U. S. 419; Scarborough v. Pargoud, 108 U. S. 567, 2 Sup. Ct. Rep. 877; Polleys v. Improvement Co., 113 U. S. 81, 5 Sup. Ct. Rep. 369;) and in Crippen v. Livingston, where our own statute, providing that no judgment, in any cause, shall be reversed or avoided for any error or defect therein, unless error be "commenced, or brought and prosecuted, within two years after such judgment, signed and entered of record," was under consideration, it was held that a writ of error was not commenced, or brought and prosecuted, within the meaning of the act, until the writ is filed in the court which rendered the judgment. See, also, Sammis v. Wightman, 25 Fla. 547, 552, 6 South. Rep. 173. These cases also hold that, when the writ is not so filed, it is immaterial that it may have been issued or tested before the expiration of the statutory period of limitation.

Unless there is something in the statutes governing writs of error in criminal cases which changes the rule, we cannot see that the issue (if not, it may be the issue and service) of a writ of error is not essential to our jurisdiction, or that, at least, until a writ has been issued there is no suit in or writ of error to dismiss.

Writs of error in criminal cases are not writs of right in this state. They were such in capital cases, under the third section of the act of January 11, 1848, (page 455, § 3, McClel. Dig.;) but this was changed by the act of February 12, 1861, (page 456, § 11, McClel. Dig.,) which puts capital cases upon the same footing in this respect as other criminal cases. Before a writ of error can issue in any criminal case, there must be an inspection of the record by a court, or a justice or judge, given by the statute the power to act in the premises, and such court, or justice or judge, must be of the opinion that there "is just cause for allowing a writ of error," and an order allowing it must be made, and thereupon the writ of error is to issue.

The order for a writ is, however, not the writ. It is, in so far as the convicted person is concerned, a judicial permission to institute a suit in error to review the judgment of the inferior court. Whereas, in civil cases, no such judicial sanction of the merit of a proposed review of a judgment or decree is required, and a writ of error may be brought as a matter of right, and without conditions, by a losing defendant, and by a losing plaintiff, upon the simple conditions of paying the costs which have accrued in the cause, and giving bond, with surety, for those which may accrue in the prosecution of the writ of error, the law-makers have yet seen fit to prevent a test before appellate courts of the correctness of judgments in criminal causes, unless and until the sanction of a judicial allowance of such a suit in error is obtained. McIver v. Marshall, 24 Fla. 42, 4 South. Rep. 563. An order of this character does not compel the complaining convict to prosecute the suit,—it merely authorizes or enables him to do so; and, if he wishes to avail himself of this permission, he may do so by applying to the clerk, either of the supreme court or of the court which rendered the judgment, for the writ, and the clerk should issue it. Until the writ is issued there is no suit in error under the statute. McClel. Dig. p. 455, § 4.

There are in the statute certain provisions as to superseding the judgment complained of.

In the first place, the statute of 1848, as applicable to convictions in the circuit court, and such statute as modified by the above-mentioned criminal court of record act, as applicable to convictions in the criminal courts of record controlled by it, provides that the writ of error shall not operate as a *supersedeas* to the execution of the judgment, sentence, or order, except upon the payment by the plaintiff in error of all costs which have accrued, and by securing, by recognizance to be entered into with one or more sureties, before the clerk of the court rendering the judgment, in a sum sufficient to secure the payment of such judgment, fine, and future costs as may be adjudged and affirmed in the supreme court, and is also conditioned that the party shall be personally forthcoming to answer and abide the final order, sentence, or judgment that may be passed in the premises by the supreme court; and, in case the cause is remanded to the circuit court, then that the plaintiff in error shall personally be and appear at the next term of the court in which he

was convicted, in the county in which the cause was originally tried, thereafter to be held, to answer in the premises, and not to depart from the court without leave thereof. It is, however, expressly provided that, where the judgment is one of capital punishment, the person of the party convicted shall be the only security required for his forthcoming to answer as aforesaid. Page 455, § 5, Id. It is also further provided that, if the party applying for such writ of error shall be in custody under sentence of conviction, the allowance of the writ and the obtaining of such *supersedeas* shall not discharge such party from custody, except by order of the court, or of the justice, allowing the writ of error, and that such an order shall be made only in cases bailable according to the course of the common law or by the statutes of this state. Pages 455, 456, § 6, Id.

It is plain from these provisions that they contemplate, where the case is not capital, a release of the convicted party from custody; and yet, though the payment of costs and the taking of the recognizance by the clerk give the writ of error the effect to suspend or supersede the execution of the sentence, they do not of themselves authorize the release of the party, if he be in custody, by the officer having him in custody. On the contrary, an express order to that effect by the court or judge allowing the writ is essential by the very terms of the statute.

The statute does not, however, contemplate a suspension of the execution of the judgment only in cases where costs can be paid and recognizance given as required above, but it also provides that when the defendant shall be utterly unable to pay the costs, in whole or in part, and shall make oath before the court or the clerk thereof, and also establish, by credible testimony, that he has no property or other means of payment either in his possession or under his control, and has not divested himself of his property for the purpose of receiving the benefit of his oath, and is also utterly unable to enter into the recognizance required to secure the payment of such judgment, fine, and costs, the writ of error, such oath being made and evidence produced, shall be a *supersedeas* without such payment, if the defendant remain in custody; or, in cases not capital, upon his entering into recognizance with one or more sureties, conditioned that he shall be personally forthcoming to answer the judgment of the supreme court, and for his appearance before the circuit court. Page 456, § 7, Id.

To secure discharge from custody, in bailable cases, where the plaintiff in error is utterly unable to pay costs, in whole or in part, and makes oath and furnishes the proof contemplated by the preceding or seventh section, as to his having no property or other means of payment, and as to his not having divested himself of his property, and as to his being unable to enter into recognizance to secure the payment of the judgment, fine, and future costs, the plaintiff in error must not only enter into a recognizance, with one or more sureties, conditioned that he shall be personally forthcoming to answer and abide the final order, sentence, or judgment that may be passed in the premises by the supreme or other appellate, as the case may be, court, and, in case the cause is remanded to the circuit or other trial court, as the case may be, then that he shall personally be and appear at the next term of the court in which he was convicted, in the county in which the cause was originally tried, thereafter to be held to answer in the premises, and not to depart from the court without leave thereof, but there must be also an express order for his discharge, as provided by the fifth section of the act supra. Of course he must remain in custody, even in bailable cases, notwithstanding the inability contemplated by the seventh section and full proof thereof, unless he gives the recognizance for being forthcoming required thereby, and obtains the order for his release.

This order should never be refused in any bailable case where the provisions precedent thereto are complied with.

It is clear, we think, that the purpose of this statute of 1848, as amended in 1861, is, in the *first* place, to make the right to a writ or suit in error in criminal causes dependent on judicial discretion,—a discretion always exercised liberally; and, *second*, to prescribe the conditions under which the writ or suit shall operate as a *supersedeas* to the enforcement of the judgment; and, *third*, to expressly limit what might otherwise be understood to be an effect of a *supersedeas*, *proprio vigore* in bailable cases, by requiring an order of discharge from custody when the applicant for the writ is in custody. There is, however, nothing in the statute that dispenses with the writ as essential to the exercise of our appellate jurisdiction. The writ is the proceeding by which the record or cause is removed to the appellate court. Brooks v. Norris, supra; Kitchen v. Randolph, 93 U. S. 87. When there has never been a writ issued, to say nothing of the necessity for its service, there is no suit in error pending. Carroll v. Dorsey, 20 How. 204; Blitz v. Brown, 7 Wall. 693; Washington Co. v. Durant, Id. 694; Ballance v. Forsyth, 21 How. 389; Slaughter-House Cases, 10 Wall. 273. Writs of error from the supreme court of the United States to state courts do not issue as matter of right, but only upon allowance by the proper judge of the state court, or by a justice of the United States supreme court. Twitchwell v. Com., 7 Wall. 321; Gleason v. Florida, 9 Wall. 779. In Bondurant v. Watson, 103 U. S. 278, a case of a writ of error to the supreme court of Louisiana, where a paper intended as a writ of error was issued and bore teste in the name of the chief justice of that court, and was signed by its clerk and sealed with its seal, instead of being in the name of the president of the United States, and bearing teste in the name of the chief justice of the supreme court of the United States, the writ also not complying with section 1004 of the Revised Statutes of the United States, providing that such writs may be issued by the clerks of the circuit courts under the seals thereof, as well as by the clerk of

the supreme court, it was said, in effect, that there was nothing even purporting to be a proper writ, and therefore nothing to amend by; and the suit was dismissed, the court saying: "The supreme court of the state has directed that its record be certified here for examination and review, but no writ to that effect, either in form or substance, has ever issued from this court. As such a writ is necessary to our jurisdiction, the suit is dismissed." In Ex parte Ralston, 119 U. S. 613, 7 Sup. Ct. Rep. 317, a writ of error to the supreme court of Louisiana had been allowed by the chief justice of that court, and, before any writ actually issued, an order that the writ should operate as a *supersedeas* was made by a justice of the United States supreme court. The latter court refused an application of Ralston for a *mandamus* to compel the clerk of the state court to transmit to the former court a transcript of the record of the cause, and also refused a motion made by the other side to vacate the *supersedeas* order, and held that, as no writ of error had issued, they had no jurisdiction of the suit, and no authority over the clerk in the matter about which the *mandamus* was asked, and that, for the same reason, the *supersedeas* order was of no legal effect; that a *supersedeas* could not be allowed except as an incident to an appeal taken or a writ of error actually sued out.

It is to be observed that the statute does not require an order that, on compliance with the *supersedeas* provisions, the writ of error shall operate as a *supersedeas*. When the writ is allowed and issued, a compliance with the mere *supersedeas* provisions, though not authorizing a discharge of the prisoner, has, of itself, the effect of arresting or superseding otherwise the execution of the sentence. It gives the writ this effect; and this court in 1857, in a capital case, which had been brought here and continued for the term, refused to make an order that the writ should operate as a *supersedeas*, and held that such was the legal effect of the writ, without any order, upon compliance with the *supersedeas* provisions, and that it was to be obeyed by the ministerial officers of the law. It has, however, become the practice, notwithstanding the above decision, for the judge, justice, or court allowing the writ to state in the order that the writ of error shall operate as a *supersedeas*, upon the requirements of the statute being complied with, and we see no harm in the practice; although it does not add anything to the effect of such compliance, it may aid the ministerial officers of the courts.

Had the writ of error been promptly issued in this case, we do not say the affidavits mentioned in the outset of this opinion would not have attached to it, and given it the effect of a *supersedeas*, notwithstanding they were filed before its actual issue. We are inclined to think they would, but, as no such writ has ever been issued, they are of no effect, and there has never been any suspension of the sentence. It should have been executed. If no application was made to the clerk for the issue of the writ, he should have delivered to the sheriff the warrant for executing the sentence, in compliance with page 450, § 35, McClel. Dig., and if it was delivered the sheriff should have executed it. There has been an omission of official duty, and one of a character which has, within the observation of each of the present members of the court, had the effect to embarrass the administration of criminal law to such an extent as to render these observations necessary; and, if such omissions of duty are to recur, similar embarrassments must follow until the law provides a remedy or the evil is otherwise corrected.

The motion must be denied, and it will be ordered accordingly.

(95 Ala. 241)

TURNER *et al.* v. BERNHEIMER.

(*Supreme Court of Alabama.* April 5, 1892.)

HOMESTEAD—EFFECT OF DEED OF HUSBAND TO WIFE.

Where a husband alone conveyed land constituting a homestead to his wife, such conveyance is not void as an alienation of the homestead, within the meaning of Const. art. 10, § 2, and Code, § 2507, but, under Act 1887, (married woman's law,) enabling the husband to convey land to his wife, passed the legal title, subject to all pre-existing homestead rights.

Appeal from circuit court, Mobile county, WILLIAM E. CLARKE, Judge.

Ejectment by Charles Bernheimer against Lewis W. Turner and another. Plaintiff had judgment, and defendants appeal. Reversed.

This was a statutory real action in the nature of ejectment, brought by the appellee against the appellants, and sought to recover certain described real estate. The defendants pleaded the general issue, and issue was joined thereon. The uncontroverted evidence showed that the property so sued for was levied upon on June 23, 1890, under an execution issued on a judgment rendered by the city court of Mobile on April 23, 1890; that said judgment was recovered by the firm of Bernheimer, Bauer & Co., on an account due from the defendant Lewis W. Turner for goods purchased by him in September, 1889; that said property was sold by the sheriff under said execution on August 25, 1890, and the plaintiff in this suit, Charles Bernheimer, who was a member of the firm of Bernheimer, Bauer & Co., became the purchaser at said sale. The defendants offered to introduce in evidence a deed from the defendant Lewis W. Turner to his co-defendant, Sarah A. Turner, who was his wife, executed on December 10, 1889, by which he conveyed the property sued for in this action on the recited consideration of one dollar. The defendants also offered to prove that the said Sarah A. Turner was put in possession of the property; that the property described in the complaint and conveyed by the deed was the homestead of the defendant Lewis W. Turner, and that the same did not exceed in value two thousand dollars; and that all of said property was owned, occupied, and used as a homestead by the defendant Lewis W. Turner at the time he conveyed it to his wife. Upon separate

objection on the part of the plaintiff to the introduction of each portion of this testimony the court sustained the objection, and refused to allow the testimony to be introduced. The defendants separately excepted to the sustaining of each one of the objections to the introduction of each portion of the testimony. At the written request of the plaintiff the court gave the general affirmative charge in his behalf, to the giving of which charge the defendants duly excepted. Defendants assign as error the rulings of the lower court upon the evidence, and the giving of the general affirmative charge for the plaintiff.

B. B. Boone, for appellants. *Pillans, Torrey & Hanaw*, for appellee.

McCLELLAN, J. The fate of this appeal depends entirely upon whether the husband can convey lands which constitute the family homestead to the wife, the deed to that end being executed by himself alone, but delivered to and accepted by her. Both the organic and statute law of Alabama declare that no alienation of the homestead shall be valid without the voluntary signature and assent of the wife to the instrument intended to have that effect. The "married woman's law" of 1887 removed the legal disabilities theretofore existing between husband and wife to the extent, among others, of enabling the husband generally to sell and convey lands to the wife; but it has never been supposed, and is not, we apprehend, the law, that the statute changed in any way pre-existing requirements in respect of the alienation of the homestead further than this: that if, before its passage, the husband might have conveyed an equitable title in the homestead to the wife, he may now convey the legal title. So that the question is not really at all affected by the act of 1887, and it comes back to this: Is such a conveyance an alienation of the homestead within the meaning of section 2, art. 10, of the constitution, and section 2507 of the Code? If it is, it cannot be effective now any more than before the passage of the act of 1887; if it is not, it would have been effectual in equity before that act as it would be now at law. And if the husband may convey land constituting the homestead to the wife, his deed for that purpose cannot be joined in by the wife; that is, her joinder therein would add nothing to its effect, since she cannot be both grantor and grantee in the same instrument. Trawick v. Davis, 85 Ala. 342, 5 South. Rep. 83. It is manifest, of course, that the requirement of the wife's voluntary signature and assent to any alienation of the homestead is for the protection of the wife, to secure to her a home of which she cannot be deprived except through her own free act. As is said by Judge THOMPSON: "The policy of those statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife, and to enable her to protect the family, in the possession and enjoyment of a homestead, after one has been acquired by the husband." It is not perceived how this policy of the law could be in any degree thwarted by upholding the husband's conveyance of the homestead land to the wife. It is still her homestead, and still incapable of passing from her and the family without her voluntary signature and assent to the instrument operating the alienation. She and the family are as fully protected before as after such conveyance, and no violence is done to any purpose of the law respecting her and her children by according validity and giving force to such a conveyance. Not only so, but the premises are still as much the homestead of the husband. He has the same right of occupancy and enjoyment as before the execution of the conveyance, and this right cannot be taken away from him; the wife cannot convey the land, without his voluntary assent and signature. And this is true whether he be regarded as still having a special property in the land, by reason of its homestead character, or whether it be considered that the land belongs absolutely to the wife, since, even in the latter case, there could be no alienation of it by her without his assent and concurrence, he being *sui juris*, and a resident of the state, "manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land." Code, § 2348. It would seem, then, in all reason, that a conveyance of homestead premises by the husband to the wife, while having effect as an alienation of the land in the sense of passing the legal title to her, is yet not an alienation of the homestead, since that does not thereby pass either from the husband, the wife, or the family, but is still in every essential quality and attribute with respect to possession, enjoyment, and all the rights necessary to its protection as exempted property, the homestead alike of the husband, the wife, and their children. And so it is said further by the eminent author quoted above, that laws requiring the voluntary assent and signature of the wife to an alienation of the homestead "are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance." Thomp. Homest. & Ex. § 473. And the adjudged cases fully support not only this text, but the conclusion we have arrived at, that such a conveyance is not an alienation of the homestead within the meaning of the constitution and statutes of Alabama, but is valid for the purpose of passing the legal title of the land into the wife, subject to all pre-existing homestead rights, without the voluntary signature and assent of the wife. Harsh v. Griffin, 72 Iowa, 608, 34 N. W. Rep. 441; Burkett v. Burkett, 78 Cal. 310, 20 Pac. Rep. 715; Riehl v. Bingenheimer, 28 Wis. 24; Baines v. Baker, 60 Tex. 140; Ruohs v. Hooke, 3 Lea, 302; Spoon v. Van Fossen, 53 Iowa, 494, 5 N. W. Rep. 624. The rulings of the trial court to which exceptions were reserved were made, are attempted to be sustained here, and could be sustained, only on the theory of the invalidity of Turner's deed to his wife. That theory being untenable, each of those rulings, it

follows, was erroneous. The judgment of the circuit court is therefore reversed, and the cause remanded.

(95 Ala. 176)

STATE v. HARRUB.

SAME v. MELVIN.

(*Supreme Court of Alabama.* April 5, 1892.)

CONSTITUTIONAL LAW—REGULATION OF COMMERCE—TITLE OF ACT.

1. Act Feb. 18, 1891, entitled "An act to regulate the planting and taking of oysters in the waters of this state," which makes it unlawful for any person not a resident of the state to take or transport oysters from, in, or through any of the waters of the state, or for any person, whether a citizen of this state or of any other state or country, "to ship beyond the limits of this state any oysters taken from the waters of this state while the same are in the shells," etc., is not in contravention of Const. U. S. art. 1, § 8, subd. 3, as a regulation of interstate commerce.

2. Neither is the act subject to objections as containing subjects not clearly expressed in the title.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

John C. Harrub and George Melvin were arrested for a violation of Act Feb. 18, 1891, to regulate the planting and taking of oysters, and, they being discharged on *habeas corpus*, the state appeals. Reversed.

This is an appeal by the city of Mobile from a judgment rendered by the judge of the city court of Mobile discharging the defendants upon a writ of *habeas corpus*. The ground upon which the court based its judgment is that so much of the "oyster law" as the defendants were charged with violating is unconstitutional. Harrub is a citizen of Alabama and Melvin is a citizen of Mississippi. The warrants of arrest and all the facts in the two cases are identical. The warrants charged that the defendant bought oysters that had been caught by a citizen of the state of Alabama, from the reefs of Alabama, and that he transported them in the shell into the state of Mississippi.

Wm. L. Martin, Atty. Gen., and *Gaylord B. Clark*, for the State. *Gregory L. & H. T. Smith* and *M. D. Wickersham*, for appellees.

COLEMAN, J. The defendants were arrested for a violation of the act of February 18, 1891, pp. 1072-1084, entitled "An act to regulate the planting and taking of oysters in the waters of this state." Upon *habeas corpus* proceedings the defendants were discharged, the court holding that the act of the legislature was unconstitutional and void as contravening subdivision 3, § 8, art. 1, of the constitution of the United States. Subdivision 3, § 8, art. 1, provides that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Sections 1 and 2 of the act of the legislature under consideration read as follows: "Section 1. That the title to and property in all oysters in the waters of this state, whether upon public reefs or in so-called 'private beds,' or whether the same be transplanted by riparian proprietors under authority of law or otherwise, or whether the same be a growth from natural deposit, is and shall remain in the state until such title shall be divested in manner and form as herein authorized or provided. Sec. 2. That a license is hereby given to resident citizens of the state of Alabama to catch and take oysters, the property of the state, from the public reefs or from private beds planted and owned by them, or in which they have secured an interest or permission from the proprietor thereof to take such oysters, upon the terms and conditions and subject to the restrictions and regulations thereinafter set forth and enacted, but no person or persons not a resident of the state of Alabama is or shall be authorized to take or transport any such oysters from, in, or through any of the waters of the state of Alabama; and it is unlawful for any person, whether a citizen of the state of Alabama or of any other state or country, to ship beyond the limits of this state any oysters taken from the waters of this state while the same are in the shells: provided, that between the middle of December and the middle of January oysters in the shells may be shipped in barrels by railroad to other states: and provided, further, that such oysters in the shell may be shipped *bona fide* from any point in the state of Alabama to any other point in said state by the lines of transportation which lie partly within and partly without the state of Alabama: and provided, further, that any resident citizen of the state of Alabama who shall lawfully take any oysters from the tide-waters of this state, as in this act authorized, shall have a qualified interest or property in the oysters so lawfully taken while in the shell, which he may sell and transfer to any other person within the limits of the state of Alabama; and after said oysters have been shelled within the state of Alabama such lawful taker, or his assigns, as the case may be, shall be vested with all of the state's property and title in and to said oysters, and shall have the right to sell such oysters and shells, or ship the same beyond the limits of this state, without restriction or reservation: provided, further, that in case of any infringement of the foregoing qualified interest in said taker of oysters, said taker may, in his own name, maintain an action against the wrong-doer, either in case or trover, as may be proper; and in case of larceny or other public offense concerning such oysters while in the hands of a lawful taker, the ownership thereof shall be averred in such taker or possessor when by law it shall be necessary to aver ownership."

We deem it unnecessary to set out the whole act. The principles of law applicable to the facts of the cases before us do not call for a discussion or adjudication of that clause of section 2 which relates to the shipment of oysters in the barrel by railroad from the middle of December to the middle of January, or that clause which permits transportation by lines which lie partly within and partly without the state. Jones v. Black, 48 Ala. 540. The agreed facts are that the oysters were taken and shipped in the shell be-

yond the limits of the state by the defendants in the month of September in sailing-vessels; that Harrub was a citizen of Alabama and Melvin a citizen of the state of Mississippi; and that both were guilty of a violation of the statute. The question involved is as to the constitutionality of the act.

The first question we will consider is as to the extent of the ownership and control of the state of Alabama in and over the oyster-beds and oysters within her territorial limits. In the case of Martin v. Lessee of Waddell, 16 Pet. 411, Chief Justice TANEY declares as a general principle that "when the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." In the case of Smith v. Maryland, 18 How. 71, the question was as to the constitutionality of an act of the state of Maryland, which was an "act to prevent the destruction of oysters in the waters of this state." The court laid down this principle: "But this soil is held by the state not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether. This power results from the ownership of the soil from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held." In the case of McCready v. Virginia, 94 U. S. 391, the foregoing principles were reaffirmed, and the court went further, and declared: "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which consequently has the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. * * * It is in fact a property right, and not a mere privilege or immunity of citizenship. * * * It does not belong of right to the citizens of all free governments, but only to the citizens of Virginia. They, and they alone, owned the property to be used, and they alone had the power to dispose of it as they saw fit. * * * The state may, by appropriate legislation, confine the use of the whole to its own people alone." In the case of Haney v. Compton, 36 N. J. Law, 522, it was said: "But it cannot with any propriety be said that a statute which simply prohibits non-residents on board a vessel from subverting the soil of the state and carrying away her property, or that of her grantees, leaving such vessel to pass and repass, and go whithersoever those in charge of her may desire, is a regulation of commerce with foreign nations or among the states. It is a law for the protection of property,—at most an internal police regulation, entirely within the competency of the state to adopt, and it is not perceived that it can by possibility interfere with commerce in the senses in which that word is used in the federal constitution." In Manchester v. Massachusetts, 139 U. S. 259, 11 Sup. Ct. Rep. 559, the court reaffirmed the principle declared in the case of McCready v. Virginia, supra; and the same principle is announced in Dunham v. Lamphere, 3 Gray, 268.

We think it clearly established that the people of Alabama own absolutely the oyster-beds and oysters in question, and that it is a property right as complete and perfect as that held to any other property. As was said by Mr. Justice WAITE in McCready v. Virginia, supra, "the principle is not different from the planting of corn upon dry land." We think it further settled that the people of Alabama, through its legislature, alone have the power to dispose of their property rights in their oyster-beds and oysters, and if they see proper may dispose of them to their own people only. It is further settled that the legislature has ample authority to adopt all precautions and regulations deemed desirable or necessary for the preservation and increased production of its fisheries. That the power of congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, is unlimited and exclusive of the power of the state, is settled law. Any statute of a state not authorized by congress which in any way obstructs or interrupts free navigation, or restricts or burdens any commodity which is an article of interstate commerce, must be declared null and void. Tiernan v. Rinker, 102 U. S. 125; Telegraph Co. v. Texas, 105 U. S. 460; Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. Rep. 213; Leisy v. Hardin, 135 U. S. 109, 10 Sup. Ct. Rep. 681. To constitute commerce there must be traffic and intercourse, and to constitute interstate commerce there must be traffic and interstate intercourse,—an "intermingling" between different states. As Mr. Chief Justice MARSHALL says in the case of Gibbons v. Ogden, 9 Wheat. 1: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one." "The completely internal commerce of a state may be considered as reserved to the state itself." We understand this great case to distinctly recognize the absolute power and control of the state upon such subjects within its territorial jurisdiction are not articles of foreign or interstate commerce. The case of Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. Rep. 475, decides an important principle as to the right of the state to tax its products, al-

though the owner may intend them for exportation, and although they may be in process of preparation for exportation at the time of the assessment of the tax; but the case is important in the present connection in determining that "there must be a time when they (the products) cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial legislation." Quoting from the case of The Daniel Ball, 10 Wall. 565, as follows: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced." But that movement, says the court, "does not begin until the article has been shipped or started for transportation from the one state to the other." Carrying it from the farm or forest to the depot is only an interior movement of the property, and, although it may be for the purpose of exportation, this is no part of the exportation itself. If the statute of Alabama under consideration militates against any of these well-established principles in regard to interstate commerce, it must yield to the dominant supremacy of the federal constitution. We do not understand the power vested in congress to regulate interstate commerce gives it power over domestic commerce, or authorizes it to regulate the commerce between the citizens of the same state or different parts of the same state. This power belongs to the several states, and is exclusive of the power of congress. If the state of Alabama should attempt, by legislation, to tax or burden or restrict the shipment of oysters from the state of Mississippi or other state, such legislation would be unconstitutional, or if the state of Alabama should attempt to impose similar or other conditions upon the shipment of any articles of interstate commerce from this state to another state, that would be an interference with the law of interstate commerce, which power alone is vested in congress. To constitute interstate commerce, however, as we have said, there must be an article or commodity the subject of commerce, and destined to pass from one state to another. These authorities do not militate but recognize the power of the state to confine the use of the oyster to its own citizens, and to regulate its shipment and disposition within its borders for their use. This would be domestic commerce as distinguished from interstate commerce. Neither do we understand the power of congress to regulate interstate commerce in any way interferes with or restricts the right of the state to prohibit its own property, to which it has an exclusive title, from becoming an article or commodity of interstate commerce. In the same line may be cited the case of Express Co. v. People, (Ill. Sup.) 24 N. E. Rep. 758. The statute of Illinois, for the protection of game, permitted the killing of game birds for two months in the year. The statute forbade the sale of the game birds at any other time, and made it unlawful, under a penalty, for any carrier or corporation knowingly to receive and transport or convey them beyond the state for sale. Under the act, at the proper time, a person was permitted to kill game for his own use, but not to go upon the market as an article of commerce. The constitutionality of the act was upheld, the court declaring: "The ownership was in the people of the state. This being so, it necessarily follows that the legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the legislature might confer. The legislature never conferred an absolute property in quail upon the person who might kill the same." It was held that the discretion of the legislature in making rules and regulations for the preservation and protection of the game birds was not subject to judicial control.

The property rights of the oyster being in the state exclusively, and the legislature having full authority to prohibit it from becoming an article of interstate commerce, and to reserve the oyster for the sole use of its own citizens, and to regulate the sale between its own citizens and between different parts of the state, the question arises, when does the oyster, under the statute, became an article of interstate commerce, and what provision of the statute attempts to burden, restrict, or control it after it has this character? The first section explicitly declares that "the title and property in all oysters in the waters of this state * * * shall be divested in manner and form as herein authorized and provided." That this is a valid enactment, under the principles of law declared in many of the foregoing decisions, cannot be questioned. The second section gives a license to resident citizens to catch and take oysters, the property of the state, and further enacts that "no person or persons not a resident of the state of Alabama is or shall be authorized to take or transport any such oysters from, in, or through any of the waters of the state of Alabama; and it is unlawful for any person, whether a citizen of the state of Alabama or of any other state or country, to ship beyond the limits of this state any oysters taken from the waters of this state while the same are in the shells, provided that between the middle of December and the middle of January oysters in the shell may be shipped in barrels by railroad to other states," etc. That the state has the right to license its own citizens to catch and take oysters, and to deny to citizens of another state the right to take and transport them, and absolutely to prohibit the shipment of oysters beyond the limits of the state, and to regulate the sale of them within its own limits, not imposing any conditions or burdens or restrictions upon the oyster as a commodity after it has entered another state, or after it may be legally delivered in this state for exportation to a common carrier or ways by which interstate commerce is effected, we think is clearly established by the following authorities: 36 N. J. Law, supra; The Daniel Ball, 10 Wall. 557; Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. Rep. 475; Gibbons v. Ogden,

9 Wheat. 1; McCready v. Virginia, supra; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6; 24 N. E. Rep. supra; Railroad Co. v. Pennsylvania, 15 Wall. 250. If the state has the power to prohibit the exportation of its oysters absolutely, *a fortiori* it may limit the shipment of such oysters to such as may have been shelled. If the legislature sees proper, as a means to prevent the exhaustion of its oyster-beds, to grant to the takers, who can only be resident citizens of the state, or their grantees within the state, such a qualified property right in the oyster as will permit its exportation only after it is shelled, where is the authority to judicially control this discretion, or what principle of the interstate commerce law is violated by such an enactment? The oyster is the absolute property of the state. It certainly has the power to prevent its becoming an article of interstate commerce. Until it becomes an article of interstate commerce congress has no authority or control in the premises. The state, by the statute itself, expressly retains the title to the oyster, and prohibits its shipment beyond the state until shelled. Only after it is shelled does the state relinquish its title, and the grantee, previously having but a qualified interest, becomes the absolute owner, and the oyster may then become an article of interstate commerce. When shelled, and the state has parted with its property rights, the state no longer interferes with the article. The owner ships it wherever he pleases and by whatsoever transportation he prefers. The statute nowhere interferes with or obstructs the sailing of the vessels. They can come and go when and whithersoever those in control see proper; but this did not authorize them to subvert the soil of Alabama, and to transport in September oysters in the shells from the reefs of Alabama to other states. The statute expressly prohibited it. The error in the argument of the defendants' counsel is in assuming that the oyster in the shell was an article of commerce, when in fact the taker, who could only be a citizen of the state, as we have seen, had but a qualified interest in the oyster, which he could dispose of only in the state. It would be unsound reasoning to hold that the state could prohibit absolutely the taking of its oysters, or confine the use of them exclusively to its own citizens, and yet could not prevent the taker from shipping them beyond the limits of the state. If the statute had undertaken to invest the taker or his grantee with a full and absolute property right and title to the oyster in the shell, so as to invest him with the power to convert it into an article of commerce, and had then undertaken to prevent its shipment, or burden its shipment with a tax, a different question might arise. That is not the case here. The state carefully guards against this condition, and it is only after being shelled can it be said that the oyster has become an article of interstate commerce. These conclusions are fully sustained by the reasonings and principles declared in the case of Kidd v. Pearson, supra, in which Mr. Justice LAMAR discusses at length and with great clearness the doctrine of interstate commerce, and the application of the principles stated in Gibbons v. Ogden, 9 Wheat. 1, and Coe v. Errol, supra, and other cases cited above.

The policy of the legislature in making provision to keep the shells within the state might be based upon many considerations. However, this court is not called upon to adjudicate upon the policy of the legislature, and we will not consider this view further than to make the following citations from section 5, vol. 2, U. S. Com. Fish, etc., 564: "Besides being useful for making roads, streets, filling wharves and lowlands, and making lime, the shells are of great utility as stools for new oyster-beds, as experiments beginning fifty years ago have demonstrated. * * * These and other minor utilizations are disappearing, however, along the northern coast, through the increased value of the shells to spread on the bottom for the foundation of new colonies, as has been explained; and before long no doubt nearly all the shells accumulated will be saved by planters for this purpose as a better economy than to sell them." When tested by the rule declared in Ballentyne v. Wickersham, 75 Ala. 533, the statute is not obnoxious to the objections that it contains subjects not clearly expressed in the title. The rule, as there held, is, that it is "sufficient if they [the subjects] are all referable and cognate to the subject expressed" in the title. Our conclusion is that the act is not unconstitutional, and that the court erred in its judgment.

Reversed and remanded.

(95 Ala. 254)

ESPALLA v. GOTTSCHALK *et al.*

(*Supreme Court of Alabama.* April 5, 1892.)

FORCIBLE ENTRY AND DETAINER — WHEN LIES — DEFENSES.

1. Plaintiff's intestate, for many years prior to and at the time of his death, was in undisputed possession of premises under claim of right, during which time T. lived with him on said premises at intestate's request, without any claim of right as against intestate. A short time after intestate's death, while T. was in possession, defendant, claiming under a tax-title, went on the premises, and arranged with T. to hold the premises as his tenant, and afterwards put a co-tenant on the premises with T., who subsequently removed therefrom, leaving the co-tenant in possession. *Held* that, plaintiff having succeeded as administrator to intestate's right of possession, which related back to the time of testator's death, and T. being precluded from attorning to defendant, plaintiff could maintain an action for forcible and unlawful detainer.

2. Such action being based on an unlawful ouster of prior actual possession, defendant cannot defeat the same by setting up his tax-title; Code, 1886, § 3389, providing that in such action the merits of title cannot be inquired into.

Appeal from circuit court, Mobile county; W. E. CLARKE, Judge.

Action by Joseph Espalla, Jr., administrator, against William Gottschalk and others. Judgment for defendants. Plaintiff appeals. Reversed.

R. Inge Smith, for appellant. *Richard P. Deshon*, for appellees.

STONE, C. J. This was an action of forcible and unlawful detainer, the complaint

being framed in varying counts, to suit possible varying phases of the proof. The subject of the suit was a lot of ground and a tenement thereon. After the trial before a justice of the peace, an appeal was prosecuted to the circuit court, and verdict and judgment were there rendered for the defendant. There does not appear to have been any conflict in the testimony proving the following state of facts: Silas Holloway, plaintiff's intestate, died February 14, 1889. At that time, and for many years prior thereto, he had been in the undisputed possession of the land sued for, resided upon it, and claimed it as his own. His claim of title and possession dated back to February, 1882. "For many years prior, and up to, and at the time of, said Holloway's death, one Turner and his wife lived with him in the house on said premises as his friends, and by Holloway's invitation and request, without any claim or right of possession as against said Holloway." On February 16, 1889,—two days after Holloway's death,—Joseph Espalla, Jr., plaintiff in this suit, was appointed and qualified as special administrator of his estate. On March 13, 1889, the said Espalla received a general appointment as such administrator, and qualified as such. On the day of the special appointment, or the next day, Espalla repaired to the late residence of his intestate, and took possession of his personal effects, Turner and his wife aiding him. He also asserted possession of the realty, "and left said Turner and wife in possession of the same as plaintiff's tenants, on the understanding and on their agreement to hold the same as his tenants until further orders." There was testimony showing that between the time of the issue of the special and general letters of administration, and without plaintiff's knowledge or consent, Gottschalk went on the premises, and arranged with Turner and wife, by written lease, that they would hold and occupy the premises as his tenants. He subsequently placed another tenant on the premises with Turner and wife; and, they not agreeing, Turner and wife removed from the premises, leaving their co-tenant in possession. Subsequently Gottschalk placed Rogers in possession as his tenant. He (Rogers) was in possession when this suit was brought, and he is made a defendant with Gottschalk. There was testimony tending to show that Gottschalk's claim of title was as follows: The lands had been sold for taxes assessed against Holloway. Gottschalk became the purchaser, and he had received a tax-deed. There was also testimony tending to show that this purchase was made at the instance and as the friend of Holloway; that he (Holloway) had all the while claimed and occupied the land as his own, and had regularly given in and paid the taxes upon it since the sale. The court gave the jury the general charge to find for the defendants, if they believed the testimony. Letters of administration conferring general authority cannot be granted "until the expiration of fifteen days after the death of the intestate is known." Code 1886, § 2019. Special administration may be granted at any time after intestate's death. Section 2020. The powers of such special administrator are defined in the statute, and taking control of the real estate is not mentioned as one of them. The functions and powers of the special administrator cease when general administration is granted. Code, §§ 2021–2023. Special administration sometimes endures for a considerable time, and it may be that it is the duty of such special appointee to look after the real estate, and see that it is not subjected to spoliation or waste. This, under our statutory system, which commits the custody and control of the realty to the personal representative at his option, and makes it assets for the payment of debts. For reasons to be stated further on we consider it unnecessary to decide this question.

The fact, if it be such, that Gottschalk had acquired a title to the property by purchase at tax-sale, could exert no influence whatever in the trial of this case. "The estate or merits of the title cannot be inquired into." Code 1886, § 3389. Prior lawful possession, and its forceful disturbance, or unlawful subsequent interference with it, are the fundamental issues of fact on which the fate of such controversy must mainly depend. Welden v. Schlosser, 74 Ala. 355; 3 Brick. Dig. p. 505, §§ 5, 8; 2 Brick. Dig. p. 9, § 35. Gottschalk and his tenant, Rogers, must be treated in this case as if they, and each of them, were without title. Under our system a personal representative may sue and recover real estate on the title of him of whose estate he is the legal representative; and prior actual possession, until overcome by opposing proof, will maintain an action to regain the property against any one subsequently found in possession. 3 Brick. Dig. p. 325, § 47. "The personal representative has the right and capacity to maintain all suits necessary to recover possession of the land." Id. p. 465, § 157. It is settled by decisions of this court too numerous to be cited that to maintain the statutory proceeding resorted to in this case the plaintiff must have had the actual possession, and the defendant must have unlawfully ousted him, or unlawfully held over after the expiration of a temporary authority to occupy. Constructive possession is not enough. 3 Brick. Dig. p. 505, § 3. Does plaintiff's testimony make a case within this rule? There is no question that when Holloway, plaintiff's intestate, died, he was, and for years had been, in possession of the premises sued for, claiming title. Turner was there by his permission, a tenant by sufferance, holding in the right of and under Holloway. He was precluded, by the very nature of his holding, from setting up title adverse to Holloway; and if, while so holding, he had acquired a perfect title to the property from an outsider, he would have been estopped from setting it up until he first surrendered back the possession to Holloway Houston v. Farris, 71 Ala. 570; Norwood v. Kirby, 70 Ala. 397. And he could not, by any act of his, clothe another with rights he could not himself have asserted. If, standing towards each

other as the testimony shows Holloway and Turner did, Holloway had removed from the premises, leaving Turner in possession, and Turner had then attorned to Gottschalk, accepting a lease from him, Holloway could have maintained unlawful detainer against Turner or Gottschalk, or against any one else who came in pursuant to and in virtue of the said attempted attornment from Turner to Gottschalk. It is necessarily true that death puts an end to all property ownership which had been in the decedent. A dead man cannot own property. It does not, however, abrogate the title. That continues, and passes at once to those on whom the law devolves it. It cannot be in abeyance. True, in cases of intestacy, there is for a time no known personal representative to assert the title; but when one is appointed his claim and right relate back to the moment of intestate's death. To the extent the law gives him title, or authorized control over decedent's estate, personal or real, to that extent the law dates that title and control back to the time when intestate breathed his last. Not the authority to sue or otherwise assert the right, for that is conferred by his appointment. It is the right which relates back, not the remedy for its enforcement. And that right exists, as the intestate left it by his death. 3 Brick. Dig. p. 463, § 130; Id. p. 464, § 139, 1 Brick. Dig. p. 932, § 262. Our statutes confer on the personal representative the authority to take possession of the realty, and to sue and recover it for the purposes of administration; and when he asserts the right it intercepts the descent, and dominates the right of the heir at law to enter. 1 Brick. Dig. p. 937, §§ 331, 332, 3 Brick. Dig. p. 465, § 152. The sum of our decisions is that "the personal representative has the right and capacity to maintain all suits necessary to recover possession from the heirs or alienee of the heirs." 3 Brick. Dig. p. 465, § 157. The doctrine of revivor applies to this form of action. Ridgeway v. Waugh, 51 Ala. 423. To apply these principles to this case: When Espalla was appointed administrator, he succeeded at once to all the rights and remedies of his intestate, if he elected to assert them, and that right related back to the moment of Holloway's death. If the plaintiff, Espalla, entered upon the land and let it to Turner, he did so as the administrator of Holloway, and in virtue of the authority his appointment conferred upon him. If that entry and letting were authorized by his appointment as special administrator, then he could have sued in his individual name, and could have counted on his personal possession. But the law did not require him to do so. He had the equal right to sue in his representative capacity, for his right was but the intestate's right and possession to which he had succeeded. Sims v. Boynton, 32 Ala. 353; Spear v. Lomax, 42 Ala. 576; Nicrosi v. Phillipi, 91 Ala. 299, 8 South. Rep. 561. It is clearly shown that if before Holloway's death he had been forcibly evicted, or his tenant had held over, he could have maintained forcible or unlawful detainer, and his tenant could not, by his attornment to another, confer a possession that could defeat that action. We hold that Espalla, by his appointment as administrator, is not to be regarded as in by constructive possession. He was thereby clothed with the possessory right and remedy of his intestate. The circuit court erred in the charge given. Reversed and remanded.

(95 Ala. 279)

CLANTON v. SCRUGGS *et al.*

(*Supreme Court of Alabama.* April 5, 1892.)

CREATION OF EASEMENT — STATUTE OF FRAUDS — ESTOPPEL — PART PERFORMANCE — PLEADING.

1. Defendant, the owner of a ferry, and land used as a landing, agreed with plaintiff orally that if he would buy a tract of land adjoining defendant, and conduct a warehouse thereon, and store defendant's freight free of charge, he (defendant) would never suffer any one to put up a warehouse on his land. Plaintiff, acting under this contract, bought the land, erected a warehouse, and stored defendant's freight free of charge for a number of years, after which defendant erected a warehouse on his own land, and ran the same in opposition to plaintiff. *Held*, in an action for relief, that the contract, purporting to create a servitude or easement on defendant's land, was void within the statute of frauds.

2. The fact that plaintiff performed the undertaking on his part to store defendant's freight would not estop defendant from availing himself of the statute, the contract being merely executory.

3. The effect of the statute on the validity of such parol contract was properly raised by a demurrer to plaintiff's bill.

Appeal from chancery court, Clarke county; THOMAS W. COLEMAN, Chancellor.

Action by Burrell A. Clanton against W. A. Scruggs and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Wm. S. Anderson, for appellant. *Wm. D. Dunn* and *Pillans, Torrey & Hanaw*, for appellees.

WALKER, J. In 1881, a Mrs. Foster owned a tract of land in Clarke county, which included what is known as the "Coffeeville Warehouse and Landing Property on the Tombigbee River." William L. Scruggs, one of the defendants to the bill in this case, and an appellee here, owned a strip of land on the river adjoining and immediately below Mrs. Foster's tract, and on which was a public ferry, owned and conducted by him. Burrell A. Clanton, the complainant in the bill and the appellant here, proposed to Scruggs to join him in the purchase of Mrs. Foster's land, and in carrying on the warehouse business thereon. Scruggs declined this proposition, but, as alleged in the bill as amended, "said Scruggs said further, however, that he hoped orator would purchase the Coffeeville warehouse, and carry on the business. Said William L. Scruggs stated further to orator, as an inducement to his purchasing said Coffeeville warehouse and landing, that, if orator would purchase said warehouse and landing, and would store all of his (Scruggs') freight free of charge, and be responsible for it just as if he was paid storage, that he would promise orator that he never would put up a warehouse on his little strip of land immediately below Coffeeville landing himself, and he would never suffer any one else to put up a warehouse

on said land. Orator then told said defendant Scruggs that this arrangement was entirely satisfactory to him, that he accepted it, and that he would carry it out." It is shown by the bill as amended that the complainant, acting under this contract and agreement with Scruggs, very shortly thereafter purchased Mrs. Foster's tract of land, erected a new warehouse and other improvements thereon, and from February, 1882, carried on there the warehouse business, and received and stored freight for Scruggs free of charge, as provided by the agreement with him; that the agreement with Scruggs was a great part of the inducement to the complainant for the undertaking. It is further shown by the amended bill that in 1887 Scruggs permitted his son and son-in-law, who are parties defendant, and were fully aware of the agreement above mentioned, to erect a warehouse on his land referred to in the agreement, and they are conducting a warehouse business therein in opposition to the business of the complainant. The purpose of the bill is to have the defendants restrained from conducting the warehouse business on the land of Scruggs above mentioned. It is charged that the conduct of that business causes irreparable injury to the business of the complainant. The demurrers to the bill as amended were sustained, and, the complainant declining to amend his bill further, it was dismissed.

It clearly appears from the averments of the bill as amended that the alleged agreement between the complainant and W. L. Scruggs was oral, and was not evidenced by any writing. That being the case, the question of the effect of the statute of frauds upon the validity of the contract is properly raised by a demurrer. A privilege which the proprietor of one tenement has, in respect to a neighboring tenement, to require the owner of the latter or servient tenement to suffer to be done or to abstain from doing something on his own lands for the benefit or advantage of the owner or proprietor of the former or dominant tenement, is an easement or servitude. A common form of such an easement or servitude is the prohibition of the proprietor of the servient estate from erecting or permitting the erection of a certain character of structure thereon, or from carrying on, or permitting to be carried on, a particular kind of business or occupation thereon. McMahon v. Williams, 79 Ala. 288. The right of the dominant owner, in such case, is an interest in the servient estate; and a contract for the sale of such an interest is a contract for the sale of an interest in lands, tenements, or hereditaments, within the meaning of the provision of the statute of frauds on this subject. Code, § 1732; Riddle v. Brown, 20 Ala. 412; 6 Amer. & Eng. Enc. Law, 143. There is no pretense in this case that Clanton was in any way put in possession of the land of Scruggs in which he claims an interest as the beneficiary of an easement. There having been no writing at all in reference to the matter, and the purchaser not having been put in possession by the seller, the alleged agreement was void under the statute of frauds. The facts that the complainant has performed and continues to perform the undertaking on his part to store Scruggs' freight free of charge, and to be responsible for it just as if he were paid storage, and that Scruggs has accepted the benefit of this stipulation in his favor, cannot have effect to take the alleged agreement out of the influence of the statute of frauds, or to estop Scruggs from availing himself of the protection of that statute. An essential element of an estoppel *in pais* is a false representation, or a concealment of material facts, upon which another has been induced to act to his prejudice. The representation or concealment must, in all ordinary cases, have reference to past or present facts. A mere promise of something to be done in the future is not such a representation or concealment. One's failure to perform a promise is a very different thing from his denial of a state of facts which he had previously held out as in existence. The rule which precludes a person from claiming that the facts of a matter are different from what he represented them to be to another, who has acted on the faith of his former statements, is not to be applied to prevent a party from setting up the invalidity of a mere executory contract. One party to an invalid executory agreement is not entitled to hold the other party to the agreement just as if it had been originally valid, because the latter has received the benefit of a part performance by the former. The fact that one of the parties to such an agreement has acted on the faith of its validity does not raise up an estoppel against the other party to deny that it is binding on him. A mere breach of promise cannot constitute an estoppel *in pais*. Weaver v. Bell, 87 Ala. 385, 6 South. Rep. 298; Starry v. Korab, 65 Iowa, 267, 21 N. W. Rep. 600; Jackson v Allen, 120 Mass. 64; Langan v. Sankey, 55 Iowa, 52, 7 N. W. Rep. 393. If the promise is made fraudulently, and is not meant to be kept, it is not denied that this circumstance might introduce an element of estoppel into the transaction. Bigelow, Estop. (5th Ed.) 576. This question, however, is not decided, as there is no such feature in the present case. There is no allegation of fraud on the part of Scruggs, or that at the time of his alleged promise he did not intend to perform it. The case made by the bill is simply that of an executory contract, which cannot be enforced, because it is void under the statute of frauds. In Weaver v. Bell, supra, it was said: "A representation, relating to future action or conduct, operates as an estoppel only when it has reference to the future relinquishment or subordination of an existing right, which is made to induce, and by which the party to whom it was addressed was induced, to act." The representation there referred to does not include a mere promise to do or to refrain from doing something in the future. It could not have been intended to assert that an invalid executory agreement may be made binding by means of an estoppel resulting from the fact that one of the parties has acted on the faith of its validity. It is true

that a disavowal of a present right, which might otherwise be asserted in the future, may be treated as the representation of an existing state of fact. But an executory agreement which is void under the statute of frauds cannot be made effectual by estoppel merely because it has been acted on by the promisee, and has not been performed by the promisor. Brightman v. Hicks, 108 Mass. 246. Such a rule of estoppel would take the sting out of the statute of frauds, and defeat its manifest purpose. The amended bill in this case shows that the alleged right upon which the complainant relies as the basis of his claim to relief depends upon an executory agreement which was within the statute of frauds, and that the provisions of that statute were not conformed to in the making of the agreement. The grounds of demurrer suggesting the invalidity of the agreement because of such non-conformity were properly sustained. Affirmed.

(44 La. Ann. 430)

RIST v. HARTNER. (No. 11,002.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

TUTOR AND WARD—ACCOUNTING—RESCISSION OF CONTRACT—TENDER AS CONDITION PRECEDENT—EQUITY—RECONVENTION.

1. Tender, as a condition precedent to the institution of a suit to annul a settlement or contract, under which money passed from the defendant to the plaintiff, may be executed where contractual relations could legally exist between them; but it cannot be required from a minor by a tutor, sued for an account, between whom no such relations existed.

2. It is only after an account has been rendered and adjusted, accompanied by vouchers, by the tutor to the minors, as required by article 361 of the Code, that the fiduciary relations between them really cease.

3. In an action by a minor, who has become of age, brought within four years after his majority, for an account from his tutor, in which a previous settlement or contract between them is attacked, as made in violation of law, and under charges of disguise and concealment by the tutor, and averment of the minor's ignorance of the true condition of things at the time, the plea of tender by the tutor from the minor of the money received by the latter under the settlement is inadmissible as a condition precedent to suit.

4. All that equity requires in such a case is that the tutor be permitted to claim the amount in reconvention.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Feliciana; F. D. BRAME, Judge.

Suit by August Rist against W. H. Hartner, tutor, for an account of tutorship. From a judgment for defendant, plaintiff appeals. Reversed.

W. F. Kernan, for appellant. *Wedge, Kilbourne & Stone*, for appellee.

BERMUDEZ, C. J. The plaintiff brought this suit, within four years after reaching his majority, against the defendant, for an account of tutorship. The defense is that a settlement has been effected, under which a sum of money was paid to the plaintiff, who has receipted therefor, and that, before the defendant can be called upon for an account, the plaintiff must pay over to him the amount which thus passed. The plaintiff thereupon filed a supplemental petition, in which he attacked the alleged settlement, and sought its nullity. Judgment having been rendered, sustaining in part the defense of want of tender to the dissatisfaction of both litigants, the plaintiff appeals, the defendant asking here an increase of the amount required to be tendered. It will not do to say that the plaintiff cannot in the same breath seek the nullity of the settlement and claim to be entitled to retain the amount received under it until a final adjustment of the differences between him and the defendant, and that the settlement is his title to the money, and, if that title is bad, he has no right under it to the money, although he may be entitled to recover a larger amount in the end from the defendant. Defenses of this description can be set up and urged by a party against another when contractual relations could have existed, and did exist, in reference to the transaction involved; but they are not admissible on the part of one who occupied fiduciary relations with the claimant, and who could have no contractual relations with him before the occurrence of a certain determinate event. Rev. Civil Code, art. 1790. This is an action by a minor, who has become of age, against one who admittedly was his tutor, and who occupied, therefore, a fiduciary position as to him. The law expressly declares that every agreement which may take place between the tutor and such minor shall be null and void, unless the same was entered into after the rendition of a full account and delivery of the vouchers, the whole being made to appear by the receipt of the person to whom the account was rendered, 10 days previous to the agreement. Rev. Civil Code, art. 361. The jurisprudence is in accord with this wise provision. Harty v. Harty, 2 La. 523; White v. Gleason, 15 La. Ann. 479; Vanwickle v Matta, 16 La. Ann. 325; Succession of Croizet, 12 La. Ann. 401; Chapman v. Chapman, 13 La. Ann. 228; Harris v. Keigler, 25 La. Ann. 471; Neilson v. Neilson, Id. 529. It is therefore clear that such an account is a condition precedent for the validity of any agreement between them, in whatever form it may have been entered into, whether by settlement or otherwise. This is a matter of proof which is decisive of the validity of the agreement. It is not until after such an account has been rendered and adjusted that the fiduciary relations between tutor and pupil really cease. There is no evidence here that such an account was rendered previous to the alleged settlement, which is treated on its face as a "contract." In cases presented for judicial determination, in which minors have sued tutors for an account, attacked purchases of their property by administrators, and settlements made in error, and while they (the minors) were in ignorance of their rights under undisclosed or concealed facts, and in which the plea of tender had been set up as a condition precedent, it has been held that it was not to be demanded. Tutorship of Hacket, 4 Rob. (La.) 290; Wood v. Nicholls, 33 La. Ann. 744; Heirs of Burney v. Ludeling, 41 La.

Ann. 632, 6 South. Rep. 248. All that equity requires in such cases is to permit the defendant to claim the amount in reconvention. Under the circumstances of this case, the plaintiff should not have been held to a tender as a condition precedent to action. It is therefore ordered and decreed that the judgment of the lower court be reversed and avoided, and that the plea of tender be overruled. It is besides ordered that the case be remanded for further proceedings according to law; the defendant and appellee to pay the costs of appeal, as well as those of the lower court, incurred subsequent to the filing of the supplemental petition.

(44 La. Ann. 378)

RIST v. HARTNER et al. (No. 11,001.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

PURCHASE BY TUTOR OF WARD'S PROPERTY—ACTION BY WARD—PLEADING—RATIFICATION.

1. The plea of prematurity cannot be successfully set up by a tutor who has acquired real estate in his official name, with due authority for account of his wards, when sued by one of them to be recognized as owner of an undivided part of the same.

2. The sale made by him, at private sale, under advice of a family meeting, to a third party, who fails to pay the price, which was on credit, and who transferred the property to him in his individual name, and not as tutor, cannot be said to have been ratified from the fact that, under a settlement alleged to have taken place between him and the minor, a sum of money has passed to the latter, unless it is shown that this was preceded by an account and delivery of vouchers, as required by article 361 of the Revised Civil Code, and that the minor knew of the infecting radical vices which contaminated the act, and yet voluntarily cured the nullities.

3. The plea of tender of such sum as a condition precedent to a suit against the purchaser and the tutor for the nullity of the sale and revendication of the property is not well founded.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Feliciana; F. D. BRAME, Judge.

Action by August Rist against W. H. Hartner and others for a share of certain real estate, including the rents and profits. From a judgment for defendants, plaintiff appeals. Reversed, and new judgment ordered.

W. F. Kernan, for appellant. *Wedge, Kilbourne & Stone*, for appellees.

BERMUDEZ, C. J. This is a petitory action for a share of certain real estate, including a demand for rents and revenues. It is brought by a minor, who has become of age, in his own name, as heir of his mother, and also as heir of a sister. It is directed against a tutor, Hartner who, under the advice of a family meeting, had bought it for account of the minors, whose tutor he was, and one of whom was the plaintiff. Hartner subsequently sold it to a third party—Schutzman—at private sale, and acquired it back from that party in his individual name. It is also directed against that party for rents and revenues. The prayer is for the nullity of both sales, and for the rents and revenues. The defendant Hartner pleaded a settlement by him with the plaintiff, which cannot be assailed collaterally, by which the plaintiff ratified the sale attacked; a want of tender of the amount received by plaintiff—$888.73—under that settlement; and prematurity of the action, which cannot be brought before a liquidation of the succession of plaintiff's mother, which is still under administration. The other defendant, Schutzman, besides urges a demand for the value of repairs and improvements made in good faith by him on the property, and that plaintiff cannot maintain this action without first tendering the amounts expended. There was judgment holding that plaintiff should have made a tender of $300.25 only, and for not having done so, dismissing his suit. From the judgment, the plaintiff appeals, and a prayer is made that the amount to be required as a tender be raised to that demanded below,—$888.73.

The record shows that the defendant, in 1875, on the advice of a family meeting, purchased for account of the three minors of Mrs. Rist, whose tutor he was, a plantation and a home residence, and that he did so, taking the title in his capacity of tutor; that in 1879, on a similar advice, he sold it at private sale to one Schutzman, who, failing to pay for it, transferred it to Hartner in his individual name, and that it thus stands yet. It appears that a settlement was made between the plaintiff and the defendant after his majority, and it is claimed that it proves that plaintiff knowingly ratified the sale to Schutzman, taking in place of the plantation and the residence the sum of $869.23, and a judgment for $19.50, both amounting to the estimated value of his interest therein. The defenses of prematurity, tender, and ratification will be considered in their regular order.

That of prematurity cannot hold. It does not lie in the mouth of the tutor, when sued by the minor, of age, to recover from him property acquired by him as tutor, for account of the minor from the succession of the latter's mother, to say that her succession has not been fully administered; that it owes debts, and is insolvent. The purchase placed the real estate in the name of the minors, in whom the title vested, and has continued until legally alienated in their name or by themselves. It is clear that one in whose official name as tutor property stands as belonging to his wards is estopped from denying their right to it, and cannot urge the plea of prematurity set up. Heirs of Burney v. Ludeling, 41 La. Ann. 632, 6 South. Rep. 248. The final liquidation of the succession of Mrs. Rist is not a condition precedent for the validity of the sale of her property at succession sale, which rests on adjudication to the purchaser, even though the price be not paid, and the sale is to an heir. In that case the remedy should be either a nullity of the sale or the payment of the price, if due, in specific performance.

The plea of tender is not maintainable. The sale by Hartner to Schutzman, although made with the advice of a family meeting, was made by private contract; not after adjudication, preceded by advertisement. The sale was a nullity, and

did not divest the minors of their title to the property, which could not be transferred unless after compliance with legal exigencies. The price of adjudication to Hartner, as tutor, was not paid. It remained due, subject to a final settlement with the mother's succession. Heirs can purchase that way, in successions in which they inherit. The sale from Hartner, tutor, to Schutzman was made entirely on credit. No money passed from the purchaser to the vendor, and the minors cannot be said to have received any consideration, even indirectly. The sale or the transfer by Schutzman to Hartner is in the latter's name individually, and purports to have been made for cash, acknowledged, paid, and received; but this payment must not be considered as a reality. In their brief, counsel for appellees say that Schutzman, failing to pay for the property, transferred it back to Hartner individually. Surely, as Hartner, tutor, received nothing from Schutzman, it cannot be conceived how the minors can be asked to make any tender if the plea refers to the price of that sale, which it possibly does not. It certainly *first* relates to the amount received by plaintiff under the alleged agreement averred by Hartner; and, *second*, to the value of the improvements and repairs claimed by Schutzman. In the just decided case of the same plaintiff against the same defendant (No. 11,002, 10 South. Rep. 759) for an account of tutorship, a plea of tender for the $300.25, said to have been received under the settlement, it has been held that tender could not be required. For the reason there given the same ruling must be made here, as that sum forms part of the $888.73 which, it is insisted, should have been offered before suit.

In relation to the plea of want of tender for the difference, which the lower court declined to require, but which is asked by answer to the appeal, and likewise touching defense of ratification, it suffices to say that, if the amount was received as alleged, it cannot be considered *prima facie* as paid in settlement of the sales by Hartner to Schutzman and by the latter to the former, for the obvious reasons that it could have been only an agreement or contract between the tutor and the minor, not preceded by the account required by article 361, Rev. Civil Code, and therefore a nullity; and that the very sale claimed to have been ratified was subsequently set at naught by Schutzman, and his ostensible title annulled. The evidence does not show that if the amount was paid by Hartner to plaintiff in settlement of his rights in and to the property, or as a purchase price of the same, it was understood in that light by the plaintiff, who may have treated it as an adjustment and liquidation of other business accounts. The testimony explanatory of the receipt preponderates the other way, and establishes the reverse of the pretensions. The ratification of a transaction which is a nullity is a recognitive and confirmative act, and cannot be successfully pressed, unless it is shown to have taken place with a full knowledge of the circumstances of a formal intention to cure the radical vice contaminating it, and with which it is infected, by an unreserved sanction and approval.

The plaintiff does not urge, on appeal, error in the dismissal of his claim for rents and revenues against Schutzman, and the latter does not insist on his for improvement and repairs. Both may be considered as abandoned, but without prejudice to their rights, if any, to demand the same in another proceeding. It is therefore ordered and decreed that the judgment appealed from be reversed and annulled, and it is now ordered and adjudged that the plaintiff be recognized as owner of the undivided five-twelfths of the property described in the petition, without prejudice to the rights of either and all of the parties to set up and urge any claim not herein passed upon, touching which the same are reversed; the costs of the lower court and those on appeal to be paid, share and share alike, by the defendants.

(44 La. Ann. 317)

STATE v. GUILLORY. (No. 10,953.)

(*Supreme Court of Louisiana.* Feb. 8, 1892. 44 La. Ann.)

GRAND JURORS—COMPETENCY—NATURALIZATION—PROOF.

1. The competency of grand jurors is presumed, and those who attack it must show good cause of disqualification. A man who came to this country with his father when a child; whose father, now dead, told him he was naturalized, and voted as a citizen; who has himself exercised the rights of a citizen in the parish without question for 30 years,—is not to be declared disqualified because he cannot produce his father's naturalization papers, and, owing to his father's residence in several states, does not know where to find the judicial record thereof.

2. Objections to failure of judge to open a note of evidence on basis for introduction of a confession is disposed of by State v. McCarthy, (La.) 10 South. Rep. 673, this day rendered.

3. The other bills are without merit.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; E. T. LEWIS, Judge.

Indictment against Oscar Guillory. From the judgment defendant appeals. Affirmed.

F. P. Veazie and *Laurent Dupre*, for appellant. *W. H. Rogers*, Atty. Gen., for the State.

FENNER, J. The first bill of exceptions is taken to the ruling of the judge in overruling a motion to quash the indictment based on the charge that a member of the grand jury who found the bill was incompetent by reason of alienage. It appears that the juror objected to was born in Ireland, and moved to this country with his parents many years ago, when only 12 years of age. He had been told by his father that he (the father) had been naturalized, and knew that his father was a voter in the state of Kentucky before his death. His father had lived in several states, and he did not know when or where he was naturalized, and had no proof thereof other than his father's statement. The juror had lived in the parish for 30 years, had always considered himself as a citizen, and as such had voted and served on grand and petit juries without

question. No such question would probably have arisen in this case but for the fact that the juror was prosecuting a claim for homestead from the United States, in the course of which it became necessary for him to prove his citizenship; and, having no copy of his father's naturalization papers, and not knowing when or where they were taken out, he concluded his simplest course was to become naturalized himself, for which purpose he made application to the court and obtained his papers. This occurred after he had been drawn on the *venire*, but nearly two months before he was impaneled or served as a grand juror. There is no question that at the time when he was impaneled and served as a grand juror he was in every respect fully qualified, and we think the presumption is overwhelming that he was qualified before the drawing. A man who has come to this country with his parents, as a child, who has been told by his father that he was naturalized, and who has seen his father voting as a citizen, who has himself always exercised his rights as a citizen in the same place for 30 years, without question is entitled to every presumption in favor of his citizenship, and is not to be declared disqualified because he cannot produce his father's naturalization papers, and, owing to his father's having resided in several states, does not know where to find the judicial record of them. "When grand jurors are duly drawn and appear upon the summons of the sheriff by virtue of his writ, they are presumed to be good and lawful men, in all respects legally qualified. It is only upon good cause shown, by a party having the right to question the qualifications of the individual juror, that he will be set aside for incompetency." Thomp. & M. Juries, No. 563; Thayer v. People, 2 Doug. (Mich.) 417; State v. Haynes, 54 Iowa, 109, 6 N. W. Rep. 156; Minor v. State, 63 Ga. 318. We think no such good cause is shown in this case, the evidence raising a strong presumption that the juror was qualified when he was drawn, and making it certain that he was qualified when he was impaneled and served.

The other bills have no merit. One of them, based on the failure of the judge to take a note of evidence as to the basis laid for admitting a confession of defendant, is covered by our decision rendered this day in State v. McCarthy, 10 South. Rep. 673. Another, based on refusal to admit evidence of prior threats, in absence of any overt act at the time, is disposed of by many authorities sustaining the judge's action. The rest need no mention. Judgment affirmed.

ON REHEARING.

(March 7, 1892.)

This application is based on the failure of the judge to incorporate in his sentence the provisions for commutation of term embodied in Act No. 12 of 1890.

We can take no notice of this alleged error, because the record contains no reference to any application to, or action by, the judge on the subject, and no assignment of such error, in any form, was made before the actual decision of the cause. If the applicant is entitled to relief, he must seek it elsewhere. Rehearing refused.

(44 La. Ann. 283)

HOBSON et al. v. PEAKE. (No. 10,993.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

CONSTITUTIONAL LAW—DUE PROCESS—SERVICE OF SUMMONS—ABSENT DEFENDANT—UNNECESSARY ADMINISTRATION—PURCHASE BY AGENT—COMPENSATION.

1. Where a succession owes no debts, and has been unconditionally accepted by the heirs, who are in actual possession of the estate, through an agent duly authorized, an administration is unnecessary and illegal; and when such proceedings are carried on with the full knowledge of the agent of the absent heirs, who himself becomes a purchaser at a sale made therein, such a sale, so far as that purchaser himself is concerned, is a nullity so absolute that it could furnish, in his favor, no basis for any prescription save that of 30 years.

2. A proceeding in a personal action against absent defendants by substituted service through a curator *ad hoc*, unaccompanied by any seizure of property, is not "due process of law," and the judgment and sale thereunder are absolute nullities. The case is not affected by the fact that such a proceeding had been recognized as valid by prior decisions of this court, especially when, prior to the date of the proceeding, the supreme court of the United States had repeatedly condemned such proceedings as not "due process" under the constitution of the United States.

3. An agent who has misconducted himself in the business of his agency, and who has engaged in illegal transactions, by which he acquires interests adverse to those of his principals, and whose services, as a whole, have resulted in injury to his principals, cannot, under a *quantum meruit*, claim compensation for his services.

4. Defendant ceased to be agent from the date of his purchases, and became a possessor, for his own account, and in bad faith. As such he is bound to account for the revenues, and entitled to recover only his expenses necessary for the preservation of the property, such as taxes, and his useful improvements only to the extent to which they have enhanced the value of the property.

(*Syllabus by the Court.*)

Appeal from district court, parish of Pointe Coupee; ROBERT SEMPLE, Judge.

Suit by J. B. Hobson and others against Glenn D. Peake to recover land. From a judgment for defendant, plaintiffs appeal. Reversed.

O. O. & A. Provosty, for appellants. *Yoist & Claiborne*, for appellee.

FENNER, J. Dr. Jesse Beaty, a resident of South Carolina, died before the war, leaving to his two brothers, Samuel Beaty and Robert Beaty, Sr., and to his two sisters, Patsy and Margaret A. Beaty, his property in the state of Louisiana, consisting of three plantations, known as "West Oaks," in the parish of Iberville, and the "McCrea" and "McKneely" places in the parish of Pointe Coupee. The heirs accepted his succession purely and simply, and took possession of the estate, through their duly-appointed agent, Robert McBeth, who promptly came to Louisiana, and sold the plantations for large prices, paid partly in cash and partly in mortgage notes with vendor's privilege. After the war, the heirs sent the present defend-

ant, Glenn D. Peake, as their agent, to visit Louisiana, and look after these mortgage claims. He came here, and, after collecting what he could, foreclosed the mortgages, and obtained the retrocession of the McCrea and McKneely places, with which we are alone concerned, to the heirs. Samuel Beaty died in 1870, Patsy Beaty in 1872, and Margaret A. Beaty in 1885. The plaintiffs in this suit are heirs of said Samuel, Patsy, and Margaret A. Beaty, in certain proportions, fully set out in their petition, and this is formally admitted in the record. At the death of Samuel Beaty, his heirs accepted and took actual possession of his estate in Louisiana through their agent, Glenn D. Peake, the defendant. The defendant continued to act as the agent, with the broadest powers, of the plaintiffs and their ancestors, until the year 1882, at which date the results of his agency, according to his own showing, were summed up as follows: The West Oaks plantation in the parish of Iberville had been sold for more than $6,000, and the proceeds, together with the revenues of all the property, amounting to about $2,000, and also a further sum of $2,900 collected in cash, had all been absorbed by the expenses of the agency. The defendant was owner of the McCrea and McKneely places. The plaintiff heirs had not a cent's worth of property left in Louisiana, and were, besides, indebted to defendant in a considerable balance for expenses of his agency. The plaintiffs seem to have lived in ignorance of the details of these transactions until not long prior to the institution of this suit, when they employed an attorney to investigate them, and, as a result of the information thus obtained, they bring the present suit, in which they claim the nullity of the titles of Peake to their interests in the McCrea and McKneely plantations, together with an account of their rents and revenues.

Peake's title to one-fourth of the McCrea plantation, belonging to the heirs of Samuel Beaty, rests upon a sale made in a succession proceeding under the following undisputed circumstances: Samuel Beaty died in 1867. His heirs had accepted his succession unconditionally, and had taken actual possession of the property, and held the same through their agent, the defendant. The succession owed no debts. Nevertheless, in 1874, the public administrator applied for the administration of the succession of Samuel Beaty, simply alleging his death; that his heirs were absent and unrepresented; that he owned land in the parish; and that an administration was necessary. Under this proceeding an order of sale was obtained, and the property was sold and adjudicated to Glenn D. Peake, the defendant. The evidence shows that the public administrator acted with the full knowledge, if not at the suggestion, of Peake. Peake knew, better than any one else, that the succession of Samuel Beaty had been unconditionally accepted, and was in actual possession of the heirs; that the succession owed no debts; and that the heirs, so far from being unrepresented in this state, were fully represented by him as their duly-authorized agent, then present in the state. It seems superfluous to cite authorities to support the proposition that such a sale, in such a succession proceeding, to such a purchaser, is a nullity so absolute—so far at least as that purchaser himself is concerned—that it gave him no shadow of title, and could furnish, in his favor, no basis for any prescription short of 30 years. The judge so held, and, beyond doubt, correctly. The balance of the property claimed by plaintiffs is held by Peake under a title derived from a judicial sale made under a judgment rendered in 1882 in a suit brought by Glenn D. Peake against the present plaintiffs and other heirs. This suit was brought for a balance alleged to be due to him for his services and expenses as agent. Although Peake was a resident of South Carolina, and a near neighbor of his principals, he came to Louisiana to bring this suit against them, without giving them any notice thereof. It was a purely personal action. The defendants were all non-residents of the state. They were not cited, but were assumed to be brought into court through a curator *ad hoc*, who was appointed to represent them. They never appeared or answered. There was no attachment or other seizure of property before judgment. Under the repeated adjudications both of the supreme court of the United States and of this court, such a proceeding is not "due process of law," and the judgment and sale founded thereon are absolute nullities. Pennoyer v. Neff, 95 U. S. 714; Harkness v. Hyde, 98 U. S. 478; Brooklyn v. Insurance Co., 99 U. S. 362; Laughlin v. Ice Co., 35 La. Ann. 1184; Duruty v. Musacchia, 42 La. Ann. 357, 7 South. Rep. 555. An attempt is made to charge plaintiffs with notice of this proceeding, and with an authorization of the curator *ad hoc* to represent them personally. The charge is not sustained by satisfactory evidence, and the evidence was, besides, improperly admitted, and was without avail to remedy the defect of citation or appearance as shown by the record. Harris v. Alexander, 1 Rob. (La.) 30; Le Blanc v. Perroux, 21 La. Ann. 27; Gliddon v. Goos, Id. 682; Nolan v. Babin, 12 Rob. (La.) 531. There was no citation except on the curator *ad hoc*, and no appearance by him except in the unqualified capacity of curator *ad hoc*, and his fee as such curator was taxed and paid as part of the costs. The record must speak for itself, and its radical defects prior to judgment cannot be supplied or cured by parol. Adams v. Basile, 35 La. Ann. 101. The judge *a qua* declined to annul this judgment on two grounds, viz.: *First*, that the suit partook of the nature of a proceeding *in rem*, for which ground there is not the shadow of foundation; *second*, that the proceeding had been taken in conformity to prior jurisprudence of this state, which had recognized the validity of substituted service on non-residents who had property in the state, without any seizure of the property itself. In this there is no force. Without intimating that it could avail under any circumstances, it is sufficient for the purpose

of this case to say that the decisions of the supreme court of the United States in the cases above cited from 95, 98, and 99 U. S. had all been rendered years before this action was brought. Those decisions were based on the constitution of the United States, and involved questions purely federal in their nature, upon which the decisions of the federal supreme court were authoritative and paramount. On such questions the decisions of that court, and not of this, settle the jurisprudence and the law. When the same questions afterwards came before this court, we had nothing to do but to follow those paramount precedents. It follows that the judgment and the sale thereunder must be decreed to be absolute nullities.

It remains to adjust the counter-claims between the parties for revenues, expenses, improvements, etc. Defendant's claim on his agency account up to 1882, on which his pretended suit in that year was brought, must be rejected. We need not determine the plea of its prescription, which presents questions not free from doubt, because, on its merits, the account gives rise to no just claim against these plaintiffs. That account shows cash collections by defendant amounting to nearly $11,000,—far more than sufficient to pay all the necessary and useful expenses as recited in the account. The difference for which the suit of 1882 was brought is made up of $8,000, charged for the agent's personal services over and above his expenses. This claim is based on no contract, and must be determined according to the *quantum meruit*. When we consider the conduct of this agent with reference to the two judicial proceedings above referred to, his illegal and unwarrantable attempt to divest his principals of their property in his own favor, and the result of his services as exhibited in the summing up made at the beginning of this opinion, the question, as to such services, *quantum meruit*, can receive from a court of justice but one answer,—*nihil*. "Where an agent is unfaithful to his trust, and abuses the confidence reposed in him by his principal, or where he misconducts himself in the business of the agency, or where he engages in transactions by which he acquires interests adverse to the interests of his principals, he may be deprived of commission and compensation." 1 Amer. & Eng. Enc. Law, p. 397, and numerous authorities there cited. We have no desire to criticise the conduct of Mr. Peake with undue severity. He may have acted on bad advice; he may have satisfied himself of the propriety of his course; but the law condemns his conduct as utterly inconsistent with that *uberrima fides* which should characterize the relations of an agent to his absent principals.

From the date of his respective purchases Peake held the property not as agent, but as possessor, for his own account. We are bound to hold that he was possessor in bad faith, under Rev. Civil Code, art. 3452, as one "who possesses as master, but who assumes this quality when he well knows that he has no title to the thing, or that his title is vicious and defective." Charged, as Peake is, with actual knowledge of the facts, and with conclusively presumed knowledge of the law, he was bound to know the nullity of his titles. As possessor in bad faith, he is bound to account for the revenues, and is entitled to recover expenses necessary to the preservation of the thing, such as taxes, and also for useful improvements, but only to the extent to which they have enhanced the value of the property. These latter rights repose on no text of the Code, but on the great equitable principle which prevents one from enriching himself gratuitously at the expense of another. Pearce v. Frantum, 16 La. 414; Baillio v. Burney, 3 Rob. (La.) 319; Williams v. Booker, 12 Rob. (La.) 254; Gibson v. Hutchins, 12 La. Ann. 545. All matters prior to 1882 are settled by our decision as to the agency account.

Nothing remains but to determine—*First*, the amount of revenues from that date; *second*, the taxes paid from that date; *third*, the useful improvements, and the extent to which they have actually enhanced the value of the property. These questions were not passed upon in the court below, and we have striven in vain to reach a satisfactory conclusion from the evidence in the record. That evidence does not define with exactness the date and character of the improvements made, and the defendant's answer does not even specify them; and the evidence is not directed to the only pertinent question, viz., the enhancement of value. We shall make our decree final as to the recovery of the property, but will remand the case for further proceedings with reference to the adjustment of the matters just referred to. It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now adjudged and decreed that the sale made in the succession of Samuel Beaty, and the judgment and sale in the suit of Glenn D. Peake v. Margaret A. Young et al., be, and they are hereby, decreed to be null and void in so far as they affect the plaintiffs in this cause; that the said plaintiffs be decreed to be the owners of the property described in the petition, and known as the "McCrea Place" and the "McKneely Place," in the proportions in which they inherit the same from Samuel Beaty, Patsy Beaty, and Margaret A. Young, as set forth in the petition, and that Glenn D. Peake, defendant, be condemned to restore the same to plaintiffs; and it is further ordered that this cause be remanded to the lower court for further proceedings according to law for the determination of the rights of the parties as to rents, taxes, and improvements according to the views expressed in this opinion; defendant to pay costs in both courts.

(44 La. Ann. 370)

REILEY v. HIS CREDITORS. (No. 11,000.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

APPEAL FROM INTERLOCUTORY ORDER—INSOLVENCY—CONSOLIDATION OF ACTIONS.

1. A devolutive appeal lies from an interlocutory decree consolidating the proceedings in a surrender made by a commercial partner, indi-

vidually to his individual creditors, with those of the surrender made by him and his copartner, as commercial partners and as a firm, to the partnership creditors, even though a suspensive appeal does not lie from the decree, because its execution could cause no irreparable injury.

2. A decree consolidating the two proceedings is proper. Far from causing any injury to either class of creditors, or to any party concerned, it inures to the benefit of all such parties, by securing to them a speedy and uniform administration of their respective rights.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Feliciana; F. D. BRAME, Judge.

Reiley & Co., claiming the benefit of the insolvent laws, surrendered their partnership property to their creditors. The cession was accepted, and a syndic appointed. Subsequently G. J. Reiley made a surrender in his individual capacity as well to his personal creditors as to those of the firm, and his cession was also accepted, and a syndic appointed. From a decree consolidating Reiley's proceedings with that of the firm's, on motion of the syndic of the firm, he, the provisional syndic, and his individual creditor, John J. Blair, appeal. Affirmed.

W. F. Kernan, for appellants. *John H. Stone*, for appellee.

ON MOTION TO DISMISS.

BERMUDEZ, C. J. It is claimed that the appeal herein should be dismissed, for the reason that the decree complained of is not a final judgment, but an interlocutory order, the execution of which can cause no irreparable injury. It appears that the two members composing the firm of Reiley & Co. went into court, as copartners, claimed the benefit of the insolvent laws, and surrendered to their creditors all the property of the concern. The cession was accepted, and a syndic was elected and qualified. Reiley, one of the members, subsequently made a surrender, in his individual capacity, as well to his personal creditors as to those of the firm to which he belonged, being statements of his assets and of the respective liabilities of both the firm and himself. The cession wa accepted, and, on the application of certain creditors, a provisional syndic was appointed. The syndic elected in the insolvency proceedings of Reiley & Co. then intervened in those of George J. Reiley, and moved that the proceedings be consolidated with those in the insolvency of George J. Reiley & Co., for the reason that Reiley, a commercial partner of Reiley & Co., should have made a surrender of his individual estate in said insolvency, and that the administration of his insolvent estate should be committed to the syndic of the insolvency of Reiley & Co. The motion was opposed by Blair, an individual creditor of George J. Reiley. After hearing, the court ordered that the motion to consolidate be sustained, and the opposition of Blair be overruled. From this decree Reiley and Blair have taken an appeal, furnishing a bond for $250, if the appeal be suspensive, and for $100, if devolutive. The appeal was perfected by their giving each a bond for $100; therefore not as a suspensive, but as a devolutive, appeal. Conceding *arguendo* that no suspensive appeal could be taken from the order to consolidate, it by no means follows that a devolutive appeal does not lie from it. The appellants cannot be deprived of the constitutional right of appealing in that way; otherwise no interlocutory decree against them could ever be revised and corrected if erroneous. The motion to dismiss is overruled.

ON THE MERITS.

The question presented is simply whether the decree consolidating the proceedings in the insolvency of Reiley as an individual with those in the insolvency of the commercial firm of G. J. Reiley & Co. was correctly rendered. The cession was made in the last proceedings by G. J. Reiley and John B. Dunn, who appeared in proper person for the purpose. The bill and affidavit are signed by both of them. When the cession was accepted by the court, all the property of the insolvent debtors vested fully in their creditors, and the syndic, when elected, was entitled to claim and recover and administer the same according to law. Rev. St. art. 1791. The members, as individuals, were liable to the partnership creditors *in solido*, as much as though they were individual creditors, although their rights against the property surrendered ranked those of the individual creditors. If the property abandoned proves insufficient to pay the partnership creditors, these can have recourse against the individual property of the members in their individual capacity; so that the creditors of the firm are also the creditors of the individuals composing it, and remain such notwithstanding an individual surrender, the individual creditors having, however, no preference over those of the partnership on the individual property of the individual members. This is so true that the syndic of the partnership insolvency would have a right, in a proper case, to seize the individual property of the members to secure the claims of the partnership creditors. It is notorious to the profession and to the bench that it is usual that, whenever a surrender is made to partnership creditors, the individual members, at the same time, make a cession of their individual property to their individual creditors, and the rights of both classes of creditors are liquidated and disposed of in the partnership insolvency proceedings. It is impossible to conceive why, where this is not done by the surrendering partners, the court should not cumulate the proceedings in the individual cession with those in the partnership surrender. It does seem that, on the contrary, far from causing any injury, specially an irreparable injury, such action on the part of the court would benefit both the partnership and individual creditors of the members, as partners and as individuals, securing to them a speedy, uniform administration and liquidation of their respective rights. Judgment affirmed.

(44 La. Ann. 356)

STATE *ex rel.* NEW ORLEANS CITY & L. R. CO. v. CITY OF NEW ORLEANS *et al.* (No. 10,984.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

MANDAMUS—SUSPENDING APPEAL—DISCONTINUANCE OF APPLICATION.

A relator who applies for a *mandamus* to compel the granting of a suspensive appeal may discontinue his application at any time before judgment thereon.

(*Syllabus by the Court.*)

Application by the New Orleans City & Lake Railroad Company for writs of *mandamus* and prohibition to the city of New Orleans and others. On motion by the relator to discontinue. Motion granted.

Buck, Dinkelspiel & Hart, for relator. *Carleton Hunt*, City Atty., for respondents.

FENNER, J. Since the submission of this case, but before decision, the relator has moved to discontinue its application for the extraordinary writs herein invoked. Counsel for the city opposes the motion, and insists that the case should be decided. Article 491, Code Pr., declares that "the plaintiff may, in every stage of the suit previous to judgment being rendered, discontinue the suit on paying the costs." This alone affords ample warrant for relator's action. But, aside from this, it would be worse than idle for us to determine whether or not the respondent judge should be compelled by *mandamus* to grant a suspensive appeal from an order rendered by him, when the relator, the only party who wants the appeal, and who invokes our aid to enforce it, in effect withdraws his application for the appeal, and abandons his proceedings in this court to enforce it.

The motion to discontinue is granted.

(44 La. Ann. 423)

NEWMAN *et al.* v. MAHONEY *et al.* (No. 11,003.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

FRAUDULENT CONVEYANCES—BURDEN OF PROOF—CONSIDERATION.

1. A conveyance of land for a fixed price, reciting a payment in cash of $300, and the balance in negotiable mortgage notes of the vendee, is not converted into a giving in payment by proof that the $300 was not actually paid at date of sale, but was discharged by a debt due the vendee for wages, when the same evidence shows that the sale had been agreed on nearly a year previously, and the vendee's wages were left in the hands of the vendor for the express purpose of being applied to the agreed cash payment. This was, in substance, a payment in advance.

2. Plaintiffs, in an action to revoke a sale as in fraud of creditors, carry the burden of proof of the facts necessary to support the action. If they have no means of proof except by probing the consciences of their adversaries, and put them on the stand as their own witnesses, they must abide the result.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Feliciana; F. D. BRAME, Judge.

Suit by H. & C. Newman against L. Mahoney and others to revoke a certain conveyance. From a judgment for defendants, plaintiffs appeal. Affirmed.

John H. Stone and *T. H. Thorpe*, for appellants. *W. F. Kernan*, for appellees.

FENNER, J. This is a suit by creditors to revoke a conveyance made by their insolvent debtor, L. Mahoney, to his son T. J. Mahoney, on the ground that it was made in fraud of creditors. The conveyance is, in form and substance, a sale. It is made for a fixed price of $1,200, of which, as recited in the act, $300 was in cash and $900 in three negotiable notes, at one, two, and three years, secured by mortgage on the property. The evidence shows that the $300 was not paid in cash at the date of sale, but was discharged by a debt due the vendee for wages. But the same evidence—which is that of plaintiffs' own witnesses—shows that the agreement to sell had been made nearly a year previously, and that the wages due the vendee were left in the vendor's hands for the express purpose of discharging the cash payment which had been agreed on. We think this circumstance robs the conveyance of any feature of a fraudulent *dation en paiement*, and takes it out of the operation of article 2658, Rev. Civil Code, which forbids the giving in payment, by an insolvent, "to one creditor to the prejudice of the others, any other thing than the sum of money due." This was, in substance, a cash payment, made in advance, and acknowledged in the act. We do not, however, intimate that, even in absence of this circumstance, the contract would not be a sale, under the maxim, *non pretii numeratio, sed conventio, perficit emptionem*. Regarded as a sale, it is elementary, and is conceded, that, in order to revoke it, plaintiffs carry the burden of proving three things: *First*, fraud in the vendor; *second*, knowledge of his insolvency in the vendee; *third*, injury to the plaintiffs. It may be unfortunate for plaintiffs that they had no means of proving the knowledge of the vendee except by putting the parties themselves on the stand. They have made the parties their own witnesses. These have unequivocally sworn that the son did not know of his father's insolvency, and there is nothing to contradict them. Plaintiffs have no alternative but to abide the result.

Judgment affirmed.

(44 La. Ann. 295)

BARON *et al.* v. BAUM. (No. 10,992.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

ADMINISTRATION—RIGHT OF HEIRS TO DEMAND ACCOUNTING—PARTIES—JUDICIAL NOTICE.

1. Parties claiming to be sole heirs of a deceased have no right to demand an account of the administration of the succession, although they attack a judgment homologating an account, where it appears that the party sued for the account has been discharged as administrator, and the order discharging him is not assailed, and the person to whom the residue of the estate was paid, and who had been recognized as the sole heir of the deceased, is not made a party defendant.

2. Courts notice judicially want of proper parties.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Baton Rouge; GEORGE W. BUCKNER, Judge.

Suit by Louis Baron and others against Jacob Baum, administrator, for an accounting. From a judgment for defendant, plaintiffs appeal. Modified.

Cross & Cross, for appellants. *Kernan & Laycock*, for appellee.

BERMUDEZ, C. J. This suit has for its object the rendition of an account by the defendant as administrator. It is brought by the plaintiffs, who aver themselves to be the legitimate collateral heirs of Pierre Baron. They charge that the defendant has filed an account already, which has been homologated, but that the judgment approving it is a nullity, because they were not cited as the law requires. They contend that eventually they are entitled to recover from the defendant the amount of the inventory, $5,457, should he fail to render a proper account to them. They pray that he be cited, and that the judgment of homologation be annulled, and that he be ordered to account, and, in default, be held for the value of the property appraised in the inventory. The defendant appeared, filing exceptions and an answer. His main defenses are that the succession of Pierre Baron has been fully and finally administered upon by him; that its debts and liabilities have been satisfied; and that the residue has been paid over by him to Mrs. Gillingham, who had been previously recognized, by judgment of the court, as the sole heir of the deceased; and that he has been discharged from further responsibility as administrator, and his bond, as such, canceled. It is to be noticed that this person, Mrs. Gillingham, was not made a party to this action. After hearing, the lower court rejected the demand of plaintiffs, who pursue the present appeal. The question presented is simply whether the plaintiffs can proceed solely against the defendant and in the manner they have. The controversy does not necessarily involve, at its present stage, the issue of heirship. On the averment that they are the only heirs of the deceased, as his brother and sisters, the plaintiffs seek the nullity of a judgment homologating an account, for want of citation to them, and demand the rendition of another account from the defendant, as administrator. The defendant denies that he is amenable, and contends that he has been discharged, and that if plaintiffs have any right to the succession of Pierre Baron, which he has fully administered, they should bring their action against Mrs. Gillingham, who had claimed to be a legitimated child, and who was recognized by a judgment of court as the sole heir of the deceased, in a proceeding in which Louis Baron, one of the plaintiffs, was a party, and had raised the issue of heirship, and to whom he had turned over the residue of the succession. The record in fact shows that an application for the administration was made by a person claiming to be the widow of Pierre Baron, and as such entitled to the tutorship of two minors born of them; that this demand was opposed by Mrs. Gillingham, who averred herself to be a legitimated child of the deceased, and by said Louis Baron, who averred himself to be the legitimate brother, and who denied that the applicant was the widow, and charged that Mrs. Gillingham was an adulterous bastard, who could not be and was not legitimated, as claimed. The case was heard, and the court rendered judgment dismissing the petition of the alleged widow, and the opposition of Louis Baron, on his own motion. It sustained the opposition of Mrs. Gillingham, appointing her administratrix, and recognizing her as the sole heir of Pierre Baron. As she failed to qualify, Baum, the defendant, applied for the administration, and, after due publication, was appointed, taking the oath and furnishing the bond required by law. He went on with the liquidation, sold the property, and presented an account, distributing the funds among the creditors, which was homologated without notice to the plaintiffs, but with the declaration that the administrator shall pay over the balance to the heirs at law, without naming any one. The record also shows that, upon production of the proper vouchers, one of which is a receipt of Mrs. Gillingham for the balance, the defendant was discharged, and his bond canceled. It may be, and it may not, that the plaintiffs are what they represent themselves, the brother and sisters of the deceased; that Mrs. Gillingham was an adulterous bastard, and not an heir; that the judgment of homologation attacked is a nullity; that another account ought to be rendered, and the plaintiffs cited; but, however this may be, it is clear that the plaintiffs cannot be listened to, unless they attack the judgment recognizing Mrs. Gillingham as sole heir, making her or her representatives party defendant, and also assail the order discharging the defendant, Baum, as administrator of the succession, neither of which the plaintiffs have done. The court cannot recognize the plaintiffs as sole heirs, without annulling the judgment in favor of Mrs. Gillingham, and it cannot do so, unless she is called in to defend it. Neither can it annul the judgment of homologation, and order another account, without declaring that the defendant is still the administrator, and it cannot do so unless the order discharging him is rescinded. Both stand until avoided and set aside. Mrs. Gillingham or her representative is an essential party, having an interest in maintaining a judgment recognizing a *status*, and under which property has passed to her. Courts must judicially notice want of necessary parties. The judgment appealed from appears to have been rendered on the merits of the controversy. It does not refer to the exceptions, and merely states that, "the law and the evidence being in favor of the defendant and against the plaintiffs, the demand is rejected, with costs." If it were to remain as it reads, it might constitute *res judicata;* but it is not just that it should be considered as presently settling all the differences between the parties, as the plaintiffs, under its terms, might be said to have been decreed, under the issue, not to be the heirs of the deceased, when

in reality they may be such, and in that capacity entitled to the residue of his estate, whatever it may be. A door should be left open to them for the revendication of their rights, if any, after proper averments and the making of a necessary and indispensable party. It is therefore ordered and decreed that the judgment appealed from be amended, so as to read as a mere judgment of dismissal, as in case of nonsuit, reserving to plaintiffs the right to renew the action, on proper averments, and against the proper parties; and that, thus amended, said judgment be affirmed, the costs of appeal to be paid by the appellee, and those of the lower court by the plaintiffs.

(44 La. Ann. 190)

STATE *ex rel.* MARCHAND v. JUDGE DIVISION A, CIVIL DISTRICT COURT. (No. 10,991.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

PROHIBITION TO DISTRICT JUDGE—USURPATION OF JURISDICTION—OMISSION TO ALLOT CIVIL CASE—INJUNCTION—CERTIORARI—WHEN LIES.

1. Prohibition will not issue on a charge of usurpation of jurisdiction unless a plea was filed and improperly overruled to such jurisdiction, and when, outside the matter of form in which it was exercised, the court was competent to render the judgment complained of.

2. An omission to allot a civil case in the civil district court for the parish of Orleans is not an absolute nullity. The allotment may be formally or tacitly waived or abandoned. After this has been done the failure cannot be made a ground of complaint. It has been held otherwise in a criminal case.

3. This court will not supply a refused injunction unless in a very clear case, where it was declined by a judge who has no discretion to deny it, and who is bound by law to allow it.

4. *Certiorari* does not lie to ascertain the intrinsic correctness of proceedings. It lies sometimes to test the jurisdiction, and usually to ascertain the validity of proceedings in point of form. It does not lie where the proceedings, if irregular, have been ratified, and where a court has the inherent competency to do the act complained of, and has performed it without objection.

(*Syllabus by the Court.*)

Application of Paul A. Marchand for writs of prohibition and *certiorari* to the judge of division A, civil district court. Application denied.

Ker & Duvigneaux and *Horace E. Upton*, for relator. *B. R. Forman*, for respondent.

BERMUDEZ, C. J. This is an application for a prohibition coupled with a prayer for a *certiorari*. The relator complains that the district judge has usurped jurisdiction in the matter of the succession of Ernest Marchand, by appointing, after the succession had been closed, one De Blois, liquidator of the partnership alleged to have existed between him and the deceased, and by ordering, at his instance, the sale of property to pay the debts of the concern. The relator avers that he was a partner of Ernest Marchand; was appointed administrator of his estate; that his widow and heirs have been recognized and put in possession of the property left by him; that, if De Blois was entitled to be appointed liquidator, he should have brought proper proceedings outside of the *mortuaria*, and had the matter allotted, under the law, to one of the divisions of the civil district court, which was not done; that the appointment made in the *mortuaria* is a nullity, which carries with it that of the order of sale. The district judge returns that the matter of the appointment of De Blois was one growing out of the succession proceedings, which, under the rules of the civil district court, did not require any allotment; that the proceedings were carried on contradictorily with all the parties concerned, who were cited and appeared without declining to the jurisdiction; that, after hearing, a judgment was rendered on August 5, 1891, which was signed after the overruling of a motion for a new trial, making the appointment of the liquidator, from which no appeal has been taken. The district judge further urges that the relator has no interest, as he avers that he is the discharged administrator of the succession of Ernest Marchand. It is unnecessary to decide whether the appointment of a liquidator was or not properly made. It is a question which cannot be raised and determined on this application for a prohibition. It is manifest that the civil district court for the parish of Orleans had jurisdiction over such a matter, and that if, in exercising its power, it has erred, the remedy is not by a resort to this court, under the provisions of article 90 of the constitution, but by an appeal, this being a case in which it can be obtained. It does not appear affirmatively that the relator, in the proceedings for the appointment of a liquidator, ever excepted to the jurisdiction of the judge, and it is the settled jurisprudence of this court that prohibition will not issue unless it appears that the jurisdiction was pleaded to and the plea was overruled. The relator has not appealed from the judgment, and cannot substitute the application for a prohibition to an appeal. The functions of the two remedies are glaringly different. The omission to allot a civil case is not an absolute nullity. The allotment may be formally and tacitly waived and abandoned, and, after this is done, the door for a complaint that it did not take place is effectually closed. This court has held differently in a criminal case. State v. Addotto, 34 La. Ann. 1. The failure of the relator to complain of the absence of an allotment, either by exception, seasonably set up, or otherwise, prevents him from proving that irregularity here if it be a factor in this matter. The respondent urges, besides, that the relator is without interest, as he avers that he was discharged as administrator of the succession of E. Marchand; but the relator does not claim that in that capacity, or as an heir, or otherwise, he is interested in the succession. He assumes the attitude, in his petition, of a copartner, and complains that a liquidator was illegally appointed to take charge of the partnership in which he is concerned as a member. The relator complains of the order of sale granted at the instance of De Blois as liquidator. It may be said that if this order is illegal the relator should have set

forth its illegality, and sought an injunction in the lower court, and that if that tribunal had jurisdiction to make the appointment of one to liquidate the partnership, it surely had the power of ordering the sale of its assets to discharge its liabilities. It does not appear that he has sought relief in that form below, and he cannot be allowed to invoke the powers of supervision of this court in the present form, to supply that omission. This sort of provisional relief should not emanate from this court, unless in very clear cases, in which a district court has arbitrarily declined to grant it, in one of the instances in which, upon proper and full averments, the law leaves no discretion to such court, but dictates the granting of the remedy, and where injury would evidently be sustained. The relator has also applied for a *certiorari*. It is unnecessary to give this application any extended attention. The writ issues sometimes to test a jurisdiction, and usually to ascertain not the intrinsic correctness of proceedings, but their extrinsic validity in point of form. These questions have been considered. We have determined that if the allotment was irregular the irregularity has been acquiesced in and ratified, and that the civil district court had jurisdiction, and was competent to do the acts complained of, in the absence of any objection to the exercise of its powers in that respect, in the form in which it did. It is therefore decreed that the preliminary orders herein made be annulled, and that this application for a prohibition and a *certiorari* be refused.

(44 La. Ann. 444)

MAY *et al.* v. NEW ORLEANS & C. R. CO.
(No. 10,884.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

PARTNERSHIP PROPERTY — WHAT CONSTITUTES — BANKRUPTCY — TITLE OF ASSIGNEE — COLLATERAL ATTACK.

1. A purchase of immovables by the members of a commercial firm, made with the partnership funds and for account and use of the partnership, as shown by the books of the latter, though the title be taken in the names of the individual members, has precisely the same effect as if the title had been taken in the name of the partnership. In either case the partners become joint owners, but as between themselves they hold for the benefit of the firm.

2. A transfer by one partner to his copartners or to a third person of all his interest in the firm and its property operates a divestiture of his beneficial interest in immovables held as above, and disables him from contesting the title of his transferee.

3. An assignment in bankruptcy under the bankrupt law of the United States, differing from a cession under the Louisiana insolvent laws, divests the bankrupt of his title to all his property, and transfers the same to his assignee.

4. While the assignee holds the title in trust for the creditors, and, as to any residuum after their satisfaction, for the bankrupt, his title cannot be divested without proper showing to, and order made by, the court which has the control and administration of the trust.

5. Until this has been done other courts must respect the title of the assignee, at least until his discharge.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Action by Mary P. May and others against the New Orleans & Carrollton Railroad Company to recover an interest in certain land. From a judgment from defendant, plaintiffs appeal. Affirmed.

Leovy & Blair, for appellants. *John M. Bonner*, for appellee.

FENNER, J. The pertinent and controlling facts in the case are as follows: On the 12th of April, 1866, G. T. Beauregard leased the railroad belonging to the New Orleans & Carrollton Railroad Company for the term of 25 years, with the stipulation that the same should be converted from a steam into a horse railroad at the expense of the lessee, and with the further stipulation that at the expiration of the lease the road and improvements should revert to the lessor. Thomas P. May and A. C. Graham signed the lease as sureties of the lessee. On April 18, 1866, Beauregard, May, and Graham entered into a copartnership by notarial act, which declared that the lease above referred to was to be held for the joint account; that Beauregard was to conduct, manage, and direct the enterprise; that May and Graham were to furnish the money necessary to carry it on, in amounts and at dates specified; that books of accounts were to be kept; and that each partner was to have an equal one-third of the net profits. The act of copartnership does not give any firm name to the partnership, but the evidence shows that the business was conducted and the books were kept under the name of the Carrollton Railroad Company. One of the first necessities of the enterprise was to establish stables for the live stock employed therein. Accordingly a square of ground, being the property here in controversy, was purchased for that purpose. The title was taken in the individual names of the partners, in the proportion of one undivided third each; but the books of the partnership show that the cash portion of the price was paid by a check of the partnership, and said books further expressly declare that the purchase was made "by the partnership." They also show that the first deferred payment, due May 8, 1867, was paid by the partnership. Stables were built on the property, and it was used by the partnership in its business. Subsequently, Thomas P. May, by facts not necessary to mention, became a debtor of the United States in an enormous sum. By an act passed on May 14, 1867, May assigned to the United States, in part payment of this debt, a large amount of property, "real, personal, and mixed," itemized in the act, and comprising the following, viz.: "The interest of the said May in and to the Carrollton Railroad Company, and the property, stock, and appurtenances thereto belonging; the value of which is estimated at $480,000." By a further clause in said act, May bound himself "to sign and execute all acts or other instruments of writing that may be necessary to give to the United States full, complete, and valid titles to the property herein transferred." Accordingly, on May 16, 1887, May executed a further and more specific transfer to the United States of his interest "in

and to the New Orleans & Carrollton Railroad, the lease and other franchises thereof, and the railroad tracks, rolling stock, engines, cars, live stock, and other appurtenances thereunto belonging," proceeding to refer to and particularly describe the nature of the property and interest as fixed by the terms of the lease and the articles of copartnership. The act further recites that it was "executed in confirmation of the act of transfer of said right, title, and interest in the said railroad and the said lease thereof, and of other property, real and personal, belonging to said May, passed on May 14, 1867." On October 31, 1867, the United States executed an act of transfer to Bonneval, Hernandez, and Binder of all its right, title, and interest in and to the property therein described, including: (1) Its interest in the lease of the railroad; (2) in the partnership between May, Graham, and Beauregard; and (3) various pieces of real estate, specifically described, and among others the square of ground in controversy. In the same month an act was passed between the New Orleans & Carrollton Railroad Company, Beauregard, Bonneval, Binder, and Hernandez, by which this property passed to the present defendant, which has since possessed, occupied, and used the same. In April, 1871, Thomas P. May availed himself of the bankrupt law of 1867. His schedules exhibited large debts, and no assets whatever. He specifically declared therein, under oath, that he had no real estate, and that there was none to the possession or enjoyment of which he is entitled. He also inserted therein the following sworn statement: "In May, 1867, by act before Graham, notary, I transferred, to secure the United States, all my real and personal property, consisting of real estate in square bounded by canal, * * * the Payne plantation, * * * my interest in Carrollton Railroad, etc." A regular assignment was executed to E. E. Norton, assignee, who has never been discharged. There being no property surrendered, as appeared by the schedules, no creditor appeared to prove his debt. In due course, May obtained his discharge. He subsequently left New Orleans, and died in London, England, in 1887. The present is a petitory action brought by his major daughter and by his widow, as tutrix of his two minor children, to recover his interest in the square of ground hereinbefore alluded to, alleging that May validly purchased the same in 1866, had never sold or conveyed it, died in the ownership thereof, and that plaintiffs inherited the same from him; that defendant is a wrongful possessor, and should be condemned to deliver the same, and also to pay $46,000 as rent and revenues. Numerous defenses are interposed, which we shall consider, as far as necessary, in disposing of the case.

1. Whatever sympathy we might feel with the children of May, we are bound to recognize the fact that they stand in the shoes of their father, and have no title to any consideration which would not be extended to him if he were personally plaintiff. If there be any ambiguity in the acts by which it is claimed that May had divested himself of this property, his acts, words, and conduct showing the meaning and effect which he himself attributed to them should have great weight in their construction. His sworn declarations, which we have quoted from his bankruptcy proceedings, admit of but one of two explanations: Either (1) that he interpreted and intended his transfers to the United States as operating a divestiture of his title to this property; or (2) that he designedly concealed his interest, with the purpose of defrauding his creditors. The first hypothesis would go far towards ending this controversy. The second would drive him away from the portals of justice, as coming with unclean hands. Hood v. Frellsen, 31 La. Ann. 577. The first is unquestionably the correct hypothesis, which his children will hardly dispute, and which is maintained by May's silent acquiescence in the effect given to his conveyances down to the day of his death. We cannot concur in the restrictive interpretation placed by counsel for plaintiffs on May's sworn statement in his bankruptcy schedules, that he had transferred to the United States "all his property, real and personal." He claims that this expression is limited by the succeeding statement, mentioning the particular properties so transferred. We think the proper construction is reached, not by restricting the words "all his property," but by amplifying the meaning of the succeeding descriptive terms, and by attributing to the words, "my interest in the Carrollton Railroad," the signification of his interest in everything connected with the road, including the partnership and all its property. No other interpretation is consistent with reason or honesty; for, if he did not mean "all his property," why did he use that phrase? And, if he meant to exclude any property, why does it not appear on his schedule? It is obvious that this declaration was made to explain why he had no property to surrender, and surrendered none. It is nothing less than a solemn declaration, under oath, that May intended, by his acts of transfer to the United States, to embrace all his property, including that here in controversy.

2. There can be no doubt that by the act of May 14, 1867, May intended to transfer, and did transfer, to the United States, his interest in the partnership between Beauregard, Graham, and himself, and in all the property belonging to it. The terms used admit of no other interpretation. The Carrollton Railroad Company was the firm name in which the partnership conducted its business, and kept the books of account required by the articles. He transferred his interest, not in the railroad, but in the railroad company, and in the property belonging to the company. The distinction is emphasized by the succeeding act of May 16th, which was obviously intended to make a more specific and descriptive transfer of his particular interest in the railroad itself, the lease thereof, and its franchises and appurtenances. It is equally clear, under the evidence, that this square of ground was bought and paid for with the funds and

for the account and use of the partnership. The books of the partnership explicitly show this, and May has never contradicted and could not contradict them, at least without showing fraud. Every fact in the case fully corroborates the books. Such a purchase of immovable property by members of a commercial partnership, with the partnership funds and for the partnership account, though the title be taken in the name of the individual partners, has precisely the same effect as if the title were taken in the name of the partnership. In either case the individual partners became joint owners. Allen v. Whetstone, 35 La. Ann. 849; Thomas v. Scott, 3 Rob. (La.) 256. But though the legal title vests in the individual partners, and the share of each is liable to seizure for his individual debts, yet as between the partners the property is equitably and practically partnership property. This subject was dealt with by this court in the case of Baca v. Ramos, 10 La. 417, where the title to the immovable was taken in the name of "J. Ramos, A. Baca, and J. Preba, partners trading under the firm and style of J. Ramos and Company." After the purchase Baca transferred his interest in the partnership to his copartners. He subsequently claimed that this transfer did not divest his ownership of the above immovable, and sued his former partners for a partition thereof. Judge MARTIN, as organ of the court, said: "The only question which this case presents is whether the house and lot was part of the partnership property. The counsel for plaintiff contends that this is joint property, in which he is a joint owner, and not partnership property. Skillman v. Purnell, 3 La. 496. The act of sale by which the premises were acquired shows that the purchase was made by the parties to this suit as partners trading under the firm of Joseph Ramos & Co., and a note was given for one-half the price, bearing the signature of the firm. The partners were joint owners, and either of them might have sold his undivided share or interest in the property, which was liable to seizure for his private debts. But, in case of such sale and seizure, he must have accounted to his partners for the price. Neither could he have occupied any part of the property for his private use without compensating his copartners. In fact, the title to one undivided third was in him, but the value thereof belonged to the partnership. When the plaintiff withdrew from the firm, and received a given sum, he relinquished his interest in the value of the house and lot in question to his copartners. He has therefore no right to demand a sale for partition, as immediately after it, the price, being the value of the premises, would instantly become the property of defendants. The distinction which we have taken between the title by which the property is held, and the value thereof, is well known in the other states of the Union, where the common law prevails. These rights are there distinguished by the expressions 'legal title' and 'equitable title.' There courts of equity enforce the rights of the equitable owner by compelling the legal one to make a conveyance to the other, precisely as this court did in the case of Hall v. Sprigg, 7 Mart. (La.) 243." This case was affirmed, and like principles announced, in a later decision. Thomas v. Scott, 3 Rob. (La.) 256. We consider that these authorities dispose of May's rights in this case. If a transfer by one partner to his copartners, of the former's interest in the partnership, divests his beneficial interest in immovables held by the partners jointly for account of the firm, a like transfer to a third person cannot have a less effect. In the latter as in the former case the transferrer is disabled from contesting the title of his transferee, or from setting up adverse claims on such property. We therefore hold that the transfer by May to the United States had precisely the effect which both parties obviously, at the time of the contract and ever afterwards, intended and considered that it should have, viz., a valid divestiture of May's rights in the property in controversy. As plaintiffs must recover on the strength of their own title, and not on the weakness of that of defendant, we have no occasion to discuss the question raised as to the validity of subsequent transfers by the United States and its assigns to the defendant.

3. The foregoing views render it unnecessary to discuss at length the defense based upon May's assignment in bankruptcy as operating a divestiture of his title which would bar this action. We have, however, studied the question very closely under the light thrown upon it by the authorities cited and by the very able arguments on both sides. The decisions of this court to the effect that cession of property under our state insolvent law does not operate a translation of title have no application to the United States bankrupt laws, because they are based on express provisions of our Revised Civil Code, of which it is only necessary to quote articles 2175 and 2178: "The surrender does not give the property to the creditors. It only gives them the right of selling it for their benefit, and receiving the income of it until sold." Article 2175. "As the debtor preserves his ownership of the property surrendered, he may divest the creditors of their possession of the same at any time before they have sold it, by paying the amount of his debts, with the expenses attending the cession." Article 2178. The bankrupt law contains no such provisions, but on the contrary declares: "As soon as the assignee is appointed and qualified the judge, or, where there is no opposing interest, the register shall by an instrument under his hand assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceeding in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee. * * *" Section 14 of bankrupt act of 1867. That the assignee holds the title in trust first for the creditors, and, as to any residuum after their satisfaction, for the bankrupt, is doubtless true. But it is certainly not in the power of the

bankrupt, by his simple *ipse dixit*, to terminate the trust, and divest the title of the assignee in his own favor. If he has reasons to urge why the assignee's title should be terminated, and the property restored to him as residuary *cestui que trust*, this is not the forum in which to vindicate them. He must go to the court which has the control and administration of the trust, and there make his showing, and obtain such relief as he is entitled to. Bump, Bankr. (10th Ed.) pp. 247, 248. Until then, this and every other court must respect the title of the assignee. Erwin v. U. S., 97 U. S. 392; Clark v. Clark, 17 How. 315; Comegys v. Vasse, 1 Pet. 193.

Judgment affirmed.

(44 Ga. Ann. 425)

CUTRER v. ADDISON *et al.* (No. 11,008.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

ILLEGAL REMOVAL OF FENCE—COMPENSATION—REASONABLENESS—APPEAL—DISMISSAL—JURISDICTIONAL AMOUNT.

1. An appeal may be dismissed *proprio motu*, in a proper case, in which the claim is inflated to give jurisdiction to the supreme court.

2. The matter here involved is one of fact, and relates to damages sustained by the illegal removal of a fence. The jury seem to have done justice by making a reasonable allowance, and their verdict, not having been shown to be erroneous either way, is not disturbed.

(*Syllabus by the Court.*)

Appeal from district court, parish of Tangipahoa; JAMES M. THOMPSON, Judge.

Suit by Joseph B. Cutrer against Ashford Addison and others to recover damages for tearing down certain fences. From a judgment for plaintiff, defendants appeal. Affirmed.

Reid & Reid, for appellants. *W. B. Kemp*, for appellee.

BERMUDEZ, C. J. This is a suit for the recovery of $2,500, as damages alleged to have been occasioned by the defendants for illegally and maliciously breaking, tearing down, and hauling away a dividing fence between the contiguous farms of the plaintiff and of the defendants, "leaving a large portion of that of petitioner unprotected and in the woods." The answer was a general denial, a charge of malicious and vexatious prosecution, to harass defendants, who had been criminally prosecuted, but acquitted, and who have sustained $500 damages, which are asked in reconvention. The issues were tried by a jury, who returned a verdict of $200 in favor of plaintiff, on which the court, satisfied with the finding, rendered a judgment for as much. The defendants appealed, and the plaintiff, answering, prays for an increase of the judgment to the full amount claimed. Surely, the plaintiff has some cause for complaint for which he is entitled to be indemnified; but it is surprising that he should ever have imagined that a court of justice could allow him $2,500 to repair the injury which he has sustained. It is clear that he magnified and swelled it to that exaggerated figure for no other purpose than that of making a jurisdictional allegation for the recovery of a largely fictitious claim, in order to bring the case within the jurisdiction of this court. Had the appeal been taken by the plaintiff, and had the defendants moved for its dismissal, the motion would have prevailed, the claim being manifestly inflated; but as the defendants could not have taken their appeal to another appellate jurisdiction, and were bound, under the allegations, to come here, we cannot, *proprio motu*, dismiss it, as we might otherwise have done. The reconventional demand was not formally or expressly passed upon, although it may have been considered and acted upon. However this be, it is not before us, as might be a plea of payment or such other plea as it is an independent matter, which might have formed the object of a distinct suit. The defendants have not shown that the verdict of the jury is excessive, and the plaintiff has not established that it is for less than he is entitled to recover. Under the circumstances, the question involved being one of fact and of little importance, the finding of the jury, which has satisfied neither side, should not be disturbed. Judgment affirmed.

(44 La. Ann. 373)

Succession of MONTGOMERY. (No. 10,998.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

MORTGAGE—RENUNCIATION OF INTEREST BY WIFE—REQUISITES—NOTARIAL CERTIFICATE—BURDEN OF PROOF.

1. The renunciation by a married woman of her rights against her husband and his property, in order to be valid and binding, must have been made as required by the act of 1835, embodied in Rev. Civil Code, art. 129.

2. The notary must have explained to her, out of the presence of her husband, the nature of her rights, and that of the contract she agrees to, and must have detailed the circumstances and the occurrence in the act.

3. A failure to comply with the requirements of the law, which are conditions precedent, vitiates the renunciation.

4. The presumption *omnia rite acta* does not attach in a case like this.

5. It does in that of a district judge, authorizing a married woman to borrow and mortgage, because he is a judicial officer empowered to hear and determine, but not in that of a notary, who is a ministerial officer, who has no judgment whatever to exercise and pronounce.

6. The burden is on the creditor who opposes the renunciation of a married woman, in order to defeat her money and mortgage claims against her husband and his property, to show by legal evidence that the essential formalities required by article 129, Rev. Civil Code, as conditions precedent for the validity of the renunciation, have been observed.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Carroll; FIELD F. MONTGOMERY, Judge.

On opposition to accounts in the settlement of the succession of J. W. Montgomery. From a judgment dismissing the opposition, and allowing the claim of Mrs. A. E. Montgomery, the opponents appeal. Affirmed.

J. L. Dagg and *C. S. Wyly*, for appellant. *J. M. Kennedy* and *Joseph E. Rausdell*, for appellees.

BERMUDEZ, C. J. This controversy involves the validity of a wife's renunciation of her rights against her husband, and the property mortgaged by him, in favor of a creditor. J. W. Montgomery having died, his widow filed an account of her administration of his estate, on which she placed herself as a creditor for $6,307 with the legal mortgage, accorded by law to secure its payment, the same to be satisfied in preference to the claims of all other creditors. The account was opposed. Mrs. Montgomery having died, her son was appointed to succeed her, and he filed another account, adopting that previously presented. There was judgment dismissing the opposition and maintaining the claim and the mortgage contended for, in favor of Mrs. Montgomery and of her succession. It is from that judgment that the present appeal is taken. There is no contention as to the amount of the claim, and as to a proper registry of it, at the date of the mortgage by Montgomery, in favor of Davis, in 1881. The litigation relates to the validity of the renunciation, mentioned in the notarial act, as having been made by Mrs. Montgomery. That instrument contains the following declaration: "I certify that there does not exist on the Deesona and other plantations any mortgage, except the following legal mortgage, in favor of Mrs. Eliza Vail, wife of the mortgagor, for $6,945.05, recorded on the 3d day of August, 1874; and she appears and declares that she renounces, unto said G. Malin Davis, her right of mortgage on said property, and agrees that his mortgage shall take precedence of hers; and she further declares that she has no other mortgage against her husband's property, recorded or otherwise." It is claimed that this renunciation meets the requirements of the law,—Rev. Civil Code, art. 129, (original act of March 27, 1835, section 2,)—which reads as follows. "Married women above the age of twenty-one years shall have the right, with the consent of their husbands, by act passed before a notary public, to renounce in favor of third persons their matrimonial, dotal, paraphernal, and other rights. The notary public, before receiving the signature of any married woman, shall detail in the act and explain verbally to said married woman, out of the presence of her husband, the nature of her rights and of the contract she agrees to." Also Rev. St. §§ 1717, 2518, 3985. On the other hand, it is contended that the recital does not show that those legal exigencies have been satisfied, and therefore, in the absence of such, the renunciation is defective and null. A simple reading of the provisions forcibly impresses upon the mind that the law permits a renunciation, provided the notary, before receiving the signature of the married woman, explains to her verbally, out of the presence of her husband,—*First*, the nature of her rights and that of the contract she agrees to; and, *second*, that he shows that he has done so by detailing in the act the nature of the double information which he has thus given her, and that the formalities have been fully observed. It is not until after he has so furnished her this information, and thus detailed what has occurred, that he has authority to receive her signature. A compliance with these requirements is an essential condition precedent for the validity of such renunciations, which is exacted for the protection of married women, who are *inopes consilii*, in order to shield them, as effectually as practicable, from marital pressure, intimidation, or captation. It is nothing but just that they should previously know their rights, just as they are, with precision, and it is for that purpose that the notary is required to inform them, and to show how he has done so, in order that they may not afterwards deny that they had full knowledge of those rights, the whole, of course, to occur out of the presence of the husband. The proof which the law allows to show that those formalities have been gone through faithfully is the notary's recital in the act.

In Succession of Gremillon, 4 La. Ann. 411, the declaration made by the parish judge, acting as a notary, was attacked as insufficient, and it was so held; yet by reference to the act it is perceived that it declares that Mrs. Gremillon voluntarily appeared, with her husband's authority, to renounce generally to all the rights whatever she had on the property mortgaged by her husband, in favor of Poydras, whereupon the judge explained to her specifically the rights which the law accords her in such a case, which he classified under five heads, covering upwards of a close-written page, and winding up with a statement that she, notwithstanding, persisted in renouncing, and had declared, that neither she nor her heirs would ever run counter to the mortgage, for any motive whatever. See Record No. 1183, in the clerk's office. It will be noticed that the parish judge, *ex officio* notary, had failed to mention the all important fact, if it existed, that all this had occurred "out of the presence of the husband." The then court therefore said: "The statute of 1835 contains the proviso that the notary public, before receiving the signature of any married woman, shall detail in the act, and verbally explain to her, out of the presence of her husband, the nature of her rights and of the contract she agrees to. A substantial compliance with the proviso is essential to the validity of the renunciation. One of its motives was to guard the wife against the influence of the husband, the moral effect of whose presence might control her will to the prejudice of her interest. This formality was disregarded in the instant case, and the renunciation must be held inoperative." In another case (Ashford v. Tibbitts, 11 La. Ann. 168) it appears from the transcript that the act of mortgage contained the following declaration of the notary: "Then appeared Mrs. Harriet Ashford, wife of said Tibitts, who, being by me made acquainted with her rights and privileges on the property of her said husband, apart and out of his hearing did, notwithstanding, declare to me that she does by the act formally renounce the same in favor of the said Mrs. Woodruff for the purpose aforesaid." See Record No. 4460, in the clerk's office. It will be observed that although

the notary stated that he had made the lady acquainted with her rights and privileges, out of her husband's presence, he failed to specify or detail in the act the nature of the rights explained to her. On the contention that this statement was, however, a substantial compliance with the law, the court said, in a quite summary way: "We think that her (Mrs. Ashford's) mortgage should have been recognized, as her renunciation was defective, in that the notary did not detail in the act the nature of the rights she renounced," —referring to the statute of 1835 and to Succession of Gremillion, 4 La. Ann. 412. In the instant case it is more than apparent that the renunciation is fatally defective, not only because the notary did not detail the rights, (the donble information which is to be given by him to the wife,) but also because it does not appear that what transpired, if anything of that kind did, occurred out of the presence of the husband. A failure to have made a recital in the act of those circumstances implies that the formalities were not fulfilled by the renunciation.

The further defense that the presumption is that the notary, who is a sworn public officer, must be presumed to have done his duty, and that this presumption has not been rebutted, cannot hold. In support of this position decisions are invoked which go to the extent that where a district judge has issued a certificate to a married woman, to authorize her to borrow money, and in order to secure its reimbursement, to mortgage her individual property, omitting to mention that he had examined her out of the presence of her husband, as directed by the statute, the presumption *omnia rite acta*, that he had done his duty, had been held to attach. Rev. Civil Code, art. 128; Locke v. Lafitte, 28 La. Ann. 232; Pilcher v. Pugh, Id. 494. Loque, Dig. 408, (12.) In refutation of this contention it suffices to say that the judge, in such cases, acts in his judicial capacity, exercising a judicial discretion, hearing, and determining. He is required officially to ascertain a certain condition of things, and after he has done so to decide whether the authority shall or not be granted; so much so that, in a proper case, his refusal might be the subject of an appeal. The notary, on the contrary, is not a judicial officer. He is vested with mere ministerial powers. He is a scribe, who has authority to identify parties appearing before him, and authenticate their declarations. In cases of renunciations he is commanded to do certain things, and he must, where he has done them, detail in the act what he has accomplished. He has no power to refuse to receive the renunciation if made legally, or to approve or to disapprove the same. His omissions or commissions are not judgments subject to be appealed from. In the Case of Ashford, 11 La. Ann., in which it appeared in the act that the notary stated that he had made the lady acquainted with her rights and privileges, the court did not hold that the presumption attached that he had done his duty. It is proper to add that the burden of proving fulfillment of the formalities was on the creditor, who affirmed a valid renunciation, and not on the wife, who denied the same. Judgment affirmed.

(44 La. Ann. 296)

STATE *ex rel.* BOTHICK *et al.* v. RIGHTOR, District Judge. (No. 10,994.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

PROHIBITION TO DISTRICT JUDGE—WHEN LIES—SUBSTITUTE FOR APPEAL—JURISDICTION.

1. Prohibition does not lie to test the jurisdiction of one of the divisions of the civil district court for the parish of Orleans, to which a suit was allotted, when it is pretended that its object is to annul proceedings had before another division, unless it clearly appears from the averments of the prayer that such is its purpose, and the division to which allotted is devoid of competency *ratione personæ* and *materiæ*, and the complainant, after exhausting all means of relief, is left without any other remedy.

2. Prohibition cannot be substituted to an appeal to determine, in an appealable case, whether the lower court, in the exercise of its legal discretion, has, after contradictory hearing, properly or improperly overruled an exception to its jurisdiction, when it is apparent that the court could render a judgment which might validly constitute *res judicata*, whichever way it goes.

3. The party aggrieved is not left without remedy, and, if error was committed to his prejudice, can be relieved by appeal.

(*Syllabus by the Court.*)

Application of James W. Bothick and others for writs of prohibition and *certiorari* to N. H. Rightor, judge of division D, civil district court. Application denied.

Augustus Bernan, for relators. *J. S. & J. T. Whitaker*, for respondent.

BERMUDEZ, C. J. The relators contend that a suit has been brought before the civil district court against them, having for its object to annul certain proceedings had in their mother's succession, which has been finally wound up; that those proceedings were duly begun, continued, and closed before division A of said court; that the suit to annul them was allotted to division D; that they have pleaded to the jurisdiction of the last division, contending that, as the suit grows out of the succession proceedings which they seek to annul, both under the rules of the civil district court, adopted in furtherance of the constitutional provision, and under the law which gives exclusive jurisdiction to the court which rendered a judgment to entertain and determine a suit to annul it, division D was incompetent, and should have referred the action to division A; that they have pleaded to the jurisdiction of division D, but that their plea has been overruled, and that their only remedy for relief is to apply to this court for a prohibition to arrest further proceedings in the suit before division D, and they accordingly pray. The district judge presiding over the division to which the suit was allotted returns substantially that the action brought against the relators does not avowedly purport to be one to annul the succession proceedings alluded to, and that it is simply a suit by parties who claim to be the legal heirs of

their mother, (Catherine Connolly, who died in 1866,) and who ask to be recognized such contradictorily with their father, Thomas W. Bothick, who is an interdicted person, provided with a curator, and with certain parties named, who pretend to be his legitimate children by another person, (Annie Cunningham, who died in 1881;) that he properly overruled the exception to the jurisdiction of his division; and that, if he has erred, the parties aggrieved can be relieved on appeal, the case being appealable. The averment that the suit against them by the relators is one in nullity of the proceedings in the settlement of their mother's succession is not apparent from the allegations and the prayer of the petition of the plaintiffs in the case. They do not even refer to them, and they could not ask for any specific decree in the judgment on the merits to annul them. When the petition was filed, and the question of the allotment of the case arose, it surely could not be ascertained from its face that its object was to annul any proceedings, orders, and judgments before another division, and the allotment accordingly took place. After the exception to the jurisdiction was filed and heard, the issue whether the suit was one to annul was to be determined by the judge of division D, in the exercise of his judicial discretion. He considered the showing made as indicating that it was not a suit in nullity; that it was an original, independent action, which could be determined, regardless of the succession proceedings, to which the plaintiffs were not parties, and which were not, therefore, in their way, so as to require them to be annulled, to justify a recovery of the rights revendicated by them. It may be and it may not that the district judge decided correctly. If he did, his judgment will stand, if he did not, it will be reversed; but the relators are not permitted to question its correctness on an application for a prohibition. That remedy is not one of right. It is granted only in cases in which a court has no jurisdiction *ratione personæ et materiæ*, and where the complainant would not be entitled to adequate relief by appeal or otherwise. State v. Rightor, 32 La. Ann. 1182; State v. Monroe, 33 La. Ann. 923; State v. Judge, 34 La. Ann. 782. The suit brought against the relators and allotted to division D is surely in itself one over the subject-matter, of which that division can pronounce a valid final judgment, whether in favor or against the relators, and which, when definitive, could be successfully set up as *res judicata*. Should the relators be aggrieved by the judgment to be rendered on the merits, they would not be left without a remedy. They could appeal, and have, if they are right, either the judgment overruling their exception, or that against them on the merits, reversed, and themselves quieted in their *status* and property. It may be that the final judgment may go in their favor and against the plaintiff in the suit, who may never appeal; or it may be, if they do, that the judgment will be affirmed, and the defendants quieted.

The relators can take nothing under the prayer for a *certiorari*. The question of jurisdiction which might have arisen under it has been disposed of in considering that for a prohibition, and the proceedings in the suit before division D are surely regular in point of form. Their regularity is the only question which would perhaps, at best, have received any attention in the present application. It is therefore decreed that the restraining order made *in limine* herein be rescinded, and that the application be refused, with costs, without prejudice to the rights of the relators as appellants in the case.

(44 La. Ann. 301)

GAY v. HEBERT *et al.* (No. 10,995.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.).

MORTGAGE TO SECURE COMMUNITY DEBTS — PRESCRIPTION — POWER OF SURVIVING HUSBAND TO WAIVE — DATE OF ACKNOWLEDGMENT — RIGHTS OF CHILDREN.

1. Although a surviving husband, personally bound for the debts of the community, may, after the dissolution thereof, waive prescription which has since accrued thereon, still, when he is the tutor of his minor children, born from his marriage with his deceased wife, he cannot do so to the prejudice of her succession or to their injury so as to burden them therewith and to prevent their legal mortgage, duly recorded against him, from ranking the mortgage securing such debts.

2. Such acknowledgment may then be made before prescription has extinguished such debts, when they are made *bona fide*. They will, when so made, keep such debts alive, as well as the mortgage securing them, and bind the succession and the minors, but not otherwise.

3. The proceeds of property mortgaged cannot be applied to the payment of the prescribed, though revived, debts, to the detriment of the succession and of the minors, but will go to extinguish only the debts not prescribed, secured by a mortgage ranking that of the minors.

4. At the dissolution of the community by the death of the wife her share therein vests in her heirs, as owners, *cum onere*, as effectually as it would have vested in her, on a dissolution by judgment, subject to all legal and valid claims against it, and susceptible of divestiture in the enforcement of these claims.

5. Neither the wife nor her heirs can be relieved from the pact *de non alienando*, contained in an act of sale, retaining a privilege and mortgage on the property sold, to secure the unpaid price. Under such pact the creditor is dispensed from the hypothecary action, and is entitled to ignore subsequent alienations and incumbrances, which, by virtue of the terms of the law, cannot impair his previously acquired and vested rights under duly-recorded acts.

6. Although the creditor possess such rights, the incumbered property may be transferred *cum onere;* and the transferee, in case of seizure and sale, to pay the secured debt, has a right to the residue of the price of adjudication after payment of such debt.

7. The privilege and mortgage securing a debt ceased to exist when the debt secured is extinguished by prescription. The accessory follows the principal, which is an essential foundation for it.

8. Waiver of the prescription does not revive the privilege and mortgage thus extinguished to the prejudice of subsequent recorded incumbrances, which then ascend and rank the extinct registries.

9. Unliquidated claims of minors against their tutors cannot be satisfied unless at the termination of the tutorship, but their mortgage

surviving such claims eventually may be recognized in the mean time.

10. Judgment reversed, and a new judgment rendered to apportion proceeds of sale and to allot costs.

ON REHEARING.

1. Acts under private signature have no date as to third parties unless the same are proved to have been executed on the day or at the time when they purport so to have been.

2. Merely offering such acts in evidence gives them, as to third persons, no other date than that of the day of offering.

3. In a proper case, in furtherance of the ends of justice, the court may *proprio motu* amend a previous decree so as to leave a door open for the proof of the date of an act under private signature, which was not made by some oversight, and which to all appearances can be furnished.

(*Syllabus by the Court.*)

Appeal from district court, parish of Iberville; EDWARD B. TALBOT, Judge.

Action by Lavina Gay *via executiva* against Amadee N. Hebert. Thomas B. Mary, the under-tutor of certain minors, filed a third opposition. From a judgment adjudicating an undivided one-half to plaintiff, the under-tutor and the administrator of plaintiff's succession appeal. Reversed.

Alex. Hebert, for appellant. *W. B. Sommerville*, for appellee.

BERMUDEZ, C. J. This litigation involves the right of ownership of the minors represented by the third opponent, as their under-tutor, to one undivided half of the property seized and adjudicated herein to the plaintiff, and also the mortgage rights which they assert, on a like share of the same property, belonging to their father and tutor, who is the defendant, and which, they claim, are entitled to rank those contended for by the plaintiff and her succession, and which are said to exist no more. It appears that on February 4, 1881, Hebert bought, for $10,000, the undivided half of a plantation known as "Dunboyne," part ($4,500) cash and part ($5,500) on time, for which he issued five notes of that date, payable two at two years and the others at three, four, and five years, each for $1,100. The act of sale contained the stipulation of the pact *de non alienando*, and was duly recorded July 23d following, and subsequently seasonably reinscribed. In October of the same year his wife, Emiline Gallaugher, died leaving several minor children as the issue of their marriage. Her succession was opened. An inventory was taken of the property composing the community between them, which was appraised at upwards of $14,000, an abstract of which was properly recorded on December 10, 1881, and afterwards reinscribed in time. Hebert was appointed tutor, and qualified as such on the same day. None of the notes having been paid, and all being then due, Mrs. Lavina Gay brought suit *via executiva*, on the 9th of March, 1891, with the averment that on the 17th of January, 1890, Hebert had obtained from her an extension to 1895, which, owing to his failure to comply with the obligations taken, authorized the suit, the same proving an acknowledgment of full indebtedness, and evidenced by an authentic act, attached to the petition, along with a copy of the deed of sale and of the notes. The fiat having issued, the undivided half purchased was seized and advertised. Previous to the day of sale Mary, the under-tutor of the minors, filed a third opposition, claiming, in their name, the ownership of one-half thereof, free from plaintiff's averred vendor's privilege and mortgage, and a mortgage on the remaining half, ranking plaintiff's pretensions. No injunction was asked to stop the sale, but on the prayer a restraining order was made arresting the proceeds. The undivided half seized was adjudicated to the plaintiff, for $7,500. She joined issue by a general denial and an averment of ownership under the sheriff's adjudication, praying for the dismissal of the opposition and for a recognition of her title. There was judgment against the under-tutor in favor of the succession of the plaintiff, dissolving the restraining order touching the proceeds and reserving the right of the minors against their father and tutor. Made a party, he failed to join issue, and no judgment was rendered as to him. The under-tutor appeals, and the administrator of the plaintiff's succession joins, asking that the judgment be amended by recognizing the title of the estate to the undivided half.

The main contention of the under-tutor on behalf of the minors is that at the death of their mother they inherited the one undivided half of the property seized, which formed part of the community which existed between her and their father, subject to all valid community debts against it; that at the date of the institution of this suit the five notes were prescribed as to their mother's succession and themselves; that thereby the privilege and mortgage claimed by the plaintiff ceased to exist, and to incumber the property to their prejudice, so that their share therein was cleared; and that the share of their father was likewise relieved, and their legal and recorded mortgage against him, as their tutor, ascended and ranked the privilege and mortgage contended for by the plaintiff and her succession. The under-tutor prays accordingly, asking, besides, a judgment against the tutor. In answer the administrator retorts that at the date of the suit not one of the notes was prescribed; that as to such which might have been so considered the defendant had waived and interrupted prescription, and had formally acknowledged liability and indebtedness. By reference to indorsements on the two notes which matured at two years, in 1883, it appears that indeed Hebert waived prescription, and acknowledged indebtedness, and by inspection of the act of extension it also appears that he did the same thing, or the equivalent, as to all the five notes. The suit having been instituted on March 9, 1891, and the fifth note falling due on the 4th of February, 1886, it is apparent that they were all prescribed on their faces, on the 4–7th of February, 1891, more than a month before the filing of the petition, unless the acknowledgment relied on had a contrary effect. The waiver and

acknowledgment on the notes at two years were made more than five years after they had matured; the acknowledgment and promises in the act of January 17, 1890, which referred to all the five notes, were made after the note at three years was prescribed, but before those at four and five years had so become. Hence they interrupted prescription as to these two only; but they revived the other three, as ordinary notes, as the privilege and mortgage securing them died away, as to third persons, the moment they became prescribed. *Accessorium sequitur principale.* Rev. Civil Code, art. 3285. The consequence was that the legal mortgage of the minors, duly recorded on the 10th of December, 1881, in consequence of the lapse of the privilege and mortgage securing the three prescribed notes, ascended and took precedence, and is entitled to a preference. Nevertheless Hebert had the right, before prescription had extinguished the last two matured notes, to acknowledge them, as he did, in the extension act, and thus to interrupt prescription, and the privilege and mortgage securing them on the undivided half bought could be and was maintained. It was a community debt, and the acknowledgment was made *bona fide* and rightfully. He was unquestionably at the time owner of one-half of that half, or one-fourth of the whole, and the usufructuary of the remaining like share. The act of extension shows that he was dealt with in that capacity, and thus implies an inheritance by the minors of their mother's share by her death. It was unnecessary for him to have acted avowedly, as tutor of the minors, in order to bind them by such acts, and continue the debt as a community debt, secured in the same way that it was from the beginning. The departure from the old jurisprudence, for a while, in this respect, has been repudiated, and the powers of surviving husbands continue shackled to a certain extent. There can be no doubt that, notwithstanding the pact *de non alienando*,—the object of which was merely to dispense with the hypothecary action eventually to enforce payment, but not to prevent the purchaser, although part of the price was unpaid and secured by privilege and mortgage on the property, from disposing of it by transfer or mortgage, in subordination of the vendor's claim, as long as valid,—the property could pass from Hebert by a complete divestiture of him. Hence he could have surrendered it to his creditors, and transmitted it by succession to his heirs, and his wife, common in property with him, could, under the law, notwithstanding any adverse will on his part, have acquired half of it at the dissolution of the community by judgment, and have transmitted, by her death, to her heirs, the same share therein, (minors being always beneficiary heirs,) as it actually happened in the present instance; but, of course, such transfer, as well by reason of the pact as of the law and sheer justice and equity, could not pass title to the prejudice of the anterior vendor's privilege and mortgage, securing payment of his just debt. The ownership passed *cum onere*, vesting a defeasible title, susceptible of divestiture, in case of non-payment of that claim and by proceedings directed alone against the original purchaser, regardless of subsequent transfers or incumbrances, in whatever form or under whatever circumstances made. Hence it is that, when the plaintiff brought this suit, she acted legally, clothed with the right of divesting Hebert and any subsequent owner or owners of the title in subjection of the undivided half of the plantation to the payment of what was due her, which happens to be only the amount of the two last matured notes, falling due on February 4–7, 1885, and February 4–7, 1886, as to which prescription was interrupted by acknowledgment and promise to pay in the extension notarial act of January 17, 1890, and which, on the day of the sheriff's adjudication, amounted in capital and interest from date to a figure which it is unnecessary to state presently; so that, when the undivided half of the property was adjudicated to Mrs. Gay, it passed absolutely to her, regardless of the inheritance of half thereof by the minors from their mother, who could not transmit to her heirs by succession more rights than she would have acquired on a dissolution of the community by judgment. The undivided half having been adjudicated for $7,500, the plaintiff is entitled to apply the same to the extinguishment or payment of the two last matured notes in capital, interest, and costs, absolutely, and to retain the balance of the price as accruing one-half unconditionally to the minors, as representing their share of inheritance, and the other half to Hebert, subject to any claim which the minors may have against him, at the termination of the tutorship, upon an account properly rendered contradictorily with all concerned; the whole of said balance so retained to remain secured by vendor's privilege on said undivided half, and to bear legal interest from the date of the sheriff's adjudication until legally deposited to be relieved from interest, or paid over to the tutor, for account of the minors and also for his own account, under suitable judicial proceedings to be had for the purpose. It is therefore ordered and decreed that the judgment appealed from be reversed, and it is now adjudged that the third opposition of the under-tutor be sustained in part and dismissed in part, and that plaintiff's reconventional demand thereagainst be likewise sustained and dismissed; and accordingly it is ordered, adjudged, and decreed that the plaintiff or her succession be recognized as the absolute owner of the undivided half of the Dunboyne plantation herein seized and adjudicated to her. It is further ordered, adjudged, and decreed that the proceeds of the sale of said plantation retained by the plaintiff be distributed as follows, viz.: That the plaintiff apply as much thereof as may be necessary to pay herself the amount of the last two notes sued on, maturing in 1885 and 1886, as stated in the opinion, in capital, interest, attorney's fees thereon, and costs of suit, up to the day of adjudication, and retain the residue of the said proceeds, the same

to accrue as follows: One-half thereof to the minors herein, represented by the under-tutor, and the remaining half to the defendant Hebert, subject to the rights of the minors against him, at the termination of the tutorship; the same, while thus retained, to remain secured by vendor's privilege on said undivided half of said Dunboyne plantation, and to bear legal interest, as stated in the opinion, until legally deposited or paid over, as likewise therein mentioned. It is further ordered, adjudged, and decreed that the third opposition and the reconventional demand thereagainst, in so far as not sustained, be dismissed, and that the rights of the minors against their tutor, not passed upon, be reserved for future action. It is further ordered, adjudged, and decreed that the plaintiff pay costs in the lower court, from the filing of the third opposition of the under-tutor, and that plaintiff and the third opponent pay, share alike, the costs of appeal.

ON REHEARING.

(March 14, 1892.)

There appears on the note at three years an acknowledgment of indebtedness purporting to have been made on the 10th of January, 1889, before five years had run from the maturity; but the date at which it was made has not been proved. The offering of the indorsement during the trial proved the genuineness of the writing, but did not establish its date. Writings under private signature, offered in evidence, have, as to third persons, no other date than that at which they are thus offered. The authentic act of acknowledgment was executed after the five years, and fixed the date of acknowledgment only as to the notes maturing in 1885 and 1886. Justice will not permit that the note at three years, which is for part of the price of sale, be treated as prescribed, when it may not be so, and the absence of proof is an oversight. The right to recover its amount, if prescription was truly interrupted, should be reserved, and the decree shaped to that end. Norres v. Hayes, 42 La. Ann. 858, 8 South. Rep. 606. It is therefore ordered that the previous decree be amended so as to reserve the right of the succession of plaintiff to prove the date of the acknowledgment of the note at three years; that a sufficient amount be retained from the price of the adjudication to meet it and the two other notes, and that to that end the case be remanded, with instructions to allow that note if the acknowledgment is proved to have been made at the date it purports to have been made; and that, as thus amended, the previous decree be confirmed and remain undisturbed.

(44 La. Ann. 511)

STANTON v. HARVEY. (No. 11,011.)[1]

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

LEASE IN NAME OF WIFE—LIABILITY OF HUSBAND—LEX LOCI SOLUTIONIS.

Rent due under a lease entered into by a husband in the name of his wife, though the lease was signed in another state, the place of their domicile, for property situate in this state, can be claimed from the husband. It is a community debt, incurred by him, for which he is liable, and can be made to pay. It is to be regulated by the *lex loci solutionis*, which thus fixes the responsibility.

(*Syllabus by the Court.*)

Appeal from district court, parish of Concordia; S. CHARLES YOUNG, Judge.

Suit by Mrs. H. L. Stanton against W. H. Harvey for the rent of property leased by him in the name of his wife. Judgment for plaintiff. Defendant appeals. Affirmed.

Luce & Lemle, for appellant. *Elam & Dagg*, for appellee.

BERMUDEZ, C. J. This is a suit to hold a husband liable for the rent of property leased by him in the name of his wife. The property lies in Louisiana, and the husband and wife were, at the date of the contract, residents of another state. The defense is that the defendant did not lease for his account, but for that of his wife; that he is not liable, but that she is. From a judgment condemning him to pay he appeals. The contention is that, under the laws of the domicile of the parties, the wife could lease the property for her own account; that the husband would not, in such case, be liable for the rent due under it; that the contract was entered into at that domicile, and that the wife is alone responsible. The laws of the place of the domicile where the contract was entered into and the domicile of the parties play no important part in this litigation. The same laws exist in this state, as a married woman may here lease property for her individual account; but this she can do only if she have the means necessary, and can show that the contract was entered into for her exclusive benefit, and not for that of her husband, or of the community, if any, between them. The law which is to govern in this controversy is not, however, that of the place at which the contract was formed, *lex loci contractus*, but that of the place at which it is to be executed, the *lex loci solutionis*. It is a well-recognized principle that each sovereignty has the right of regulating the acquisition of property within its terminal boundaries, and to fix the nature of its character. Hence it is that the lawgiver has declared that all property acquired in this state, by non-resident married persons, whether the title thereto be in the name of the husband or wife or their joint names, shall be subject to the same provisions of law which regulate the community of *acquets* and gains between citizens of this state. Rev. Civil Code, art. 2400. It is apparent that, had property been purchased situate in this state, by the wife, whether acting in person or through an authorized agent, with the sanction of the husband, that property would have become *prima facie*, at least, community property, whatever the domicile of the purchaser would have been, here or out of the state, and would have been thus dealt with, until the wife had proved that the purchase was made for her separate account, with her individual

[1] Rehearing refused April 4, 1892.

funds, and in no way for account of her husband or the community. Had the lease been signed by the wife with the authority of the husband, it would have been as much a community contract as it is when signed by the husband for the wife. In the absence of such proof, had any portion of the price of sale remained unpaid, suit could have been brought for it against the husband, as head and master, and as such alone responsible, and judgment could have been recovered. Rev. Civil Code, art. 2404. It would have been a community debt. This applies, whatever the property might be, for the law does not discriminate, and place any limit or characterize the same. Rev. Civil Code, art. 2402. It merely considers the date of the purchase, and not the person who made it. It needs no reasoning or authority to show that the husband, as head and master of the community, is liable for its debts contracted by him, for which the wife is not responsible, and which anyhow would be his, community or no community. It is unnecessary to determine whether a lease is real or personal property, as its character, in that respect, is no factor in this case. It is sufficient that it be a contract under which a right which is property has been acquired. Being property, it falls under the provisions of laws quoted, which apply as well to residents as to non-residents, and therefore to the defendant, for he is either the one or the other. Non-residents surely cannot claim to be placed on a better footing than residents. Where they do so pretend, they must show clearly that they are entitled to the preference. The right to enjoy the property leased was therefore a community asset, and failure to pay for it can be saddled on the husband. Judgment affirmed.

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44 La. Ann. 199)

CITIZENS' BANK OF LOUISIANA v. MILLER *et al.*, (EXCELSIOR PLANTING & MANUF'G. CO. *et al.*, Interveners.) (No. 11,009.)[1]

SAME v. OBER & SONS CO. *et al.* (No. 11,009.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

MORTGAGES—PACT DE NON ALIENANDO—RIGHTS OF PURCHASER—COMPENSATION FOR IMPROVEMENTS.

1. The pact *de non alienando* inserted in a mortgage is nothing more than the expression in the act of a principle which, by the terms of article 3397 of the Rev. Civil Code, is, without any expression, conclusively implied in every mortgage.

2. The effect given to the pact under our jurisprudence rests on no general principle of our existing law, but simply on a judicial interpretation of its effect as a contract between the parties. The pact historically considered. Donaldson v. Maurin, 1 La. 89.

3. That effect is clearly defined and limited to be nothing more than the conferring of authority to seize the property, in the hands of a third possessor by proceedings directly against the original mortgagor without notice to third possessors or other preliminary proceedings required in the ordinary hypothecation.

4. The pact *de non alienando* does not prevent the alienation of the property, nor does it deprive the alienees of any right appertaining to third possessors, except so far as concerns the method of proceeding above indicated.

5. Hence a purchaser of property subject to a mortgage containing the pact is a third possessor, within the purview of article 3407, and entitled to claim compensation for his improvements to the extent they have enhanced the value of the mortgage security.

6. The improvements fall under the mortgage and are subject to seizure and sale; but equity requires that the third possessor should be indemnified to the extent that he has enhanced the value of the creditor's security.

7. In determining the amount recoverable the sole question is the extent to which they have enhanced the value. Repairs which only preserve the thing are not recoverable, only those improvements which increase the value.

8. Assumptions contained in contracts to which the bank was not party have no effect in its favor except as stipulations *pour autrui*, of which the bank might have availed itself by accepting them, but which, until acceptance, were revocable, and conferred no right on the bank.

9. Acceptance by the bank would have made it a party to the contract, which it would have been bound to respect. Its whole course in the case has been an absolute repudiation of these contracts as in no manner affecting it, and it is estopped from claiming *uno flatu* an acceptance.

10. Where a seizure takes place during the pendency of a plantation lease for the entire year, payable in kind out of the crops when gathered, the seizure only covers the proportion of rents due for the unexpired term after its date.

11. The suing creditor is also responsible for its like proportion of the necessary expenses of management required to realize the crops, and which it left undisturbed after seizure.

(*Syllabus by the Court.*)

Appeal from district court, parish of Concordia; S. CHARLES YOUNG, Judge.

Two actions,—one by the Citizens' Bank of Louisiana against David F. Miller and others to foreclose a mortgage; the other by same plaintiff against G. Ober & Sons Company and others, to recover rent. In the former plaintiff obtained an order of seizure and sale, and the Excelsior Planting & Manufacturing Company and J. K. Ober and others intervene. The actions were consolidated. From the judgments plaintiff appeals. Affirmed.

Luce & Lemle and *Henry C. Miller*, for appellant. *Elam & Dagg*, for third opponents, appellees.

FENNER, J. The Citizens' Bank is the holder of a mortgage on the Point Pleasant plantation, executed, in its favor, by David F. Miller, in 1838, and containing the pact *de non alienando*. In the long period since the date of the mortgage the property has experienced several changes of ownership. In the year 1882 its then owners transferred the property to the Excelsior Planting & Manufacturing Company, which was the owner and possessor in 1891, when the Citizens' Bank, proceeding *via executiva* directly against the heirs of the original mortgagor, David F. Miller, obtained an order of seizure and sale in foreclosure of their mortgage. In this proceeding intervened the Excelsior Planting Company, claiming that during its ownership and possession of the property it had placed thereon valuable improvements, which had enhanced its value, and that to the extent of the enhanced value it was entitled to be reimbursed out of the

[1] Rehearing refused March 21, 1892.

proceeds of sale. J. K. Ober et al., mortgage creditors of the Excelsior Company, also intervened, claiming a ranking mortgage on whatever might be found due to their debtor for improvements. The Citizens' Bank opposes the claims of interveners on various grounds, which will now be considered and disposed of *seriatim*, forming the issues involved in the first of these consolidated cases, which, though disposed of by one judgment, are entirely independent of each other.

First. The bank claims that a purchaser of property subject to a mortgage containing the pact *de non alienando* stands in the shoes of the original mortgage debtor, and cannot, any more than that debtor himself, claim reimbursement on account of improvements made on the property; in other words, that he is not, in the eye of the law, a third possessor, and is not, therefore, entitled to the protection of the article 3407, Rev. Civil Code, which is the basis of interveners' claim, and which reads as follows: "The deteriorations which proceed from the deed or neglect of the third possessor to the prejudice of the creditors who have a privilege or mortgage give rise against the former to an action of indemnification; but he can claim for his expenses or improvements only to the amount of the increased value which is the result of the improvements made." The question raised is an interesting one, and we have considered it very closely. To the student of our Codes the effect given to the pact *de non alienando* is an anomaly, only explained by reference to its derivation in our law from the Spanish system. The pact is nothing else than the expression in the act of mortgage of a principle which, by the very terms of article 3397 of the Code, is, without any expression, implied in every mortgage, viz.: "That the debtor cannot sell, engage, or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor." It is difficult to understand why the fact that this principle is expressed in the act should confer any different rights than would result from its conclusive implication. There is no express provision in either our Civil Code or Code of Practice on the subject; and in the French law, from which our system of mortgages is derived, this pact *de non alienando* is not recognized as conferring any particular right. Under the Spanish law, however, which long prevailed in this state, the holder of a mortgage containing this pact was allowed to disregard subsequent alienations, and to proceed directly against the original mortgagor, and have the property seized and sold without notice to actual third possessors, which was required in other cases. After the adoption of our Code of 1808 the question arose as to whether this effect of the pact was not destroyed; but the court held that "the mode of proceeding under orders of seizure and sale is still regulated in a great measure by the Spanish laws which remain in force in this country," and that the mortgagee's right under the pact *de non alienando* was not repealed. Nathan v. Lee, 2 Mart. (N. S.) 32.

After the act of 1828, which repealed the Spanish laws and rules of proceeding, the question again arose, and it was contended "that there is now no express law in force to support any exception to the rules of proceeding established by the Code of Practice for hypothecary actions." But the court said: "Admitting this to be true, it is a universal principle, founded in reason and law, that effect must be given to all the parties of a written contract or agreement, and meaning to all its stipulations and phrases, unless such a construction leads to absurdity. It is also a general rule that owners of property must be presumed to know the titles and incumbrances under which they hold it. In applying these rules to the case under consideration, it is evident that the mortgagee intended some advantage to himself by the introduction of the clause '*de non alienando*,' consented to on the part of the mortgagor, beyond what he would have had without such a pact or agreement, and that the only manner in which it can have the effect intended by the parties is to construe it into an authority to seize the property in the hands of the third possessors, without preliminary proceedings, as in case of an ordinary hypothecation." Donaldson v. Maurin, 1 La. 39. This decision is the fountain head of our whole subsequent jurisprudence on this subject. We consider that it conclusively negatives the contention so ably urged by counsel of appellants. It distinctly holds that, after the repeal of the Spanish law formerly prevailing in this state, there remained in force no law giving any exceptional effect to the pact *de non alienando*, and that whatever effect it had was derived from that law which the parties made unto themselves by their contract. It interpreted the meaning and effect of that contract, and declared that its only effect was to authorize a direct seizure in the hands of third possessors, "without preliminary proceedings, as in case of an ordinary hypothecation." There are not wanting very clear reiterations of this principle in later cases. On this point the court in the case of Watson v. Bondurant, 30 La. Ann. 10, said: "We understand the effect of the pact *de non alienando* to be this: Where a mortgage contains this stipulation, the sale by the mortgagor does not prevent the mortgagee from proceeding by executory process, and he need give no notice to the purchaser. * * * A little reflection will show that the pact *de non alienando* contains nothing that the law does not imply in every mortgage." Again, in Ducros v. Fortin, 8 Rob. (La.) 167, the court said: "We do not consider the clause "*de non alienando*" as producing the effects supposed by the counsel. It does not absolutely prevent a sale of the property by the mortgagor. The latter may transfer the property subject to the right which such a clause gives the mortgagee of proceeding summarily against it, as if it still belonged to the mortgagor. The purchaser acquires a valid title which he can, in like manner, transfer to others." In Linn v. Dee, 31 La. Ann. 218, the right of the purchaser

of property subject to a mortgage containing the pact, to recover for improvements, was expressly recognized. See, also, Ducros v. Fortin, 8 Rob. (La.) 167; Jamison v. Barelli, 20 La. Ann. 453. The correctness of this is conspicuously illustrated by the particular form given to the pact in the very mortgage on which the bank proceeds, and which is derived from section 24 of the charter, as follows: "That all property mortgaged to said corporation for any purposes may be seized and sold at any time, according to law, in whosesoever hands or possession the same may be, notwithstanding any alienation thereof, or change of possession, by succession or descent to heirs or legatees, by last will and testament or otherwise, in the same manner as if the same was in the possession of the original mortgagor." This is the only pact of nonalienation contained in the charter or mortgage, and it has been held by this court to be the exact equivalent of the common pact *de non alienando*. Gillaspie v. Bank, 30 La. Ann. 1321; Bank v. Freitag, 37 La. Ann. 271. Now, this section simply expresses in plain language the precise sense and meaning which the jurisprudence above referred to had held to be implied in the pact *de non alienando*, conferring no exceptional right beyond that therein stated of proceeding directly against the property without notice to third possessors. The learned lawyers who framed this charter in 1835 were obviously doubtful whether, under the changed law, the interpretation given to the ordinary pact would be maintained, and preferred to give a clearer expression to their contracts. They have done so, and can claim nothing beyond what their contract gives them. This they have been allowed, and have actually proceeded, in this case, by executory process against the original mortgage, without notice to third possessors, in the very manner stipulated by their contract.

The apprehension suggested by counsel that mortgage creditors may be deprived of their security by ruinous improvements on the part of third possessors, has no greater application to the case of mortgages in which the nonalienation pact is expressed than in that of all others in which the law itself writes it; and, besides, it has no foundation under a just application of the principle. The improvements, by whomsoever made, fall under the mortgage. If they have not actually enhanced the value of the property, the mortgagee absorbs them without compensation. If they have enhanced the value of the property, why should the mortgagee enrich himself at the expense of the third possessor? In the language of Troplong: "There is no room for doubt that improvements placed by a third possessor fall under the mortgage, and are subject to seizure for its satisfaction; but equity requires that the third possessor should be indemnified to the extent that they have enhanced the value of the property *quatenus res pretiosior facta est;* for the creditors who dispossess him should not be permitted to enrich themselves at his expense." 3 Troplong, Hyp et Priv. No. 836. Or, as Pont says: "From a sense of equity, the legislator who forbids the third possessor to injure the creditor by deteriorating the security while in his possession will not, on the other hand, permit the creditors to profit gratuitously by his improvements. Therefore the law, after announcing the principle of indemnity for deteriorations, by a just reciprocity assures to the third possessor the reclamation of the enhanced value given by his improvements." 2 Pont, Priv. et Hyp, No. 1205. This is justice; and it is undoubtedly the law applicable equally to all mortgages, whether the pact *de non alienando* be expressed or only implied in the contract.

Second. The bank further contends that the planting company and its authors, by reason of their assumptions contained in their contracts with each other, have become personally bound to the bank for the debt secured by its mortgage, and that this prevents them from asserting any claim for improvements. These assumptions are contained in contracts between these parties, to which the bank was in no manner a party. They can have no effect in favor of the bank except as stipulations *pour autrui*, of which, perhaps, the bank might have availed itself by accepting them, but which, up to the time of such acceptance, were revocable between the parties, and conferred no right whatever on the bank. Rev. Civil Code, art. 1890; Gravier v. Gravier, 3 Mart. (N. S.) 207; Wiggin v. Flower, 5 Rob. (La.) 406; Mitchell v. Cooley, Id. 240. The bank has never accepted. If it had done so, it would thereby have made itself a party to those contracts, which it would thereafter have been bound to recognize and respect. Mitchell v. Cooley, Id. 240. While such acceptance would not have operated an ovation of the debt, it would unquestionably have disabled the bank from disregarding these alienations to which it had thus made itself a party. The proceeding in this case, and all the contentions of counsel which we have considered, are based upon the assumption that the bank is in no manner affected by those alienations; that, as to it, they produced no effect, and that it was entitled to treat them as if they did not exist. It is impossible to say this, and then, *uno flatu*, to say: "I have accepted these stipulations, have made myself a party to these contracts, and hold you bound by them." The case of Latiolais v. Bank, 33 La. Ann. 1444, only held that by the acceptance of such an assumption the bank did not waive the pact *de non alienando* so far as the original mortgagee was concerned, who was the only party urging it. We said: "The pact *de non alienando* was not abandoned; on the contrary, it was carried out by the proceedings against Sproule and others. Admitting that it was, however, what is it to the plaintiff, who is the administratrix of the succession of the original mortgagor, whether it ever existed at all?" No one could question the correctness of this decision, but it has no application to the point here at issue which concerns only the rights of third possessors. It is too late for the bank

now to urge an acceptance of these stipulations, and it is conclusively estopped from doing so.

Third. The final question, under this branch of the case, is as to the settlement of the amount due for improvements. The principle applicable is very clearly stated by Toullier: "The third possessor can recover only for improvements *quæ rem maliorem faciunt*, and not for those *quæ rem deteriorem non sinunt*. The only question is to ascertain if there has been an enhancement of value. Whether such enhancement result from expenses necessary in their origin, but carried to the point of improvement, or whether they resulted from less urgent expenses, matters nothing. If there has been an enhancement, the right arises to claim it to the extent of the increased value. If there has been no enhancement, the third possessor has no recourse except against his vendor." 3 Trop. Priv. et Hyp. No. 838, (*bis*,) p. 505. We have examined the evidence in the case very critically. No doubt some of the improvements claimed belong to the class of ordinary repairs, merely intended to preserve the *status quo*, which the possessor was bound to make, and for neglect to make which he would have been responsible under article 3407 as "deteriorations proceeding from his neglect." Of course, these could not operate to enhance, but only to maintain, the value. But the new church, the new cabins, the new fences, the new levee, and, perhaps, to some extent, the extensive repairs to the dwelling-house, are certainly entitled to consideration. The following decisions, relied on by counsel for appellant, do not apply to this case: Daquin v. Colron, 8 La. 398; Haynes v. Harbour, 14 La. Ann. 237; McKenzie v. Bacon, 41 La. Ann. 13, 5 South. Rep. 640. They relate to controversies between evicted possessors and their warrantors or vendors, or between such mere possessors in good faith and the true owner, which rest on different principles. In those cases the benefits derived by the possessor from his improvements, as well as their cost, are to be considered. Here we have nothing to do with either benefits or cost, except with the latter as limiting the possible claim of the third possessor. We have simply to inquire whether the improvements have enhanced the value, or are of a nature which only prevented deterioration. The improvements are not to be considered separately, but in block, and it is to be determined whether as a whole they have enhanced the value of the security, and to what extent. The estimates of various witnesses on this precise question are found in the record. They differ widely. We think the judge *a qua* made, in his judgment, a very conservative and satisfactory estimate; and, while both parties complain, we should not feel that by disturbing we could improve it.

2. The suit of Bank v. Ober & Sons Co. et al. is to recover rents alleged to have been collected by the latter after the date of the bank's seizure in the case just decided. It appears that early in 1891 Ober and others, vendors of the Excelsior Company, had issued a seizure and sale in foreclosure of their mortgage, under which the property was taken in possession by the sheriff. In that suit it was agreed between plaintiff and defendant that the sheriff should cultivate the property, provided the plaintiffs would furnish the means, the expenses up to date of sale to be taxed as costs; and D. M. Slocum was appointed as custodian and manager. Slocum made contracts with tenants by which the land was leased for the year for rents payable in kind out of the crops. Defendants in this case furnished the tenants with mules and teams to work the land, and also advanced them supplies. In May, 1891, the bank issued its executory process, and seized the property. After this seizure, the cultivation and management of the plantation went on as before. Slocum remained in charge, and devoted his time as manager, without interference by the bank. As the crop was gathered and ginned, he collected the rents. After he had collected rents to the extent of 8,271 pounds of lint cotton, the bank, under an order from the sheriff, demanded delivery thereof, and it was handed over to the bank. He refused to give to the bank any more of the rent cotton, the balance of which was shipped for account of defendants. The total rent cotton collected was 22,000 pounds, worth in all about $1,800, of which, as above stated, the bank received 8,271 pounds, worth about $700. It is claimed that defendants must pay over, without deduction, the whole of the rent collected. We consider the claim inequitable, and untenable in law. The rent, though it became due after the bank's seizure, was contracted for and attributable to the year, and the defendants were entitled to the proportion thereof due on account of the part of the year which had expired prior to the bank's seizure, which took place on May 1st, being four months, or one-third of the total rents. The bank should also be held for two-thirds of the expenses of Mr. Slocum's management and services, which are shown to have been worth about $800, and which were necessary to the realization of the rents. A brief calculation on this basis will show that there remained due to the bank out of the rents just about the sum decreed in the judgment of the court below, which we see no reason to alter. Judgment affirmed.

(44 La. Ann. 356)

PATUREAU v. MCCARDLE *et al.* (No. 10,996.)

A. WILBERTE SONS LUMBER & SHINGLE CO. v. PATUREAU. (No. 10,996.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

JOINT TENANCY—REMOVAL OF TIMBER—LIABILITY—MEASURE OF DAMAGES.

1. A joint owner of swamp land is at liberty to cut and remove timber from the community, without becoming amenable to charge of tort or trespass, as against the co-proprietor.

2. In such case, the person cutting and removing timber, for purposes of manufacture without waste or other destruction to the premises, is not liable *ex delicto*, but *ex quasi contractu*; and the measure of damages is the value of the trees when taken at the stump.

(*Syllabus by the Court.*)

Appeal from district court, parish of Iberville; E. B. TALBOT, Judge.

Action by Mrs. Emma Patureau against Frederick Wilberte McCardle and others to recover damages to the amount of $3,366, as the value of her alleged half interest in certain cypress trees which had been cut and removed from land of which she was half owner with A. Wilberte Sons Lumber & Shingle Co. This action was consolidated with a suit by A. Wilberte Sons Lumber & Shingle Company against Mrs. Emma Patureau for the partition of the common property by licitation. Defendants consented to a sale. Judgment for plaintiff for $412, from which she appeals. Affirmed.

Samuel Matthews, for appellant. *Sims & Gondran* and *A. Talbot*, for appellees.

WATKINS, J. In the former of these consolidated causes the plaintiff seeks to recover of the several defendants damages *in solido* to the amount of $3,366, as the value of her alleged one-half interest in 1,122 cypress trees that they had wrongfully and tortiously cut, felled, and removed from a certain tract of swamp land, designated as section 62, township 9, of range 10 E., situated west of the Mississippi river, of which she was at the time half-owner with the plaintiffs in the latter of said consolidated causes, same being a suit for the partition of the common property by licitation. Some resistance was at first made on the part of the plaintiff Patureau to the order of consolidation, and to an adverse ruling in this regard she reserved a bill. She also appeared and filed an answer in the partition suit, and insisted upon a division in kind. But she subsequently appeared in the consolidated cases, and filed a waiver of her demand for a partition in kind, and consented that a sale be made; thus practically renouncing her objection to the consolidation of the two causes, as her consent to the sale necessarily abandoned her claim to a severance. This leaves but one issue in the case,—the value of the trees. The judge *a qua* found the number of trees cut to be 824, and fixed their value at $1 apiece at the stump; and gave plaintiff judgment for $412, or one-half of their value. From that decree plaintiff Patureau appeals, and demands an increased allowance.

Whether or not the amount of the judgment should be increased depends upon one ruling of the judge *a qua*, rejecting evidence of "the market value" of the raw material, that is to say, the value of the trees for the purpose of their manufacture into lumber, thus restricting the plaintiff to the value of the trees as they were taken in the forest. His theory was that, inasmuch as the Wilberte Sons Lumber & Shingle Company was the half owner with Mrs. Patureau of the lands, as well as all the timber growing thereon, they had a perfect right to cut and remove the timber therefrom without becoming amenable to a charge of trespass on the part of the co-proprietor; and, possessing that right, it had a corresponding right to contract with others to cut and remove timber for it without their becoming thus amenable; hence defendants are not liable *ex delicto*, but only *ex quasi contractu*. This proposition is not quite clear, or altogether free from difficulty; but we cannot see how defendants can be held liable for tort or trespass on land in which they have one-half interest, to the other co-proprietor, by the simple cutting and removing of trees for manufacture and sale, in the ordinary course of affairs, and without waste or destruction. A simple course is always open to a dissatisfied co-proprietor,—a suit for partition,—and that has been availed of. Under the law and evidence the judgment appealed from seems to have done substantial justice, and it is affirmed.

(44 La. Ann. 575)

CALHOUN v. McKNIGHT *et al.* (No. 10,987.)[1]

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

WEIGHT OF EVIDENCE—REVIEW ON APPEAL—PRESUMPTION OF FRAUD.

1. Evidence of extrajudicial admissions by a dead man, out of the presence of others, is the weakest of all testimony.

2. In cases of conflicting evidence, the judgment of the judge *a qua* will not be disturbed except on clear showing of error.

3. Fraud is never presumed. While it may be inferred from circumstances, these must be of a character clearly convincing the judicial mind in order to support the charge of an offense closely akin to crime.

(*Syllabus by the Court.*)

Appeal from district court, parish of Grant; A. V. Coco, Judge.

Suit by Mrs. C. E. P. Calhoun, as executrix of William S. Calhoun, deceased, and as tutrix of his only surviving child and sole heir, against Mrs. Elizabeth McKnight, as administratrix, and others, for the restoration of certain lands. Judgment for defendants. Plaintiff appeals. Affirmed. Rehearing refused.

Hunter & Hunter, for appellant. *T. H. Thorpe* and *Andrew Thorpe*, for appellees.

FENNER, J. The plaintiff sues as the legal representative of the succession of William S. Calhoun, deceased, and as tutrix of his only surviving child and sole heir. The petition avers that William S. Calhoun was the sole heir of his father, Meredith Calhoun; that he had accepted his succession unconditionally, and been put in possession by a decree of court; and that Howard McKnight was administrator of the succession of Meredith Calhoun from May, 1882, to the date of his acceptance of said succession, January 29, 1887; and that W. S. Calhoun died January 4, 1891. Howard McKnight, as administrator, secured orders, and procured three succession sales of the lands of the succession of Meredith Calhoun, had on the 4th day of November and 2d day of December, 1882, and on the 17th day of February, 1883. The petition charges that at these several succession sales, while he was administrator, and in violation of his duty and the prohibitory statute, Howard McKnight, having formed a conspiracy and had an understanding with his son-in-law, John H. Mc-

[1] Rehearing refused April 4, 1892.

Neely, Ludlow McNeely, the brother of J. H. McNeely, and George S. Johnson, through these several persons interposed, purchased the property described in the petition, and which it is sought to recover from his succession and heirs. The petition then avers the nullity of these sales by reason of said conspiracy and the prohibition of the law, and asks for the restoration of the lands, for judgment for rents, and for the value of timber cut from off the pine lands. All parties in interest were made parties and cited. The district judge gave judgment in favor of the defendants, and the plaintiff prosecutes this appeal from that judgment.

The defendants pleaded various estoppels by judicial admissions and by conduct, and also the general issue. Waiving consideration of the estoppels pleaded, except in so far as the facts on which they are based bear upon the merits, we are clearly of opinion that the case is with the defendants under the general issue. McKnight, the administrator of Meredith Calhoun's succession, was not a bidder or an adjudicatee at the sale made therein. The property was adjudicated to John H. McNeely, Ludlow McNeely, and George S. Johnson, who acted for himself and his father, John W. Johnson, jointly, receiving title in their joint names,—persons entirely competent to buy at the sale. The plaintiff's case rests upon the charge that these adjudicatees were mere nominal purchasers interposed by McKnight to evade the prohibition of the law against such purchases by administrators, and to acquire the property in their names, but for his account and benefit. This charge rests upon the testimony of two witnesses, detailing conversations had with McKnight and with John H. McNeely before and after the date of the sale. These conversations are said to have taken place out of the presence of any third person. At the date of testifying, McKnight had been dead for several years, and the statements as to him could not be contradicted. McNeely, however, testified, squarely denying the statements attributed to him, and vindicating thoroughly the reality and honesty of his purchase. J. W. Johnson, a venerable man of 84 years, also testified, denying any interest or concern of McKnight in the joint purchase made by him and his son, and declaring the absolute reality and honesty of their action. If McNeely is believed, the evidence of the two opposing witnesses falls under the principle, *falsus in uno falsus in omnibus*. Witnesses are to be weighed, not counted. We do not know these persons who thus contradict each other. The district judge, presumably, does know them. He evidently gave credence to the witnesses of the defendants, and there is nothing in this record that would justify us in disturbing his conclusion in a matter on which he had so much greater advantages for judging than we have. Moreover, it has passed into an axiom of the law of evidence that parol testimony as to extrajudicial admissions made by a dead man, and out of the presence of others, is the weakest kind of evidence. It further appears, from the statement of these witnesses themselves, that they communicated the substance of these reported conversations to William S. Calhoun, the father of these plaintiffs, and the little reliance he placed upon them is illustrated by the fact that, instead of acting on them, he, in many ways not necessary here to recite, recognized the validity of these sales, and that, though informed of every fact now relied on to support this charge of fraud, he died without taking any steps to attack or impugn them.

Outside of the testimony of these witnesses, all other circumstances relied on by plaintiff in support of her theory are readily explicable on grounds entirely consistent with the honesty of the transactions attacked. Fraud is never presumed. While courts recognize the cunning concealment in which it shrouds its devious practices, and the difficulty of tracing it by direct proof, and therefore give due weight to all circumstances indicating its existence, yet such circumstances must be of a character to convince the mind clearly before they can support a conviction of such an offense, almost akin to crime. We rise from a careful study of this record without feeling any such conviction in the present case, and satisfied that the judgment appealed from accords with the law and the evidence.

Judgment affirmed.

(44 La. Ann. 320)

STATE v. CURTIS *et al.* (No. 10,985.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

AMENDMENT OF INFORMATION.

1. The defendants were prosecuted by information filed. It contained two counts, one for burglary and one for larceny. The verdict was, guilty in manner and form as charged. In framing the information the district attorney in the allegations as to burglary made the proper recitals. In the count for larceny he used the language proper in an indictment. On the day he filed the information he discovered the error, and under section 1047, Rev. St., amended the same. *Held*, that the recitals in the information were clerical errors, and the information could be properly amended. The verdict was a general one, and responsive to the information, and was valid.

2. When the information charges that four pairs of shoes and four pairs of pants were stolen, it is sufficient description of the property.

3. Irregularities imputable to the jury commission cannot be taken advantage of, unless the injury is such as is described in section 10, Act No. 44, of 1877.

4. Motions to set aside the *venire* must be filed on the first day of the term. When the indictment or information has been presented at a previous term, the objections to the *venire*, drawn at a subsequent term, must be urged on the first day of the term, unless it is shown that the facts upon which the motion was based were of such a character that it was impossible for the defendant to know them until after the commencement of the term.

5. On an application for a change of venue, the defendant must give notice of its filing in a reasonable time to the district attorney.

6. In ruling on applications for change of venue, the trial judge is vested with a certain discretion, that will not be disturbed unless his rulings are manifestly erroneous.

(*Syllabus by the Court.*)

Appeal from district court, parish of Acadia; E. T. LEWIS, Judge.

Conviction of Richard A. Curtis and others for burglary and larceny. Defendants appeal. Affirmed.

Joseph A. Chargois and *E. P. Veazie*, for appellants. *Walter H. Rogers*, Atty. Gen., for the State.

McENERY, J. The defendants were indicted for burglary, convicted, and sentenced to hard labor for three years. They have appealed. The defendants were prosecuted by information. In the information there are two counts,—one for burglary, and the other for larceny. In the second count the district attorney, in framing the information, probably using a blank form for the purpose, charges that "the grand jurors aforesaid, under their oaths aforesaid, do further present," etc. The district attorney, on discovering the error on the same day, moved to amend the information so as to insert, instead of the above words, the proper allegations. The information was amended in accordance with the motion. The accused objected that the information purported to be an indictment, and to change it as requested by the district attorney was altering it in substance. The grand jury never presented the indictment. The prosecution was by information. The error was purely clerical, and the court, under section 1047, Rev. St., was authorized to permit the amendment. The defendants further objected that the amended information served on them was not a correct copy of the indictment. If the original had been served, it would have been sufficient, as the amendment was not one of substance, but of form only. The information contains two counts,—for burglary and larceny. The first is properly charged. The verdict was a general one, of guilty in manner and form as charged in the information. This is sufficient to obviate the objection of defendants.

In the second, objection is made to the description of the offense charged. It is alleged that the articles alleged to have been stolen were not described with sufficient particularity. They are particularized as four pairs of shoes, four pairs of pants, one lot of jewelry, one lot of shirts, cravats. The description is sufficient, as the articles stolen are in part described with as much certainty as it would be possible to give by alleging the exact number of articles stolen.

The defendants complain of the denial of their applications for a change of venue. The defendants neglected to give the notice required by section 1023, Rev. St., to the district attorney. In the matter of granting the application for a change of venue, the district judge is vested with a latitude of discretion, and his rulings in these matters, like those in matters of continuance, will not be disturbed, unless manifestly erroneous. The motion was demurred to, and during its consideration the counsel for the accused required the introduction of testimony on the motion. The fact that the motion was filed at a late day in the progress of the case, without notice to the district attorney, and was taken up to be disposed of before any request was made for the introduction of testimony, leads us to believe, with the trial judge, that the motion was for delay. The defendants moved to quash the *venire* because the general *venire* box was not kept locked, and the names of jurors drawn were not written on the slips by the clerk of court. These were irregularities imputable to the commissioners, and, in order to serve the defendants, it must be shown that they have suffered some injury, or some fraud has been practiced, as designated in section 10, Act No. 44 of 1877. State v. Taylor, 43 La. Ann. 1131, 10 South. Rep. 203; State v. McCarthy, (La.) 10 South. Rep. 673, (not yet officially reported.)

In the same motion the additional reasons are assigned for quashing the *venire* drawn for the second week of the term, that some of the jury commissioners who drew the jury were disqualified to act, having accepted offices since their appointment as jury commissioners, which vacated the latter. We have held that, when the accused was put on trial during the term the indictment was found, he could, after the first day of the term, file a motion to quash the *venire*. State v. Ashworth, 41 La. Ann. 683, 6 South. Rep. 556. The defendant was indicted November, 1891. This motion was filed January 19, 1892, at a subsequent term of the court, eight days after the commencement of the term. The case was fixed, without objection, for trial January 18, 1892, and on this day refixed for the 20th. The defendants make oath that these facts as to the disqualifications of the jury commissioners have come to their knowledge since the 18th day of January, the day on which the case was fixed for trial. The accused have failed to show these facts could not have been ascertained by them by diligent inquiry. They were all matters of record in the parish of Acadia, and could have been easily ascertained. The motion was filed too late.

Judgment affirmed.

ON REHEARING.

(March 21, 1892.)

The assignment of errors, filed herein before submission, was misplaced and not brought to our attention. The error assigned is the failure of the judge *a qua* to comply, in his sentence, with the requirements of section 2 of Act 112 of 1890, which requires the judge to state at time of sentence "that it is subject to commutation and diminution, provided," etc. It does not appear that appellants called the judge's attention to this matter in any way or made any application to him on the subject. Under such circumstances, we do not feel called upon to reverse the judgment. State v. Benjamin, 7 La. Ann. 47; State v. Romano, 37 La. Ann. 98; State v. Johnson, 33 La. Ann. 889. It is doubtful if the judge's omission prejudices defendants' rights under the statute, and they will no doubt find means to secure its benefit.

Rehearing refused.

(44 La. Ann. 400)

GREVEMBURG *et al.* v. BRADFORD. (No. 10,916.)[1]

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

JUDICIAL SALE — IMPEACHMENT — JURISDICTION — DUTY OF PURCHASER—EFFECT OF JUDGMENT.

1. A purchaser at a judicial sale is not bound to look beyond the decree recognizing its necessity. The jurisdiction of the court is an essential inquiry, but the *truth* of the record, concerning matters within its jurisdiction, cannot be disputed.

2. A purchaser under a decree of a probate court is bound to look to the jurisdiction of the court granting the order of sale. Such order is to be received as conclusive, and is not to be impeached from *within*, but it is impeachable from *without*.

3. A judgment, sentence, order, or decree passed by a competent jurisdiction, which creates or changes a title or any interest in an estate, is not only final as to the parties themselves, and all claiming under them, but furnishes conclusive evidence *to all mankind* that the right or interest belongs to the party to whom the court adjudges it.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Action by Louis Grevemburg and others against James L. Bradford to establish and enforce their interest in certain land. From a judgment for plaintiffs, defendant appeals. Reversed. Rehearing refused.

Calhoun Fluker and *Merrick & Merrick*, for appellant. *Rouse & Grant*, for appellees.

WATKINS, J. This is a petitory action in ordinary form, instituted by certain persons, alleging themselves to be the heirs of Euphrosine Boisdore, widow of Francois Grevemburg, deceased, for the recovery of a tract of land situated in the parish of St. Landry, *quoad* that portion held by him at the date the suit was filed, and for the avails of such portion thereof as had been theretofore sold by him. The plaintiffs' claim of title may be stated in this wise, viz.: That Euphrosine Boisdore died in the parish of St. Martin, this state, in the year 1818, and upon an inventory of the property of her estate, taken in the following year, was scheduled "by way of a memorandum" a land claim for 800 arpents of land, or 680.56 acres, situated in the old county of Attakapas. That this claim was acquired by her under a Spanish grant or order of survey, during the year 1781, prior to her marriage, and it was subsequently and regularly listed by the register and receiver of the United States land office in their report, as land commissioners, to congress, on the 30th of December, 1815, and was thereafter confirmed to her by act of congress in 1825. This claim was not satisfied by survey or location in place, and no provision was made, looking to the satisfaction thereof, until by act of congress passed on June 2, 1835, the surveyor general was authorized to issue "to the claimant, or her legal representatives," of such land claim, a certificate of location or land scrip for the number of acres called for, which was locatable on any public lands of the United States at any land office in the United States. That the *immediate* heirs of Euphrosine Boisdore died in 1851 and 1864, respectively, and two of her grandchildren died in 1856 and 1864, respectively,—the third and only grandchild now surviving,—and that none of said children and heirs at any time applied for or received scrip under the act of 1835, or procured any other satisfaction of said land claim. Nothing further appears to have been done in the premises until, during the year 1872, said land claim was adjudicated to one D. J. Wedge at public judicial sale made in the succession of Euphrosine Boisdore, in the parish of Lafayette, on the 29th of August, 1872. Claiming thereunder to be, *quoad hoc*, the legal representative of said claimant, this adjudicatee applied to the surveyor general for *land scrip* in satisfaction of said *land claim*, in pursuance of the provisions of the act of June 2, 1858, and the same was accordingly issued and delivered to him on the 27th of October, 1887. This scrip was duly certified by the commissioner of the general land office on November 16th of same year, and on the 8th of December following the surveyor general certified it, and indorsed thereon, that "by reason of the evidence on file in my [his] office, Daniel J. Wedge is the legal representative of the confirmee, and as such is entitled to locate the within certificate." On the 12th of December following, Wedge assigned the land scrip thus indorsed to the defendant, Bradford, and for which he obtained patents to the lands in suit on the 28th of October, 1888. That those patents substantially recite that they are in full satisfaction of the unsatisfied claim of Euphrosine Boisdore and of the land scrip issued in satisfaction thereof, in pursuance of the act of congress of date June 2, 1858, and that they evidence the title of the defendant, Bradford, assignee of D. J. Wedge, representative of Euphrosine Boisdore, deceased. We have premised this much of the *undisputed* facts of this case, so that the demands of the plaintiffs, and the exceptions and answer of the defendant, might appear more striking and distinct.

Plaintiffs, representing themselves to be the lineal descendants of Euphrosine Boisdore,—about 25 in number, and for the greater part residing in parishes of this state in the vicinity of Lafayette parish,—come into the civil district court of the parish of Orleans upon demands against Bradford *alone*, not making Wedge a party, and averring that "they never applied for nor received certificates of location in satisfaction of the land claim of their ancestrix, Euphrosine Boisdore, but remaining in ignorance of their rights until within the year last past, (1889,) they sought the advice of counsel and instituted this suit. In their petition they make the following averments and representations, viz.: "That for the reasons heretofore stated the heirs of Euphrosine Boisdore accepted her succession; and *because she did not die and was not domiciled in Lafayette parish * * * the said parish court was without jurisdiction to open her succession*, and that all proceed-

[1] Rehearing refused March 21, 1892.

ings in said court in that behalf, and all orders therein made, are and were *absolutely null and void*, and that the sale made by the said sheriff to said Wedge thereunder was not preceded by the formalities prescribed by law." (Italics ours.) Further, "that said proceedings were *absolutely null and void, and that the absolute nullity of said proceedings was* [*and is*] *patent upon the face thereof*, and that the defendant, *Bradford, was bound to take notice of* [*the*] *petitioners' rights in the premises*, and was bound *to take notice of the nullity of said pretended probate proceedings* in said parish court, so, as aforesaid, *patent on the face thereof, and of the total lack of jurisdiction in said court in the* matter of said succession." (Italics ours.) On the foregoing theory and averments, plaintiffs allege that they have a right "to claim the benefit of said certificates, * * * and to be decreed the joint owners of the land located therewith." The foregoing are supplemented by the following averments, viz.: "That notwithstanding the nullity of said probate proceedings, * * * and the sale made thereunder, they *had* the right to hold said Wedge as their *negotiorum gestor*, and to claim said scrip so obtained by him, and they *have* the right to hold said Bradford as such *negotiorum gestor*, and to claim the lands located by him with said scrip." Upon these averments, plaintiffs pray "that there be judgment in [their] favor, declaring that said proceedings in the parish court of the parish of Lafayette, pretending to open the succession of Euphrosine Boisdore, *are absolutely null and void for want of jurisdiction in said court in the premises*, and that all orders therein made, and thereunder the sale of said land claim to said Wedge, *are and were absolutely null and void, and without effect to vest any title whatever in him*, and that the defendant took said *scrip* with full knowledge of the nullity of said proceedings, and that he acquired no title thereto by an assignment thereof to him by said Wedge," etc. To this petition defendant tendered an exception, to the effect that plaintiffs' averments were bad for duplicity and inconsistency, and ruled them for cause why they should not be compelled to elect whether they would pursue their allegations *ex delicto*, in *disaffirmance* of said probate proceedings, or those *ex contractu*, in *affirmance* of them. This exception having been overruled, and a bill of exceptions thereto reserved, defendant filed an answer, in which he pleaded the prescription of 1, 5, and 10 years, and the general issue, supplemented by the following special defenses, viz.: That the land claim of Euphrosine Boisdore was of little value at the date of the probate proceedings in 1872, and for many years thereafter, and that the plaintiffs and their authors "have been guilty of such *laches* and gross neglect of said claim that they have no just right thereto, and have no right to speculate upon [such] laches and negligence, and avail themselves of money and labor expended by others," and to recover property, to the acquisition of which they have contributed nothing. He further represents that, had the plaintiffs been mindful of their supposed rights, they could at any time between August, 1872, when said *land claim* was adjudicated to Wedge, and the 27th of October, 1887, when the surveyor general issued *land scrip* therefor, have appeared and set up claim thereto as the legal representatives of Euphrosine Boisdore, and contested Wedge's right thereto before the officers of the interior department of the United States government; the same being at that time a matter of which such department had undoubted jurisdiction. That having failed to take timely and proper steps in that regard antecedent to the issuance of patents to him, predicated upon the *scrip* he surrendered, this inquiry cannot be gone into now, and he be deprived of the *property*, his title to which is evidenced by such patents. Accepting plaintiffs' theory of the case, the judge *a qua* rendered judgment in their favor in conformity to their prayer, and the defendant has appealed.

1. The defendant's exception is suggestive of some embarrassment in the discussion and decision of the case, of which we consider it important that it be relieved preliminarily. We take it to be clear and undoubted that this is a petitory action of ordinary form, in which it became necessary for the plaintiffs to set up the *absolute nullity* of the probate sale to Wedge of the Boisdore land claim in 1872, and the consequences flowing therefrom, in order to remove an apparent obstacle to their recovery of the property from Bradford, as Wedge's assignee of the land scrip which he gave in exchange for patents. This is not in any sense an action of nullity or rescission, seeking the help of a judicial decree revoking an illegal sale. Such sale and proceedings are only collaterally drawn in question, and plaintiffs' full reliance is placed upon the Boisdore succession records to exhibit and prove the want of jurisdiction in the probate court of Lafayette parish to grant the order of sale, and the consequent absolute nullity of Wedge's title to the land claim. The difficulty suggested by defendant's exception is that, while adhering to their charges of absolute nullity, plaintiffs' contention is that they *had* "a right to hold said Wedge as their *negotiorum gestor* and claim said scrip," and that they *have* the right to hold said Bradford as such *negotiorum gestor*, and to claim the lands located by him with such scrip,"—thus placing themselves in the position of asking this court to find and decree the nullity of a judicial sale, and in the same judgment to decree them entitled to its avails; asking us to declare Wedge to have been their *negotiorum gestor* throughout the whole course of his negotiations with the officers of the land department in receiving scrip in settlement of the Boisdore land claim, and at the same time to declare that the defendant likewise became their *negotiorum gestor* in obtaining the scrip from Wedge, and that he acted as such in obtaining patents in his own name, in the face of allegation and proof that their alleged *negotiorum gestor*, Wedge, had made an assignment of scrip standing in his name to the defendant, Bradford, for

a consideration. This embarrassment is increased when the fact is taken into consideration that Wedge has not been made a party to this litigation; that no judgment is asked, requesting the revocation of the acts and contracts of these two *negotiorum gestores;* and that this suit was brought and decided in a jurisdiction wholly different from that of Wedge's domicile, as well as that of the succession of Euphrosine Boisdore, whether in St. Martin or Lafayette parish. These various positions seem to us to be altogether incompatible with each other; but as the district judge left them undisturbed, and preferring to try the case as a unit, we will simply adopt the course he pursued, and treat the issues in detail as they occur, chronologically.

2. Addressing ourselves to the questions appertaining to the nullity of the Lafayette probate sale in 1872, we have examined the transcript, and reproduce therefrom the following summarized statement of facts, viz.: The petition of the public administrator of the parish of Lafayette avers "that Euphrosine Boisdore *departed this life in said parish* [*of Lafayette*] *many years since*, leaving some property, consisting of an old, deferred, private claim for lands, against the government of the United States, as shown by the reports of the register and receiver," etc.; and it further avers "that said property should be inventoried, appraised, and sold according to law;" and thereupon said administrator prayed for an order of court, directing and requiring "that the property be sold according to law to pay debts," etc. The judge of the parish court, exercising probate jurisdiction, entered up an order directing that said public administrator, "after ten days' notice, if there is no opposition, take charge of said estate, and administer it according to law." He further ordered "that after legal delays and advertisement the property appertaining to the estate *be sold for the purpose of paying debts* and settling the succession." Subsequently, and in due form of law, an inventory was taken of said property, and same was duly advertised for sale, and adjudicated to D. J. Wedge for cash at the full amount of its *appraised* value, and a *proces verbal* was duly executed and properly filed in the clerk's office. The evidence of the Boisdore land claim physically and actually passed into the *possession* and under the control of the adjudicatee at the price of $40, the valuation fixed in the inventory by two sworn appraisers, and which amount is neither alleged nor shown to have been an undervaluation thereof. These are the facts exhibited on the face of the Boisdore *mortuaria* in Lafayette, upon which we are requested to maintain and decree the *absolute* nullity of Wedge's title in this collateral action. Not content with this showing, however, the plaintiffs introduced as their witness the present clerk of the court of the parish of St. Martin, who in the course of his testimony made the following statements, viz.: "Question. Have you made search for the record of the succession of *Euphrosine Boisdore?* Answer. Yes, sir. Q. Did you find the record of the succession of *Euphrosine Boisdore* amongst the records of your court? A. I find what I have of the succession of *Francois Grevemburg, and nothing entered in the name of Euphrosine Boisdore in the records of my office.*" (Italics ours.) Upon further interrogation, and having his memory refreshed by the exhibition to him of some *loose papers*, fragmentary in character, he said that, upon a very *careful search* among the archives of his office, he found what appeared to be a *proces verbal* of an *inventory* and a *marriage contract*, and added: "But nothing more having *reference* to the estate of *Euphrosine Boisdore*, except the file I hold here, marked: 'No. 816. *Estate of Widow Francois* Grevemburg. 1819.'" It was upon this inventory that the *memorandum* entry of the Euphrosine Boisdore land claim appears to have been entered, as above stated. In addition to the foregoing, there are a few parol statements made, to the effect that *Euphrosine Boisdore lived and died in the parish of St. Martin;* but among the oldest members of the family, who were interrogated as witnesses, there was an old lady, of 78 years of age, who stated that she once saw Euphrosine Boisdore, who was her grandmother, and that she died soon afterwards. She must have been but a little girl then, as she must have been born in 1812, and was consequently but six years of age at the date of her grandmother's death, in the year 1818. This circumstance is cited for the purpose of illustrating how desultory is the proof on this score. Of the testimony it may be fairly said that it leads to the *inference* of Euphrosine Boisdore having resided and died in the parish of St. Martin, but it does not *prove it fully*, nor does it clearly establish the fact that an *actual administration of her estate* was ever *commenced* in that parish. Much less does it prove the *commencement and termination thereof in that parish* by an acceptance by the heirs of the deceased, or otherwise. It is a noteworthy fact that in the plaintiffs' *original* petition no mention is made of the residence of any one of the 22 heirs of Euphrosine Boisdore, who instituted this suit, and it was only in response to an exception of the defendant that plaintiffs filed a supplemental petition setting forth their various places of present residence; further illustrating how obscure and scarce are the facts on which plaintiffs place reliance for the overthrow of the jurisdiction of the court of Lafayette parish in 1872, *even* if it be conceded to be perfectly competent evidence in such a proceeding as this.

Accepting the situation of affairs to have been as above outlined, and what was the exact *status* of the jurisdiction of the parish court of Lafayette parish in 1872, in respect to the succession of Euphrosine Boisdore? It appears from an authoritative publication of the statutes and resolves of the legislative session of the general assembly of this state for the year 1823 that an act was passed thereat, creating "a new parish in the county of Attakapas, to be called the 'Parish of Lafayette,'" section 1 of which declares "that the parish of St. Martin is

and shall be, by the present act, *divided, and a new parish formed out of the western part of the said parish, which shall be called and known by the name of the 'Parish of Lafayette.'*" (Italics are ours.) Among other things needful for the complete and perfect organization of the *new* parish, the act provided for the election of certain officers, the establishment of a courthouse, and for the administration of justice therein, so as to make it a complete and perfect political entity in all respects. Adams v. Forsyth, 44 La. Ann. —, 10 South. Rep. 622. In pursuance of this theory the act, in its ninth section, declares "that as soon after the said *parish* of *Lafayette* shall be established, * * * it shall be the duty of the *clerk of the court of the parish of St. Martin* to transmit *to the clerk of the court of the parish of Lafayette* all the papers, documents, *and other judicial proceedings unfinished*, which may be in his office, and which, *from the residence of the defendant* and the *situation of the parties, belong to the parish created by this act.*" It is evident that, from a fair and reasonable interpretation of this section of the act, unfinished and incompleted *mortuary proceedings* were contemplated by the term "*other judicial proceedings unfinished;*" and it seems quite clear that such unfinished and incomplete mortuary proceedings, in the courts of the parish of St. Martin, as those in which persons who were domiciled in the new parish might have an interest, were contemplated by the phrase "from the *situation of the parties, belong to the parish created by this act.*" (Italics ours.) Reading the petition of the public administrator of the parish of Lafayette in the light of this statute, his declaration, "that Euphrosine Boisdore departed this life *in said parish* [of Lafayette] *many years ago*," seems quite suggestive of that court having jurisdiction of her succession; and when we take into consideration the order of the judge, made on the faith of that declaration, directing the public administrator to "take charge of said succession, and administer it according to law," that suggestion becomes convincing proof, and gives substantial support to his further order directing the sale of the land claim "for the purpose of paying debts," etc. That upon this state of the *then* existing law, and in view of the *status* of the succession of Euphrosine Boisdore at that time, the probate judge of the parish of Lafayette had authority to grant *that* order of sale, in the exercise of the jurisdiction his court possessed over said succession, is a conclusive presumption of law, so far as this case is concerned, we cannot doubt, nor can it be successfully denied. The legislature of 1823 was fully competent to deal with the question in hand, and no one doubts its constitutional authority to thus alter and change the jurisdiction of courts, so as to transfer "judicial proceedings unfinished" into the courts of the territory in which the litigants were to reside thereafter, and which "from the situation of the parties belongs to the parish thus created."

This identical question arose and was decided in the case of Beale v. Walden, 11 Rob. (La.) 68; the controversy being whether the probate court of the parish of Jefferson had jurisdiction to order a sale of property therein situated *at the time*, though previously forming a part of the territory of the parish of Orleans, from which the parish of Jefferson had been taken, and wherein the succession of the deceased had been opened, and upon the authority of two previous decisions (Patoulet v. Patoulet, 2 La. 270, and Forstall v. Forstall, 4 La. 214) the court said: "The succession of Thomas Beale, Sr., was opened, in a legal sense, by his death, which took place in the parish of Orleans before its division. If the court of probates had already taken cognizance before the parish of Jefferson was cut off, its jurisdiction was not divested by the separation." That case would appear to be conclusively in favor of the plaintiffs, if it be conceded that Euphrosine Boisdore's succession was once under administration in the parish of St. Martin antecedent to 1823; and indeed it would be, but for the fact that is stated by the court, that the act of February, 1825, creating the parish of Jefferson, does not contain any "provision relating to a transfer of causes pending in the courts of the parish of Orleans to those of the new parish, nor relative to administration of successions already opened before the separation of the two parishes." But, as we have already seen that the act creating the parish of Lafayette does contain such provisions, the supposed *partial* administration of the succession of Euphrosine Boisdore in the parish of St. Martin *did not prevent* the acquisition of jurisdiction by the probate court of the former to continue and terminate said administration, but on the contrary expressly sanctioned it. Act 39 of 1871, creating and providing for the organization of the parish of Red River, and the supplemental act, (No. 78 of 1873,) containing similar provisions to those of the act of 1823, creating the parish of Lafayette, were construed in Hammett v. Sprowl, 31 La. Ann. 325; and therein the court maintained the jurisdiction of the court of the *new* parish to try and decide a suit to revive a judgment anciently rendered in the parish of Natchitoches, from which a portion of its territory had been taken in its formation,—the court basing its decision on the ground that the statutes referred to "put the Red River court in the place and stead of the Natchitoches court; vesting it, as regards the judgment, with the jurisdiction of the latter;" considering "the proceeding to revive a judgment not as a new suit, but simply a proceeding in the same suit to continue and keep alive a judgment rendered therein, and to furnish proof that it has not been satisfied or extinguished." Even so, under the terms of the act creating the parish of Lafayette, was the probate court thereof vested with complete jurisdiction of the unfinished *gestion* of the Euphrosine Boisdore succession, who apparently resided in that portion of the territory of the ancient parish of St. Martin which was embraced therein.

The case of Duson v. Dupre, 32 La. Ann. 896, was a petitory action instituted by

plaintiff as curator of the succession of Le Blanc, to which the defendants excepted on the ground that the order of his appointment by the parish court of the parish of St. Landry was a nullity, because "Louis Le Blanc having died in the parish of Orleans, where he resided, the probate court of St. Landry had no jurisdiction over his succession." That exception was sustained in the court below, but in this court the judgment was reversed; the court expressing the following view, viz.: "Defendants' position could be maintained if the appointment of the curator was absolutely void, *and the nullity apparent on the face of the papers and pleadings.* * * * The late parish court had probate jurisdiction, and was exclusively competent to grant letters of administration in all successions properly opened in that court. Defendants contend that this succession was not properly opened in that court, for the reasons urged in their exceptions. This denial presents a question of fact,—that the deceased was not a resident of that parish," etc. "* * * These questions can be looked into and adjudicated upon only in a direct action *before the same court,*" etc. That decision is but the announcement of what is the settled jurisprudence of this court, and it is perfectly conformable to the views hereinabove expressed. Evidently, had Duson, curator, made a sale of the property of the Le Blanc succession in the parish of St. Landry, and the heirs had contested the validity of the title conferred on the purchaser, who, like the present defendant, was a stranger to the succession, this court, acting on the authorities therein cited, would unquestionably have denied their action, and affirmed the validity of the sale.

The principles of law recognized in the cases cited were recognized and applied by the supreme court, speaking through Mr. Justice LAMAR, in the recent case of Simmons v. Saul, 138 U. S. 441, 11 Sup. Ct. Rep. 369. That was a suit in equity, brought in the circuit court for the eastern district of Pennsylvania, by citizens of Louisiana, Mississippi, and Texas, claiming to be the legal descendants of Robert Simmons, late a citizen of Louisiana, against H. R. Saul, a citizen of Pennsylvania. Its object was to charge the defendant, as the former owner of a tract of land in Wisconsin, *as a trustee for complainants* with respect to said ownership, and have him account for the *value* of the lands, their rents and profits, and for loss and damage resulting from the cutting and removal of timber therefrom. The bill represents that Simmons died intestate in the parish of Washington, La., seised and possessed of an inchoate land claim in the parish of St. Tammany, for 640 acres, founded upon the purchase of a settlement right, which was confirmed by the act of congress of March 3, 1813, but remained unlocated until subsequent to the passage of the act of congress of June 2, 1858,—the identical act under which the Boisdore land claim, of identically similar character, was located. It further represents that precisely similar probate proceedings were inaugurated in the parish of Washington, whereby said land claim was adjudicated in the year 1872 at a public judicial sale for the alleged purpose of paying debts of the succession; the price paid being $30 in cash, which was consumed in the payment of costs. That thereafter said purchaser presented this land claim, thus acquired, acting as the legal representative of Simmons, to the surveyor general, for certificates of location, and same were issued, and duly approved by the commissioner of the general land office, and delivered to him; and thereafter he located them upon the lands in controversy, situated in Wisconsin, for which patents regularly issued "in the name of Robert M. Simmons or his legal representatives." Those lands were subsequently acquired by *mesne* conveyances from said adjudicatee by the defendant. To the averment of nullity of all of said probate proceedings and sale, had in and entertained by the parish court of Washington parish, for want of jurisdiction, the defendant demurred on the ground that the relief demanded "is barred by the judgment or decree of a court of competent jurisdiction, rendered in proceedings regular on their face, and which have not been attacked by any proceeding in *that* court, or in any appellate court." The court below sustained this demurrer and dismissed the complainant's bill, and the latter appealed. Thus paraphrased, the Simmons Case appears to be an exactly parallel case to the instant one, excepting the solitary question of the decedent's disputed place of domicile and death. First reciting the provisions of the various articles of our Civil Code and Code of Practice applicable to the administration of small successions, the supreme court said: "The general principles of probate jurisdiction and practice, as settled by a long series of decisions in state courts and in courts of the United States, are applicable to the powers and proceedings of the parish courts of Louisiana, and have been recognized and enforced by the supreme court of that state. They also show that under the averments of the bill the parish court of Washington parish had jurisdiction of the succession of Robert Simmons. The succession had been open for over forty years, and no one had claimed it; nor did any of the complainants, as heirs, accept it expressly in writing or by judicial proceeding, nor tacitly, by doing any act which necessarily supposed their intention to accept. It was properly adjudicated to be vacant, and was administered as such. * * * The petition, in reciting that Robert M. Simmons departed this life in said parish many years since, * * * leaving some property, consisting of an old, deferred, unlocated, private land claim, * * * set forth the necessary jurisdictional facts to warrant the court in proceeding to administer the estate." On this statement of fact and those conclusions of law the court said: "It is our opinion that the parish court of Washington parish had a clear and unquestionable jurisdiction of the intestate estate or succession of Robert M. Simmons," and affirmed the judgment. As authority for that opinion the court cited and relied upon several preceding and pertinent decisions of that tribu-

nal, and notably that of Comstock v. Crawford, 3 Wall. 396, a case involving the validity of an administrator's sale in Wisconsin, on the authority of the court to order which they said: "It is well settled that, when the jurisdiction of a court of limited and special authority appears upon the *face* of its proceedings, its *action* cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was *rightly exercised* as prevails with reference to the action of a court of superior and general authority." Also, upon McNitt v. Turner, 16 Wall. 352, a like case, in which they said: "Jurisdiction is authority to hear and determine. It is an axiomatic proposition that, when jurisdiction has attached, whatever arises or may subsequently occur in its exercise, the proceeding, being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error." Also, Grignon's Lessee v. Astor, 2 How. 319. Their review of authorities on this question is concluded by a reference to the case of Lalanne's Heirs v. Moreau, 13 La. 433, cited infra. Also, Pintard v. Deyris, 3 Mart. (N. S.) 32; Beale v. Walden, 11 Rob. (La.) 67; and Sizemore v. Wedge, 20 La. Ann. 124; and various other like cases,—but particularly emphasizing the case of Duson v. Dupre as "a case of great importance in this connection," quoting with approval the paragraph we have cited above. This case is referred to as illustrating the fact that the courts of other states have, as well as the supreme court of the United States, accepted the decisions and jurisprudence of this court in reference to the effect of decrees and orders made and granted by the inferior courts of this state in successions under their control, and, maintaining their jurisdiction as appearing on the face of the record, have upheld titles of purchasers thereunder as valid and legal, and in cases precisely similar to this one. The case of Weeks v. Railway Co., (Wis.) 47 N. W. Rep. 737, presents a case quite similar to this, in which a land claim in favor of a certain deceased citizen of the parish of St. Tammany was involved; the land scrip issued in exchange for which, having been located on lands situated in the state of Michigan, and the plaintiffs setting up the identical claim the plaintiffs do here,—the defendant claiming title by *mesne* conveyances founded primarily upon similar probate proceedings and sale of the land claim in the parish of St. Tammany as those had in Lafayette. But all the mention that is made of the proceedings in, or the jurisdiction of the probate court of, St. Tammany parish, is "that the complaint sets out *sufficient* to show that said court had no jurisdiction of said estate of said deceased, and that the whole proceedings were a fraud upon the rights of the plaintiffs." *But none of the facts are stated.* Of course, on that hypothesis, judgment went in favor of plaintiffs. Walker v. Daly, (Wis.) 49 N. W. Rep. 812, is quite a similar case, arising upon a similar state of facts and proceedings in the parish of St. Tammany, La., with the material distinction that it is alleged therein that the land claim was *not the property of the person whose succession was administered.* Of course that was quite sufficient to justify a judgment for plaintiffs. The case of Hardy v. Harbin, 4 Sawy. 536, practically rests upon the declaration of the court that a prefect under the Mexican government in California had no jurisdiction over the estates of deceased persons, or authority to appoint an administrator, and that the confirmation of a land grant inured to the benefit of the confirmees. But, however pertinent those cases may be to the case in hand, they must yield to the paramount authority of Simmons v. Saul, and the established jurisprudence of this court.

3. Having ascertained that the probate court of the parish of Lafayette in 1872—and it is not doubted, and cannot be disputed, that parish courts had unlimited jurisdiction, under article 87 of the constitution of 1868, in all succession and probate matters—had apparent jurisdiction of the succession of Euphrosine Boisdore, what is the effect that must be given to the order of sale therein granted by the judge in respect to the title of Wedge as adjudicatee of the Boisdore land claim? The authorities are uniform, and our own jurisprudence is consistent and emphatic, to the effect that such a decree must stand, and is entitled to the respect and observance of all those whose interests may be affected by it, until same is set aside in the due course of law. The sanctity and authenticity of judicial sales founded upon orders of competent courts is so clearly defined, and the principle involved so well stated, in Lalanne's Heirs v. Moreau, 13 La. 431, we will quote it, as concisely announcing our views: "We place our decision," say the court, "on the broad ground that sales directed and authorized by courts of justice are judicial sales, to all intents and purposes." And, in treating of their effect, they further say: "The necessity and wisdom of such a rule of property has long been felt and acknowledged in the most important states of the Union, and none is better settled by the decisions of their courts. They all maintain that a purchaser under a decree of the orphans' court is bound to look to the jurisdiction, but the matters within that jurisdiction cannot be disputed. That the decree of the court is to be received as conclusive evidence, not to be impeached from *within*, and, like all other acts of the highest judicial authority, impeachable only from *without*, and that a judgment, decree, sentence, or order passed by a competent jurisdiction which creates or changes a title or any interest in an estate, is not only final as to the parties themselves, and all claiming under them, but furnishes conclusive evidence to all mankind that the *right or interest belongs to the party to whom the court adjudged it.*" In many different forms of phraseology, this principle has been in many subsequent decisions announced, but in none has it been more correctly or forcibly expressed. In Sizemore v. Wedge, 20 La. Ann. 124,—a very similar suit,—the court expressed itself thus: "The purchaser at a probate sale, which is a judicial sale, is not bound to

look beyond the *decree* recognizing its necessity. The jurisdiction of the court is an essential inquiry, but the *truth* of the record, concerning matters within its jurisdiction, cannot be disputed." In Woods v. Lee, 21 La. Ann. 505; Webb v. Keller, 39 La. Ann. 55, 1 South. Rep. 423; Linman v. Riggins, 40 La. Ann. 764, 5 South. Rep. 49; and in many other cases,—this court has consistently and rigorously adhered to that principle. It was recently applied by us in a very similar case, (Gale v. O'Connor, 43 La. Ann. 717, 9 South. Rep. 557,) and the same was repeated in Succession of Theze, 44 La. Ann. —, 10 South. Rep. 412, citing many previous cases; and among others the cases of Succession of Dumestre, 40 La. Ann. 571, 4 South. Rep. 328, and Succession of Lehmann, 41 La. Ann. 987, 7 South. Rep. 33, were quoted with approval. This doctrine is likewise cited and relied upon in Simmons v. Saul, as the epitome of Louisiana jurisprudence on this question.

On reason and authority, we are of opinion that the case is with the defendant; that on the *face* of the record and *mortuaria* of the parish of Lafayette the parish court of that parish in 1872 had probate jurisdiction of the unfinished *gestion* of the succession of Euphrosine Boisdore; that the order of the court directing a sale of property of that succession to pay debts is *prima facie* valid and jurisdictional; that the sale thereunder conveyed a fee-simple title to the purchaser; and that said proceedings and the sale must stand until, in some direct proceeding in the courts of the parish of Lafayette, the recitals thereof are proven untrue, and annulled and set aside. Entertaining this view, we must reverse the judgment appealed from. It is therefore ordered, adjudged, and decreed, that the judgment and decree pronounced by the court *a qua* be and the same is annulled and reversed; and it is further ordered and decreed that the demands of the plaintiffs be rejected, at their costs in both courts; their rights being reserved in a different form of action in a competent court.

(44 La. Ann. 570)

OBER *et al.* v. EXCELSIOR PLANTING & MANUF'G CO. (No. 10,951.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

RECEIVERS—EX PARTE APPOINTMENT—DISMISSAL OF APPEAL.

1. An appeal taken by a third person, not a party, who appears in the capacity of receiver of the defendant corporation, will be dismissed, when the order appointing him such receiver, attached to his petition of appeal, shows upon its face that it was made *ex parte*, and without notice to the corporation.

2. Section 688 of the Revised Statutes does not authorize the forfeiture of the charter of a corporation and the appointment of a receiver by *ex parte* order without notice. The statute discussed and construed.

(*Syllabus by the Court.*)

Appeal from district court, parish of Concordia; S. CHARLES YOUNG, Judge.

Action by I. K. Ober and others against the Excelsior Planting & Manufacturing Company. Judgment for plaintiffs. An appeal was taken by H. N. Soria, who alleged that he had been duly appointed commissioner and receiver of defendant corporation. Appeal dismissed. Rehearing refused.

D. C. & L. L. Labatt, for appellant. *J. L. Dagg*, for appellees.

FENNER, J. The appeal is taken by H. N. Soria, who alleges that he has been duly appointed commissioner and receiver of the defendant corporation. He annexed to his petition of appeal an extract from the minutes of division D of the civil district court for the parish of Orleans, of proceedings in a case entitled Smith, Limited, v. Excelsior Planting & Manufacturing Company, reciting that "on motion of D. C. and L. L. Labatt, of counsel for plaintiffs, and on suggesting to the court that in the above-entitled suit plaintiffs have issued an execution, which has been duly returned by the civil sheriff of this parish *nulla bona*, it is ordered by the court, under and by virtue of section 688 of the Revised Statutes of Louisiana, that the charter of the Excelsior Planting and Manufacturing Company is hereby forfeited for insolvency, and that H. N. Soria be, and is hereby, appointed commissioner, for effecting its liquidation, and also as receiver," etc. This purports, on its face, to be a purely *ex parte* order, entered without any notice whatever to the corporation; and the appellee assigns as ground for dismissal of the appeal that it is a patent and absolute nullity, conferring upon the appellant no right to intervene in these proceedings, or to appeal from the judgment therein rendered. No general principle is more firmly founded in reason and justice, or better recognized by authorities, than that announced by Mr. High as follows: "Courts will not exercise their statutory power of appointing receivers over an insolvent corporation upon an *ex parte* application, and without giving the defendant an opportunity to be heard; but, upon filing a petition, duly verified, setting forth the grounds on which the application is based, an order to show cause should issue, and a copy thereof should be served upon the officers of the corporation, directing them to show cause on a future day why the application should not be granted." High, Rec. par. 346. Appellant relies upon section 688 of the Revised Statutes, which, in treating of this class of corporations, provides: "They shall forfeit their charter for insolvency, evidenced by a return of no property found on execution; and in such case it shall be the duty of the district court, at the instance of any creditor, to decree such forfeiture, and to appoint a commissioner for effecting the liquidation, whose duty it shall be to convert all the assets of the company, including any unpaid balances due by stockholders on their shares, into cash, and to distribute the same, under the direction of the court, amongst the parties entitled thereto, in the same manner, as near as may be, as is done in cases of insolvency of individuals." The most critical study of this statute fails to furnish to our minds the slightest reason for supposing that it was intended

to authorize any such summary proceedings, without notice, as that here presented. The statute provides a particular ground for forfeiture of charter; it authorizes any creditor to invoke the forfeiture on such ground; and it invests the district court—meaning any district court having jurisdiction of the parties—with jurisdiction of such cases. It does not confine the relief to the particular creditor at whose instance the execution was issued, nor to the particular court from which it was issued, nor does it make the proceeding necessarily an incident of the particular suit wherein the execution was invoked. The statute evidently contemplates a judicial proceeding, and does not prescribe the special form thereof.

In two former cases we had under consideration an analogous statute, being section 4 of Act 47 of 1873, viz.: "That the tax collectors shall be, and they are hereby, authorized to give a title in the name of the state of Louisiana to all persons purchasing property sold in pursuance of this act; and such title shall be held in and recognized by the courts of this state as valid in law. Upon the presentation of a title so given to the district or parish court, it shall be the duty of the judge to order the sheriff to put such persons in possession of the property so purchased by them." Under that statute a purchaser conceived that he had an unqualified right to demand an order of possession without notice to adverse parties. But this court said: "As the act does not declare in express terms that the order to the sheriff to put a purchaser in possession shall issue without notice, we may well construe it as adopted with reference to the general laws relating to summary proceedings in the courts of the state, and as authorizing the district courts to which application is to be made to require the necessary legal notice to be issued to the party to be ousted, and to dispose of the contest in a summary manner." State v. Judge, 27 La. Ann. 705. In a later case we cited the above with approval, and further emphatically held that, if the statute were construed to authorize a proceeding without notice, it would be void, as not being "due process of law." Fischel v. Mercier, 32 La. Ann. 704. We need not quote from the last case, but a reading of it will throw light upon the principles involved in the proper construction of the statute now before us, and the proceedings authorized thereby.

We have said enough to sustain our conclusions that the *ex parte* order presented by appellant as the muniment of his right to intervene in this case and invoke a review of the judgment rendered is an absolute nullity, and confers on him no right to stand in judgment on this appeal. We do not exercise our appellate jurisdiction except at the instance of those who exhibit a legal right and interest to demand it. When the right of a third party to appeal has not been established contradictorily in the lower court, and is denied in this court, it is our practice to remand the issue for separate trial in the court below. Succession of Lauve, 6 La. Ann. 529; Griffing v. Bowmar, 8 Rob. (La.) 112; Anselm v. Wilson, 8 La. 36; Brown v. Williams, 12 La. 614. But in this case, it being apparent, on his own showing, that he is without right, remanding would be useless. It is therefore ordered that this appeal be dismissed at appellant's cost.

ON REHEARING.

(April 4, 1892.)

We have given grave consideration to the points and authorities urged in this application.

1. We discover therein no suggestion tending to contradict the facts on which the opinion was based, to-wit, that the decree (if such it can be called) forfeiting defendant's charter and appointing a receiver, was rendered upon an *ex parte* motion, without any notice or attempted notice, and under the supposed authority of section 688, Rev. St.

2. The more we study the statute, the more firmly we are convinced of the correctness of the construction we have placed upon it, and that it does not authorize or contemplate any such proceeding as that here presented. The so-called "decree," finding no support in the statute, stands just as it would if there were no statute.

3. The nullity is absolute, and it is patent on the face of the decree itself. Authorities denying collateral questioning of such orders have no application to intrinsic and patent absolute nullities.

4. The claim that a receiver represents the corporation, and is not subject to the rules governing appeals by third persons, involves a *petitio principii*. If appellant is not receiver, he is certainly a third person, without any pretense of right to appeal. He is not a receiver because he calls himself so. He presents his alleged title to the office, which, upon its face, is an absolute nullity, conferring no title whatever. He himself shows that he is not receiver. What, then, is he, if not a third person undertaking to appeal from a judgment in which he sets up no other interest whatever?

5. This case presents no analogy to that of Stark v. Burke, 5 La. Ann. 740. There the corporation had been for years in liquidation before the court, which held all its affairs *in gremio legis*, under statutes regulating the liquidation. The liquidator, in charge under direction of the court, was destituted by a decision of this court declaring the law under which the governor had appointed him unconstitutional. The court thus found itself in control of the affairs and property of the corporation, without any legal representative to manage them. Under such circumstances, this court sustained the judge in appointing a receiver, saying: "The court, *ex proprio motu*, was bound to prevent the confusion and dilapidation consequent upon the abandonment of its affairs produced by the inefficiency of the law under which Stark had taken possession of and continued to hold the records, papers, and assets of the company. The proceedings for the forfeiture of the charter and the liquidation, as far as it had progressed, being before the fifth dis-

trict court, we think the court properly exercised its authority in making the appointment." In Baker v. Railroad Co., 34 La. Ann. 754, we referred to the above case, and held that in this state "courts have no jurisdiction to appoint receivers for corporations in absence of express statutory authority. This court has recognized no exception to this rule, unless where the corporate property is abandoned, or where there are no persons authorized to take charge of or conduct its affairs." Holding that, on the face of the title presented by himself, it fully appears that appellant's appointment rests on no statutory authority, but is based on a statute which did not authorize it, we are bound to maintain our decree.

Rehearing refused.

(44 La. Ann. 528)

LEVY v. MCCAN. (No. 10,908.)[1]

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

SUIT FOR WAGES—EVIDENCE—PRESUMPTIONS—LIBEL AND SLANDER.

1. In a suit for extra compensation of a clerk and bookkeeper against his employer, when the proof discloses false entries in the defendant's books, evidencing the employer's assent thereto, if unexplained and unsupported by confirmatory and satisfactory evidence, they create a strong presumption against the demand.

2. Instructions given to the employer's counsel to investigate such questioned entries, and make protest to the bookkeeper against them, cannot serve as the foundation of a charge of slander and libel, or ground an action in damages against the employer.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Action by A. B. Levy against D. C. McCan for a balance alleged to be due on plaintiff's salary and for damages. Judgment for defendant. Plaintiff appeals. Affirmed.

W. S. Benedict and *Lionel Adams*, for appellant. *Farrar, Jonas & Kruttschnitt*, for appellee.

WATKINS, J. This is an action brought by a discharged clerk for balance of $11,400, as the amount due him on his salary for the full term of his contract of employment, and for damages. Plaintiff's claim is somewhat ambiguous and involved, but the substance of it is that on the 15th of September, 1886, he was employed by the defendant as bookkeeper, at a salary of $100 per month, but for the term of one year; the defendant being engaged in operating a foundry and iron works. Soon after his said employment Charles P. McCan, son of defendant, became a partner of his father in business, and the capital thereof was very largely increased, and the business, also, was increased, and extended to the purchase of plantations, and the furnishing of supplies to sugar planters, whereby the labors of petitioner were greatly increased; that during the time Charles McCan was a member of the firm, and prior to his death, he was the active man of the firm, and was chiefly interested with and responsible for its management and administration; that after his death, on the 19th of September, 1886, the defendant requested him to take the place of his son in the conduct of the business, but simply as an employe,—the transactions of the firm in liquidation aggregating many hundred thousands of dollars annually; and that defendant promised to pay him a compensation commensurate with the value of his services, over and above his assured salary, which was, at that time, $200 per month, to which he assented. Under this arrangement, plaintiff claims that the scope of his services was enlarged and extended, so as to embrace, not only all of the various details of the foundry establishment, but to extend to all the receipts and disbursements thereof, and also to those of the defendant's several plantations, situated in different parts of the state; including the supervision of the laborers and lessees thereof, and the furnishing of them with plantation supplies. Plaintiff specially avers that his said services continued from the 19th of September, 1886, until the 1st of January, 1890, when he was discharged by the defendant without sufficient cause or any serious ground of complaint. He further avers that during the time he was so engaged, and prior to the date of his discharge, the defendant, "while frequently promising, failed to fix a proper remuneration for the services of petitioner outside of his regular line of duty as such bookkeeper, and for the entire and active management and control of the property and business of the defendant;" but he further avers that subsequently, on or about the 9th of August, 1889, the defendant gave him $300 on account of said extra services, and authorized him to credit himself with $200 additional on that account, the remainder to be settled thereafter, and corresponding entries were made on the defendant's books. He further avers that in the fall of 1889 he demanded of defendant a settlement in the premises, and same was referred to defendant's counsel, who drew up a document, wherein the amount of his salary was increased from $2,400 per annum to $8,000 per annum, but same was so coupled "with conditions that your petitioner did not feel that it was proper for him to sign, and he declined to sign, same;" but, on the contrary, he expressed a willingness "to sign same without such obnoxious conditions, and defendant declined to abate said conditions." Notwithstanding what had transpired, plaintiff represents that he continued his services until January 2, 1890, when over his written and verbal protest, and expressed desire to continue to perform his services, he was discharged from further employment by the defendant. On the score of extra services, the plaintiff claims the sum stated above; and, charging defendant to have slandered and defamed him by making and publishing as true a false statement to the effect that he had, as bookkeeper, made false entries in his books in relation to the alleged agreement with petitioner, the latter claims and demands an additional $10,000 as damages for slander and libel.

The defendant's answer is full and ex-

[1] Rehearing refused April 4, 1892.

plicit in detail, and we reproduce from his counsel's brief the following careful synopsis of it, as the best mode of presenting his side of the case, viz.: His entries in the defendant's books show "an admission that plaintiff was employed by defendant, and by his firm of D. C. McCan & Son, and that the salary agreed to be paid to him prior to 1882, and which was paid to him in full, was at the rate of $100 per month, which was duly and regularly paid to him from month to month; that from January 1, 1882, to September 30, 1885, plaintiff's salary, fixed at $125 per month, was also duly and regularly paid to him; that from October 1, 1885, to December 31, 1887, his salary, fixed at $150 per month, was also duly and regularly paid to him; that from January 1, 1888, to January 1, 1890, his salary, fixed by agreement at $200 per month, was also duly and regularly paid to him; and he avers that these salaries were in full for all services rendered, and that no other agreement was ever entered into between plaintiff and defendant, or defendant's firm, or his deceased son, concerning the salary of said Levy, or any further compensation ever agreed to be paid to him for his services as clerk or otherwise; that on or about the 10th of December, 1889, Levy informed respondent that, in his opinion, his services had actually been worth to respondent far more than his agreed salaries, and notified respondent that, unless a material pecuniary recognition of this claim were made, he would leave respondent's service on the 1st of January, 1890; that respondent positively and emphatically declined to do this, stating to said Levy that throughout the term of his said engagement he had been at all times at perfect liberty to resign his position if he had considered the salary agreed upon and regularly paid as insufficient compensation for his services; that Levy thereupon fully and unreservedly admitted the legal correctness of respondent's position, and without asserting that he had any legal claim upon respondent for past services, or pretending that such claim existed, notified respondent that he would withdraw from his service on the 1st of January, 1890; that thereupon respondent, not wishing at that time to lose the services of said Levy, requested him to name a salary for the single year of 1890, which he (Levy) would consider, not only a full compensation for all services to be rendered during the year, but it would likewise remove from his mind all dissatisfaction caused by his belief that his agreed salary in the past had been insufficient; that Levy thereupon suggested the sum of $8,000, which respondent assented to; that when the agreement was prepared, on the 12th of December, 1890, Levy refused to sign the same, and, refusing longer to remain in the employment of respondent, voluntarily withdrew therefrom on or about the 1st of January, 1890; that by his course of action respondent's suspicions were excited, and he employed an accountant to examine his commercial books, which had been kept solely by said Levy, and were exclusively under his control; that an investigation of said books thus made showed the following entries made therein in the handwriting of and by said Levy."

Thereto is appended a statement of the various entries upon the ledger and cashbook that were kept by the plaintiff, exhibiting the proof of the amounts that were due him on account of his salary during various years of his service. Then follow quoted extracts from the same books, the alleged false entries made therein by plaintiff while he was in defendant's employ as bookkeeper, and, as he (defendant) avers, wholly without his knowledge or consent, and in reference to plaintiff's claim for the extra services, and which are as follows, viz.: "Cashbook, at page 244, July 31, 1888, is the following entry: 'A. B. Levy, by D. C. McCan. Balance July salary, *as agreed by the year*, from July 1, 1888, of $4,800.' (5) In ledger, June 30, 1889, and in the cashbook, June 30, 1889, is the following entry: 'A. B. Levy, by D. C. McCan. *As agreed between A. B. Levy and D. C. McCan;* credit for back wages from October 1, 1886, to June 30, 1888, *to compensate A. B. Levy for extra services* connected with the several plantations of the estate of C. P. McCan and D. C. McCan, as *per contra* entry of this date, $4,950.' (6) In the cashbook, June 30, 1889, is the following entry: 'D. C. McCan to A. B. Levy. *Salary of $4,800 per annum is hereby renewed* from June 30, 1889, for one year, *under the same conditions as those of July 31, 1888, as agreed between A. B. Levy and D. C. McCan, and, in addition to said renewal, D. C. McCan agreed to give A. B. Levy credit for back wages* from October 1, 1886, to June 30, 1888, *to compensate A. B. Levy for extra services* connected with the several plantations of the estate of C. P. McCan, and of the said D. C. McCan, $4,950.' And on a check stub No. 2,409, of August 9, 1889, is the following entry: 'A. B. Levy, on account of accumulated salary to his credit to July 30, 1889, amounting to $7,550, $300.' And a similar entry appears in cashbook No. 381." (Italics ours.)

The defendant refers to the foregoing entries as those he complains of as incorrect, and not authorized, and to which he requested his counsel to direct the plaintiff's attention; at the same time denying that he ever, at any time, defamed or slandered him, though he denounced said entries to be false. Defendant specifically denies any recognition or acknowledgment of the plaintiff's claim for extra services, and affirms that when he signed a check in favor of plaintiff in August, 1889, he was ignorant of the statement he subsequently ascertained was contained on the stub of said check book.

These comprehensive statements from the petition and answer narrow the controversy to a very small compass, and leave us practically nothing to do but settle one or two disputed questions of fact. It is well to premise our discussion by the statement that plaintiff's petition concedes that, whatever may have been the course of the negotiations with the defendant, they never reached and perfect-

ed an agreement with relation to such extra services, and no price therefor was ever agreed upon between them. His claim, therefore, must necessarily be upon the score of a *quantum meruit*, and not on a contract. At the outstart, we will further observe that while the plaintiff in his petition makes special reference to the disputed entries pointed out in the defendant's books, he seems to have done so for the sole purpose of supporting his charge of slander against the defendant; for, while he avers "that each and every of said entries so made as aforesaid on the books of said firm * * * were so made at the instance of said firm and said D. C. McCan by your petitioner, then their employe, under their orders and directions," etc., yet there is neither statement nor claim made in the petition to the effect that said entries furnished evidence of defendant's acknowledgment of his liability for the extra services claimed of him; for if said entries were, indeed, authorized by defendant, the claim of the plaintiff would be clearly and fully made out; but if they were false entries, made in the defendant's books by plaintiff, secretly and without the defendant's knowledge, they do not constitute evidence against the defendant at all, but, on the contrary, completely confound the plaintiff, as his case could not, for a moment, stand in the presence of such a palpable fraud on defendant.

But when we consider the fact of plaintiff's failure to claim the full benefit of said alleged true and correct entries in the defendant's books, in verification of his claim, and further consider the fact that he explicitly places reliance upon the written document that was prepared by the defendant's counsel alone, as containing an admission of the value of his services, the conclusion becomes irresistible that he deems those entries unreliable as testimony, and puts the ban of distrust upon them. The testimony of the plaintiff, as a witness, is equally equivocal and self-contradictory as his petition is, for he fixes an altogether different date in his evidence for the beginning and termination of his contract from that fixed in the ledger entries; and, instead of relying upon those entries as furnishing positive proof of the defendant's consent to pay a specified price of $200 per month additional for said extra services, his testimony places an altogether different interpretation upon the transaction, and shows, at most, that a state of negotiation existed at date of the conference that occurred at the law office of the defendant's counsel, which the testimony of other witnesses establishes never matured or ripened into an actual agreement at all. We quote, in this connection, the following from the plaintiff's testimony, viz.: "After he had given me two hundred dollars, and up to the 31st of December, 1889, *I frequently spoke to him about fixing up a definite amount, and he asked me how much I thought I ought to have. I told him five thousand dollars a year was fair enough. He says, 'I will tell you what I will do; I will give you forty-eight hundred dollars,—two hundred dollars for plantations and two hundred dollars for the regular business;'* and I said to him that I had lost time, from the time that I started in; and he says, 'I will fix that for you;' *and on July 1, 1888, he agreed to give me forty-eight hundred dollars a year;* and in June, 1889, he told me I could credit myself with back wages from October, 1886, to June 30, 1889. Then I continued drawing that two hundred dollars, and crediting myself, to keep it straight, just as the books show there." (*Vide* italicised paragraphs, particularly.)

Per contra, we have the statement of the defendant's lawyer, who prepared the *projet* of agreement plaintiff's petition makes reference to, who, upon finding that his testimony was required, withdrew from the case; and from it we make the following pertinent extract selected from his evidence touching the interview at his office, viz.: "Mr. Levy then repeated, in a very emphatic manner, the sense of the injustice, or his sense of the injustice, as he considered it, of Mr. McCan having employed him in a very responsible and difficult position for many years, without *proper* compensation. He stated that Mr. McCan time and again *promised* to make him some effectual recognition of those services by *an increase of salary* or otherwise, and that he had never done it, and had never kept his word." (Italics ours.) Again: "He stated that he had a number of conversations with Mr. McCan, and that Mr. McCan had *promised* to give him one fourth of Promised Land, and that he had discussed giving him an interest in the foundry; but he said that he knew, as a matter of course, that verbal arrangements of that kind were not legal, and were inoperative, and that 'I come here for the purpose of making arrangements that I knew would be legal and binding;' and then I said to him, 'Mr. Levy, before I discuss this thing, let me understand one thing,—have you made, or have you pretended to have made, any arrangement which is *final and closed* with Mr. McCan in this connection?' and he said, 'I have not.' I said, 'Very well, then, we are discussing this question absolutely as an *open question, and nothing has been done between you and Mr. McCan; nothing has been said which you regard as final, binding, or operative,' and he answered, 'That's the position which I occupy in this matter to-day.'* I said, 'In order that I might understand your position towards Mr. McCan, *what is your salary?' Mr. McCan and Mr. Levy answered simultaneously, Mr. McCan saying, '$200,' and Mr. Levy saying, 'I am drawing two hundred dollars.'* I said, 'Very well, then, I understand your position to be that Mr. McCan has been paying you a salary of two hundred dollars, and that *you consider your salary is insufficient for the services which you have rendered to him;*' and he says, 'Yes; that's it. I have taken the responsibility,—a very heavy responsibility. I have worked incessantly and have worked faithfully for Mr. McCan, and he has not paid me sufficiently.'" (Italics ours.)

This testimony establishes the plaintiff's clear and distinct admission that there

had not been, prior to that date, any agreement between him and the defendant; and the following shows just as conclusively that the proposed written agreement, in which it was stipulated that defendant should pay to the plaintiff $8,000, related to one year's services only, and those services were to be thereafter rendered, and during the progress of the liquidation of the business of D. C. McCan & Son, viz.: "Then it seemed as though there could be no agreement between them. *Mr. Levy* said, 'Very well, I shall leave on the 1st of *January; that's all there is about it.*' McCan seemed very much loth to have him quit. I then said to Mr. Levy, 'It seems to me that you might state some amount in dollars and cents—some round sum—that would be satisfactory; some round sum that would not only be ample compensation to you for your services for one year,—[and there was never any question of any engagement being made except for one year,]—which would not only be ample compensation for your services, but would *enable Mr. McCan to retain you during the liquidation;* and would also be sufficient to remove from your mind any sense of the injustice, as you claim it, that has been done to you, by *not having heretofore given you a sufficient salary* for your services.' He asked me to state an amount, which I declined to do, and after some hesitation he stated, as it were, tentatively, '*Will you give me eight thousand dollars?*' and before I could speak Mr. McCan jumped up, and said, 'Yes;' evidently glad to have the tension of his mind relieved. They went out, after a few unimportant words, and I heard nothing more of it at that time."

It just as clearly appears from the foregoing that plaintiff proposed to discontinue his services after the 1st of January, 1890, unless the defendant consented to pay him additional compensation during the year 1890. From all that has been disclosed by the preceding quotations from the pleadings and evidence, and from other evidence not quoted, but equally convincing and clear, we are satisfied the case is with the defendant on both branches of plaintiff's action. The entries made in defendant's books were never known to or sanctioned by the defendant, and are wholly without efficacy to make proof of a contract. The *projet* of agreement discloses a simple and incomplete compromise as to plaintiff's contemplated extra services to be thereafter rendered in 1890. There is no evidence to support a *quantum meruit* for years prior to 1890. The defendant is an old and infirm person, possessed of large means, and who was evidently solicitous of retaining the plaintiff in his employment during the liquidation of the business of the firm, during the year 1890, consequent upon the death of his son and partner, and upon whose services the defendant placed a high estimation. It is also evident that the plaintiff both saw and appreciated the advantage to himself of this situation, and had made up his mind to take all the benefit possible of it; and, finding his schemes circumvented, he brought this suit, in the hope of recouping the profit of his unsuccessful negotiations. It is our deliberate opinion that the plaintiff has no well-founded claim for extra services, and none whatever for damages on the score of defamation of character and slander. In the court below there was judgment for defendant, and it is affirmed.

(44 La. Ann. 390)

CLEMENS v. MEYER *et al.* (No. 10,874.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

ADVERSE POSSESSION—COLOR OF TITLE—EVIDENCE—ESTOPPEL TO DENY ANCESTOR'S TITLE.

1. Plaintiff and defendants, having traced their title to a common author, cannot question the validity of the title.

2. The American State Papers, published by order of congress, and the copies which they contain of legislative and executive documents, are admissible in evidence.

3. To maintain the prescription of 30 years, the intention of possessing as owner and the corporeal possession of the thing must be proven.

4. To maintain the prescription of 10 years, there must be a title received from one the possessor honestly believed the real owner.

(*Syllabus by the Court.*)

Appeal from district court, parish of Madison; FIELD F. MONTGOMERY, Judge.

Action by J. W. Clemens, curator, against V. A. and S. Meyer and others to recover an interest in certain land. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles J. Boatner, for appellants. *Stone & Murphy*, for appellee.

BREAUX, J. Plaintiffs brought this petitory action to recover from the defendants the half of the E. ½ of section No. 3, in township No. 15 N., of range 12 E. They are the children of Horace Groves, who, with his brother Elijah, inherited from Moses Groves and wife. One of the plaintiffs was born on 26th January, 1853, and died on the 29th July, 1884; the other was born on the 6th day of March, 1854. In April, 1830, Rachel Rundle and others sold a tract of land to Moses Groves containing 160 acres. In the deed the land is described as part of the land entered by Chiliab Smith. On the 14th day of August, 1830, Sydney M. Smith sold to the same purchaser, Groves, another tract, also containing 160 acres. This completes the title of Moses Groves to 320 acres. The defendants are the owners of Araby plantation, in the parish of Madison. Since many years the lands in controversy have been cultivated as part of that plantation. S. W. Fisk, defendants' author, purchased from Elijah Groves, in 1860, an undivided one-half interest in the east half of section 3. The deed contains a declaration that the half section contains 320 acres. The most ancient title to Araby plantation dates from the year 1850, 38 years prior to the institution of this suit. In the deed of that date H. Nutt was the vendor and Mrs. Urquhart the vendee. No description in that deed includes the land claimed. The sections and other subdivisions make no mention of any portion of section 3. It is, next in order, proven that in June, 1870, S. W. Fisk sold one-half of the plantation to D. Urquhart.

The land in controversy was not described in that deed. On the 18th day of November, 1870, Urquhart sold to Mrs. E. W. Fisk the undivided half of the E. ½ of section 3. On the 19th day of April, 1872, Mrs. E. W. Fisk sold to Urquhart the one-half of the E. ½ of section 3, containing 320.76 acres. In 1882 all the lands were sold to the defendants, and completely described as belonging to the defendants. Then, for the first time, the E. ½ of section 3 is described in its entirety as the property of the defendants. But Urquhart, their author, owned only the one-half of the E. ½ of section 3, which he had bought from Fisk, and therefore could not transfer the entire one-half of that section. S. W. Fisk did not purchase a larger area from Groves than the one-half of the E. ½. Defendants' answer is a general denial, and the prescription of 30 years and of 10 years is pleaded.

With reference to the former prescription, it will not be denied that, to maintain it, the intention of possessing it as owner must be proven, and the corporeal possession of the thing. It is not shown that the possession of this land by the successive owners of Araby plantation has been continuous. It is established by the testimony that, at times, the owners of this plantation cultivated the land in controversy, but it is not proven that they exercised the right of ownership over it, or ever in any manner claimed to be the owners, or did anything showing the intention to possess as owners. The immediate predecessor of the defendants, Urquhart, testifies that he possessed the E. ½ of section 3; occupied and cultivated it by right of ownership, as per act of sale. This purchase to which he refers, witness testifies, was in 1870. He does not state that this possession as owner preceded 1870. He is the only witness who has testified with reference to acts of ownership, such as contemplated by article 3436, Rev. Civil Code, to enable a party to maintain the prescription of 30 years. Another witness, Zeigler, testifies that he has known the property about 30 years. When he knew it first, about 30 years ago, it was cultivated by the owner of Araby plantation. We are not informed by him that the cultivation was that of an owner, even of the crop, or of one known or looked upon as the owner, nor that the owners of that plantation have since cultivated this land or claimed to own it. Another witness, Stanbraugh, testifies that the land now claimed was in in the plantation inclosures after the purchase of J. W. Fisk. The deed of purchase dates from 1852. It is not shown how long it was after the sale. This witness afterwards states that the land was cultivated by Nutt, who was the vendor to Fisk. He only knows of the cultivation. These are the facts submitted to prove the intention of possessing as owner, and the consequent ownership of the realty. The defendants also plead the prescription of 10 years.

After a study of the record, we have not found any title in defendants or their authors prior to 1882. Title, good faith, and possession must concur to maintain this plea. The question of good faith and possession does not arise, as there is no title upon which to base that prescription. We will not return to propositions already considered, to show why we reach the conclusion that defendants have no title prior in date to 1882. It suffices at this time to state that in selling and transferring the one-half of E. ½ it did not include the entire one-half section.

The plea of prescription of 30 years must be overruled, the evidence not having established the condition required from a date sufficiently remote. The prescription was suspended during the minority of plaintiffs. The prescription of 10 years or of 30 years does not run against minors. Rev. Civil Code, arts. 3522, 3554. One of these minors had 19 years of minority, the other 20 years of minority, after their father's death. They married; the dates of their marriage are not proven. The proof would not change the result, as prescription is suspended until majority, and the marriage of the minor does not affect the plea. *Vide* Barrow v. Wilson, 39 La. Ann. 405, 2 South. Rep. 809. The time necessary to bar their claim is therefore 49 years as to one, and 50 as to the other.

It is also objected that plaintiffs have failed to prove title from the government. The American State Papers (volume 20) were offered to show title in Chiliab Smith, the transferee of the United States government The evidence offered should have been admitted to prove the right of plaintiffs' author as grantee. It is legal evidence. Watkins v. Holman, 16 Pet. 55; Dutillet v Blanchard, 14 La. Ann. 97. It is properly before us by bill of exceptions, and will be considered. In our judgment, this plays no important part. The defendants trace their title to E. W. Groves, the coheir of plaintiffs' father, under which they claim the whole tract. Their author was Moses Groves, also plaintiff's author. We have already stated that in 1860 defendants' author, J. W. Fisk, bought from E. W. Groves; they, therefore, each trace title to the same author. It is held as settled, if the parties trace their title to the same source, neither will be permitted to attack the title of their common author. Girault v. Zunts, 15 La. Ann. 684. Defendants, having no right except such as is derived from E. W. Groves, are a privy thereto, and bound by its recitals equally with the author. 1 Greenl. Ev. § 23.

The defendants also contend that the *locus in quo* is not proven; that if it be admitted that a confirmation was made to Chiliab Smith of the whole of section 3, that 360 acres of the section was sold to plaintiffs' ancestor, and that plaintiffs' right is not barred, there is still nothing to show that they have acquired any right to the east of half of the section. The deed of sale by Sidney M. Smith to Moses Groves describes part of the land as containing 160 acres, and refers particularly to certificate 1,499, granted to Chiliab Smith by the commissioner. The boundaries are also given. They correspond with the description and boundaries given on the plat in evidence. The plat locates section 3, and the boundaries set forth in the deed locate the land in controversy as

being in that section. We therefore conclude that one-half of the east half is the property of plaintiffs, viz., 160 acres; that the prescription of 30 years is not a bar, for the reason that the intention to claim as owners is not made evident by the facts proven; that the prescription of 10 years is unavailing, as defendants' title does not date 10 years prior to the institution of the suit; that the plaintiffs and the defendants own jointly the E. ½ of section 3, once owned by a common author; that the *locus in quo* is proven. Judgment affirmed, at plaintiffs' costs.

(44 La. Ann. 327)

GRAUGNARD v. FORSYTH. (No. 10,964.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

SEIZURE AND SALE—RETENTION OF PROCEEDS BY SHERIFF—STIPULATION.

1. A party having entered into an agreement authorizing the sheriff to retain an amount,—part of the proceeds of the sale of a plantation, realized under executory process,—not having alleged that the agreement had been violated, having introduced a copy of it in evidence without any stipulation or restriction, having proven certain facts by the agreement and by its introduction in evidence, which, had they not been proven, might have resulted in a loss, cannot be relieved from its effects.

2. The sheriff is directed to retain part of the amount agreed upon to await the result of a decision in another court.

3. Although one of the parties to the stipulation may not be a party to the suit, conducted in part at least for his benefit and in compliance with the agreement, he is bound by the proceedings and the result of the suit.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. James; HENRY L. DUFFEL, Judge.

Suit by J. B. C. Graugnard against Lucius Forsyth, Jr., to foreclose a certain mortgage lien. Pugh & Co. file their opposition. From the judgment opponents appeal. Modified.

Sims & Poche, for appellants. *T. J. Semmes & Legendre* and *P. E. Edrington*, for appellee.

BREAUX, J. Plaintiff, on the 14th of January, 1891, bought four notes of the Citizens' Bank, of $4,037.25 each. He at the same time bought one note of $5,375 from the Burbridge heirs, and three notes of $3,000 each, all secured by mortgage on Pike's Peak plantation in the parish of St. James. The last three are secured, in addition, by special mortgage on the Burbridge plantation, in the parish of Plaquemine. Plaintiff, on the 27th of January, 1891, obtained from the district court of the parish of St. James a writ of seizure and sale on the said mortgage notes against Pike's Peak plantation. Afterwards plaintiff obtained in the United States circuit court a writ of seizure and sale against the said Burbridge plantation under the said four notes of $3,000 each. On the 6th day of March, 1891, as directed by the plaintiff, the sheriff discontinued all proceedings under the writ of seizure and sale issued in St. James parish on the said four notes of $3,000 each, and continued with the seizure on the other notes. A satisfaction of judgment was entered by plaintiff's counsel, and payments of the five notes attached to plaintiff's petition (the first notes before mentioned) was acknowledged, and the clerk was authorized to cancel the mortgage. Pike's Peak plantation was sold under the said writ on the 7th day of March, 1891, for $39,200, and with the machinery in the sugarhouse, which was appraised and sold separately, it brought $41,325. On the 5th day of March, 1891, the plaintiff and Pugh & Co., holders of an inferior mortgage, entered into an agreement setting forth that executory process had been obtained, and Pike's Peak plantation seized on nine promissory notes, due by the defendant, being the notes before referred to; that four of these notes were secured by mortgage and vendor's privilege as per act passed January, 1889; that another was also secured by mortgage on the 26th of January, 1889; and that four, (of the said nine notes,) dated November 18, 1885, were secured by mortgage and vendor's privilege on the Burbridge plantation, as per act of sale of that date; that they were also secured by mortgage on Pike's Peak plantation, under the before-mentioned act of January 26, 1889; that since the said proceedings were instituted executory process was issued on said four notes of $3,000 each before the circuit court of the United States, whereby the said notes have been withdrawn from the operation of said writ of seizure and sale in the district court of St. James; that Pugh & Co. are mortgage creditors of the defendant in the sum of $12,271.79 and interest and attorney's fees, for which judgment has been obtained as per said mortgage on Pike's Peak plantation, dated May 1, 1890; that they sued out, or were about to sue out, a third opposition in said district court, claiming to be paid, by preference over the plaintiff as holder of the said $3,000 notes, bearing on said plantations, out of the proceeds of said Pike's Peak plantation, and claiming, as to their four notes, that plaintiff is bound to discuss the said Burbridge plantation, and that an injunction might become necessary to protect their interest as mortgage creditors. After these preliminaries had been written, it was agreed that the sheriff should return the writ, *quoad* said notes, and retain in his hands, out of the proceeds of the sale of Pike's Peak plantation, (after paying plaintiff's said four notes of $4,031.25 and said note for $5,375, also interest, attorney's fee, and costs,) a sum sufficient to pay and satisfy the judgment of Pugh & Co., and hold the amount subject to the decree of the court in said opposition. It was also agreed that, after the sale of the Burbridge plantation under the writ in the circuit court of the United States, the plaintiff "shall credit said writ with the proceeds of said sale, and that any balance due to said Graugnard, after exhausting the proceeds of said Burbridge plantation, shall be paid out of the proceeds of the said Pike's Peak plantation by preference over Pugh & Co.; the intent and purpose of this agreement being to prevent litigation, and the arrest of the sale of Pike's Peak plantation by injunction, which would inflict injury on all par-

ties in interest; and it being also the interest hereof that, while Graugnard authorizes and instructs the sheriff to discontinue the writ in so far as the said four notes, each for $3,000, are concerned, he in no manner abandons his mortgage rights in Pike's Peak plantation or the proceeds to satisfy any balance which may be due him on said four notes of $3,000, after the sale of the Burbridge plantation." The sheriff, in accordance with agreement, paid to plaintiff the five notes and interest, but refused to pay the fee of plaintiff's attorney, of $1,270, and retained the remainder of the proceeds. The Burbridge plantation was sold in April, 1891, by the United States marshal, and brought $7,700; the taxes, commissions, and costs of planting the crop were $2,186; balance, $5,514.

A. F. Slangerup, a creditor of the defendant, intervened in the United States circuit court in the case of Graugnard v. Forsyth, and claimed the proceeds of the sale of the Burbridge plantation in an amount sufficient to satisfy his claim. Four thousand dollars were retained, subject to the further orders of the court, leaving $1,514, which were paid to plaintiff, and properly credited. Pugh & Co. filed their opposition in the district court on the 6th day of March, 1891, and claimed the proceeds to which they laid claim in the said agreement. Plaintiff denied their right to recover, and further alleged in his answer that, should the court recognize their right, he was entitled to be paid the sum of $11,500 out of the proceeds in the sheriff's hands, leaving $4,000 to be paid after the determination of the case before the United States court. At the instance of plaintiff's counsel, a rule was issued against the sheriff to show cause why the fee stipulated in the act of mortgage should not be paid to them. That officer, in his answer, denied their right. The interveners made themselves parties, and, answering, alleged that plaintiff in rule had no right to stand in judgment. Other creditors, hereafter named, also intervened. The district court rendered judgment ordering the sheriff to pay plaintiff's claim secured by mortgage, and including attorney's fee, by preference over all opponents, from the $12,854.90 retained by him subject to a credit of $1,514, collected by the plaintiff from the proceeds of the sale of the Burbridge plantation, and decreed that the sum of $2,125 be paid to H. Kehoe, M. Schwartz & Co., and Taylor Bros., respectively, being due on amount secured by privilege recognized by the judgment, leaving an amount of more than $400 due plaintiff. The claim of A. G. Payne, also an intervener, was rejected. From this judgment Pugh & Co. are the only appellants.

Plaintiff chose to enter into an agreement, the purpose of which he declares was to avoid litigation. He was to endeavor to secure an amount under the mortgage on Pike's Peak plantation which also attached to another plantation. The consideration for the agreement on his part is not made conclusively apparent by its terms, for under the law he had the right to proceed with the foreclosure of his mortgage on Pike's Peak plantation. The want of consideration of this agreement is not alleged, nor its violation. By reference to the record it appears that the stipulation in question was of some use to plaintiff. The plaintiff entered satisfaction of judgment and payment of five notes attached, (the first notes described in the agreement,) and authorized the clerk of court to cancel the mortgage, as before mentioned. The stipulation to pay this fee as contained in the agreement dispenses with the necessity of passing upon the effect of this order to cancel, in so far as relates to the fee. This payment having been agreed upon, it was properly ordered in the judgment appealed from. Without the agreement plaintiff in argument seeks to have ignored, serious questions as to the right to recover might have arisen. The act of agreement was offered in evidence by the plaintiff without restriction as to its effect. A party introducing himself evidence he might exclude must abide its effect. Lafon's Ex'x v. Gravier, 1 Mart. (N. S.) 243; Maclin v. Insurance Co., 33 La. Ann. 801. It was not offered to prove its nullity, for it was not alleged. This agreement had the force of a contract, and cannot be set aside upon grounds less than would warrant the rescission of a contract. Plaintiff refers to several decisions in support of the propositions that, "if a party refuse to comply with his part of the contract, the other may decline his, and that in commutative contracts the failure or refusal of one party to comply liberates the other." It is not decided in any of the cases quoted that the contract is void to the extent that without issue as to its violation a contract admitted without any limitation can be disregarded. In referring to one of the cases, the syllabus from the digest is correctly quoted as above. From the decision to which the syllabus refers we quote: "In synallagmatic contracts the refusal of either party to perform his agreement entitles the other to his liberation." Chase v. Turner, 10 La. 21. On proper issue in this last case the contract was annulled. Although there has not been willingness and promptness on the part of said interveners in complying with its terms, and the sheriff has been erroneously encouraged in retaining this fee, we will not regard the contract as null, and treat it as void, without any issue to that effect. We quote the following from Thompson on Trials, (page 196,) not as conclusive authority, or as having a direct bearing on the subject, but as a reference somewhat in point: "When several cases are pending in court, depending upon the same facts in questions of law, it is competent to stipulate that only one shall be tried, and that the others shall abide the result of that one." "Such a stipulation is not merely an independent executory agreement, but it operates presently to affect the *status* of the case itself, and invests the plaintiff with rights in respect to its conduct which he otherwise would not have had, and of which neither the opposite party nor the court can lawfully divest him."

The issue is reduced to the amount of $4,000, deposited with the marshal,

awaiting the decision of the United States circuit court. We cannot relieve plaintiff, as to this amount, from the effect of his agreement. At the same time justice requires that interveners should be equally bound. In following the terms of the agreement, they are met by the defense in the United States court that a mortgage creditor cannot divide his mortgage so as to affect the rights of third persons. The question must be decided by the court before which it is pending. The interveners cannot ignore nor question the legality of proceedings to which they have consented, carried on contradictorily with the plaintiff, and raise issues which have been settled with him in a tribunal of their selection. In making the agreement it necessarily gave some control of the proceedings to the mortgage creditor. The interveners cannot abstain from all concern in that litigation, and be heard to question the binding effect of the proceedings in the said circuit court. When the decision will have been rendered, if adverse to plaintiff, he will have a right to the immediate payment of the $4,000. If it be rendered in his favor, he will be entitled to all balance due him, principal, interest on all principal due, cost, and balance which may be due on fee, secured by mortgage. The intervenors will have right to the remainder.

Plaintiff, in his answer to the appeal, asks that the judgment appealed from be amended and corrected, in so far as it recognizes the privileges claimed by Schwartz & Co., Taylor Bros., Kehoe Bros., and that these privileges be rejected. All the parties are appellees, except Pugh & Co. Plaintiff is an appellee, and cannot, as such, have the judgment of his coappellees amended. If he desired to have the judgment amended as between him and his coappellees, he should have appealed. Bowman v. Kaufman, 30 La. Ann. 1021; Vance v. Vance, 32 La. Ann. 186; Boisse v. Dickson, 31 La. Ann. 742. It is ordered, adjudged, and decreed that the judgment appealed from be amended, by ordering the sheriff of the parish of St. James to retain $4,000 of the funds realized by the sale of Pike's Peak plantation to be paid to plaintiff if he be cast in the suit pending before the United States circuit court for the eastern district of Louisiana in the case of J. B. C. Graugnard v. L. Forsyth, Jr., Aug. L. Slangerup, intervener, (No. 11, 986,) or, if rendered in his favor before said court, so much of said amount to be applied to the payment of the balance due said plaintiff, Graugnard, as may be necessary, and the remainder to be applied to the payment of Pugh & Co., interveners, on the judgment. After amendment as above, judgment is affirmed, at appellee's costs.

(44 La. Ann. 865)

TELLE *et al.* v. ST. TAMMANY SCHOOL BOARD *et al.* (No. 11,007.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

SALE OF SCHOOL LANDS—RIGHT TO ANNUL—TENDER—ELECTION.

1. The residents and the alleged tax-payers in a township in whom is vested the title of the sixteenth section, for the maintenance of the schools, have the right to invoke the interpretation of the court to annul a sale of this section.

2. Tender as a prerequisite to the suit cannot be required.

3. The price was not received by the plaintiffs.

4. No title passed to the adjudicatee of the property.

5. The amount should be returned by the authority by which it was received. In the mean time plaintiffs can prosecute their suit to have the sale annulled.

6. The general government donated the sixteenth sections to the township, and authorized their sale, with the consent of the inhabitants residing within their respective limits.

7. The legislative department of the state, in compliance with the conditions of the grant, adopted laws requiring elections to be held to ascertain the will of a majority of the voters residing within the township, and providing certain prerequisites to the sale.

8. An election not having been held in the township, the return of the election not being sustained at all, the adjudication made was null.

9. The sixteenth section offered for sale should bring its appraised value, which cannot be less than $1.25 per acre.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Tammany; JAMES M. THOMPSON, Judge.

Suit by Edwin Telle and others against St. Tammany school board and others to annul a sale of land adjudicated to defendant Joseph D. Taylor by the parish treasurer of St. Tammany parish. Judgment was rendered annulling the sale, from which Taylor appeals. Affirmed.

J. Q. A. Fellows, for appellant. *Charles T. Madison*, for appellees.

BREAUX, J. Plaintiffs sue to annul the sale of the sixteenth section of township 7, range 15 E., adjudicated to defendant Taylor by the parish treasurer of St. Tammany parish on the 17th day of December, 1887, for the sum of $250 cash. They charge fraud, and allege non-compliance with legal requisites. The school board joins the plaintiffs. The defendant filed an exception of no cause of action, and that petitioners had no right to stand in judgment. He also pleads a want of tender. These exceptions were overruled. The defendant Taylor, in his answer, sets up the validity of the sale. Judgment was rendered against him, from which he prosecutes this appeal. No evidence was introduced on the trial of the exceptions. The district judge, having heard the testimony of the witnesses on the merits, part of which related to the issues which had been raised by the overruled exceptions, decided that the alleged taxpayers resided in said township.

The conclusion of the district judge on the issue of fact will not be disturbed on appeal where no error is shown, and it appears correct. State v. Bradley, 37 La. Ann. 623. The names of at least two of the petitioners are on the list of voters, and, it is proven, voted in favor of the said sale. If they were residents of the township, and voted for the sale, they are conclusively residents, as alleged in the petition to have the sale annulled. The illegal disposition of public property can be avoided and annulled at the instance of individual taxpayers. "The courts may be

safely trusted to prevent the abuse of their process in such cases." Crampton v. Zabriskie, 101 U. S. 607. We will not maintain the plea of want of tender. The adjudicatee has placed the amount of his bid, less costs, in the treasury of the state. The title to the land has not passed from the township to the said defendant. Those applying for a decree annulling the sale have authority to stand in judgment. They have not the least control over the price received. The state is trustee of the lands, or of the proceeds of their sale. When the lands are sold in compliance with law the amount is placed to the credit of the township, and the interest is applied to the maintenance of its schools. If the title is not such as to divest the owner, the trustee holds the proceeds of the sale illegally. It should be returned to the purchaser. The state, as an act of justice, should return the amount, and doubtless, if application to the legislative department be made, authority for the return will be granted. In the mean time, we cannot give sanction, even temporarily, to a sale that is null, by deciding that the defendant shall hold until the plaintiffs tender an amount which they have not received, and for which they are not responsible.

ON THE MERITS.

The sixteenth section should be sold in the manner directed by law; and, in the apportionment of the interest paid by the state in the proceeds, each township is entitled to the interest on the sums arising from the sale of its school lands. Act of congress of the United States, approved February 15, 1843, authorizes the sale of lands previously reserved and appropriated for the use of schools within the state, and authorizes the investment of the money arising from the sale thereof in some productive fund, and the proceeds to be applied under the direction of the legislature to the support of the schools within the several townships for which they were received, and for no other purpose. These lands are to be sold, under the said act, with the consent of the inhabitants of the township. This was made one of the conditions of the grant. The right of the general government to dispose of the lands, as has been done, and of requiring compliance with the conditions of the donation has never been denied. In several decisions of the United States supreme court the right to require compliance has been recognized. In conformity with the requirements by the government the state legislature, also, has adopted laws to govern in the disposition of these lands. It is made the duty of the parish treasurers to take the sense of the inhabitants of the township, whether or not any lands donated by congress for the use of schools shall be sold, and the proceeds invested as authorized. Polls shall be opened at the most public places in the township after advertisement of 30 days. The evidence satisfies us, as it did the district judge, that no polls were opened, and no election was held. Witnesses whose names appear on the list of the names of voters as having cast their votes at the election for the sale declare that they did not vote. Twelve names are on the list as having voted. The witness at whose residence the election is returned as having been held declares that he saw no box and no ballots. Only two persons came. They did not vote, for no election was held, he says. The return of the justice of the peace, that 12 persons voted, is not sustained by the testimony of record. That the required notice of the election was given is not satisfactorily shown. The law was not complied with. It was never contemplated that those lands could be disposed of without obtaining the consent of a majority of the voters, after a compliance with the legal prerequisites. Without an election the order to sell was void, and the adjudication did not confer any right. If the property of a minor were sold without holding a family meeting, in a case in which it is provided one should be held, the sale would be null. In selling school lands, a sale not authorized by an election is a nullity. The right to sell depends upon compliance with the statute.

The land was sold for less than $1.25 per acre. Section 34 of act 321 of 1855 provides that in no case shall the land be adjudicated for less than $1.25 an acre. This act did not require any appraisement of school land before the sale. Section 34 of said act makes provision for an appraisement. In construing these two acts the court held "that the meaning of section 34 is that the land should bring its appraised value, but that in no case it should be appraised or sold for less than $1.25 an acre." School Directors v. Coleman, 14 La. Ann. 186. To the same effect is section 2944 of the Revised Statutes. In the case to which we have just referred the sale was annulled solely on the ground stated.

In the case under consideration the advertisement was not made as required, the election was not held, and the property was adjudicated for much less than the amount fixed by law.

Judgment affirmed, at appellant's costs.

(44 La. Ann. 350)

CHAPOTON v. HER CREDITORS. (No. 10,990.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

MORTGAGE IN FRAUD OF CREDITORS—CANCELLATION—RIGHT OF SYNDIC TO SUE—INSOLVENT SUCCESSIONS.

1. The syndic can maintain a revocatory action to have a mortgage canceled, if given in fraud of creditors.

2. He may maintain the action against a creditor, as he can against a non-creditor, of the insolvent.

3. The origin or the date of the claims of certain creditors will not be a cause of dismissal of the action, should it appear that some of the creditors have a right under the *actio pauliana*.

4. The laws applying to the settlement of insolvent successions *in pari materia* may be construed with those applying to proceedings affecting the insolvents.

5. Although a judgment is not conclusive on the creditors, similar, in that respect, to judgment against administrators, representing creditors, the syndic can maintain the revocatory action to have the mortgage of a creditor annulled, if it was given in fraud of the creditors.

(*Syllabus by the Court.*)

Appeal from district court, parish of Iberville; EDWARD B. TALBOT, Judge.

In the matter of the insolvency of Anna Chapoton. Suit by the syndic of her creditors against her and her mortgagee, to annul a certain mortgage. From a judgment sustaining defendant's exceptions, the syndic appeals. Reversed.

Alex. Hebert, for appellants. *Ernest T. Florance*, for appellee.

BREAUX, J. The syndic of plaintiff's creditors brought suit to revoke and annul a mortgage she executed in favor of one of her creditors, on the ground that it was given a short time prior to the surrender of her property to her creditors; that she was insolvent at the time, to the knowledge of the mortgagee; that it was granted to the creditor with the intention of giving him an illegal and fraudulent preference, to the detriment and loss of her other creditors. The defendants (the insolvent and the mortgagee) tendered separate exceptions to plaintiff's action, in which they aver, substantially, that it is not competent for the syndic to maintain such a suit, because, being the representative of all the creditors, he could not champion the cause of some against others, or one class against another class; that creditors must litigate their claims *inter sese* and *en concurso*, and not by separate suits instituted by a syndic. The district judge maintained these exceptions, and from the judgment the syndic has appealed.

This action is revocatory. Counsel representing one of the defendants seeks to establish a difference between a class of actions brought under the term *actio pauliana*, for the purpose of bringing back into the debtor's estate property that has passed out of it, and another class brought to have a right annulled, resting on the property that is still in the debtor's estate; that is, suits in one case against non-creditors, and in the other against a co-creditor. It is conceded that in proceedings against those who are not creditors, to bring into the estate property that has passed out of it, the syndic, as the representative of all the creditors, is authorized to stand in judgment. But it is contended that in cases falling under the latter category, where the litigation is between creditors and creditor, the syndic cannot "take sides;" that he must leave to his constituents the burden of settling their rights among themselves.

It is urged that if this distinction be kept in mind, apparent inconsistencies in the decisions will disappear, because suits by syndics have been maintained where the property which was the subject thereof had passed out of the possession of the insolvent, and had to be brought back, and that suit had not been maintained whenever the issue has been the right of priority of payment out of the property surrendered to the syndic. The law does not seem to contemplate the difference urged in giving to the representative of all the creditors, where there is a cession, an action to annul any contract, in fraud of their rights, and in authorizing him to sue and be sued in everything, respecting the rights and actions which may belong to the insolvent debtor, and which concerns the mass of creditors. Rev. Civil Code, art. 1970; Rev. St. § 1811. Judicial interpretation recognizes the right, in matter of claims such as the one under consideration, of creditors in a *concursus* opposing the claim of an alleged preferred creditor. This right has not been held as exclusive, and as precluding the direct action between a syndic and a creditor who claims an adverse right. In Giraud v. Mazier, 13 La. Ann. 147, it was held that the creditor can institute an action to cancel a contract made in fraud of creditors after the cession of property. The authority of the syndic to bring a similar action was not questioned. In Tenny v. Provosty, 14 La. Ann. 221, and other cases, it was decided that the syndic was incapable of standing in judgment in a suit to have a privilege recognized; that he represents the mass, and not individual creditors. This must be held correct when creditors bring suit to establish their claims as against their co-creditors, for the syndic cannot stand in judgment for the purpose. The creditors have an interest in a fund to be distributed by the court, and must contest in the distribution contradictorily with each other. The syndic is without authority to oppose a creditor in this respect, or to recognize his claim in any manner, so as to bind the other creditors. But when a creditor has a right on property, and holds it against the *concursus*, and it becomes necessary to invoke the *actio pauliana* to have the property brought to the estate free from incumbrance, the syndic has the authority to stand in judgment.

The question arose in the case of Byrne & Co. v. Their Creditors, 33 La. Ann. 201, in which it was urged that the syndic is without authority to question the validity of any claim on the part of creditors. The court held that his duty requires that he should resist all claims which he suspects as illegal or fraudulent, and maintained his answer, setting up the nullity of the judgment of one of the creditors. "The right to plead in behalf of the estate and of the creditors, being once recognized in the syndic, cannot be affected or modified by the nature, origin, or the date of the claims of any creditor of the estate." We have referred to the law authorizing the syndic to stand in judgment in all matters of interest to the creditors. The ground urged for restricting the right to non-creditors in a revocatory action is that the judgment may be rendered annulling a mortgage given before the claims of some creditors were created, and to this judgment such creditors would not be entitled. It sometimes happens in a *concursus* that creditors have rights in which their co-creditors do not share. A fund may be distributed among particular creditors who have privileges. "The revocatory action may be instituted by a syndic or administrator without regard to the date or origin of the claims of the creditors." Sullice v. Gradenigo, 15 La. Ann. 582. In distributing the funds, the syndic represents all the creditors. In suing to establish a right, he may be placed in a position in opposition to the illegal or fraudulent demands of one or more of the creditors.

The next objection,—"A suit of the latter

character would not, if decided against the syndic, constitute *res adjudicata* as against the creditors." This is correct. The decree between the creditor and syndic would bind them, but would not bind the creditors in all respects. In this we do not find cause to dismiss the action. A decree against an administrator, representing creditors, does not unqualifiedly bind the latter. That would not be considered good ground to dismiss an action against an administrator. The laws applying to the settlement of insolvent successions *in pari materia* may be taken and construed together with those applying to proceedings in insolvency, as one system, and as explanatory of each other. Although a judgment may not be conclusive on the creditors similar in that respect to judgment against administrators representing creditors, the syndic can maintain the revocatory action to have the mortgage of a creditor annulled if it is given in fraud of creditors. State v. Ellis, 41 La. Ann. 41, 6 South. Rep. 55. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, that the case be remanded to the lower court, and that it be reinstated on its docket for further proceedings according to law; appellee to pay costs of appeal.

(44 La. Ann. 605)

SEVIER *et al.* v. DOUGLASS. (No. 10,982.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

WILLS—DEVISEES—CHILDREN BY SECOND MARRIAGE—USUFRUCT—SUBSTITUTION.

1. The testator bequeathed a life estate to his wife, and directed that in case she, at the time of her death, left a child or children, his estate was to descend in fee simple to such child or children. The testator having died, the wife contracted a second marriage, of which the plaintiffs are the issue. The child not conceived at the death of the testator is as incapable of receiving a conditional legacy as he is incapable of receiving a legacy pure and simple.

2. Under the French system, article 906 applies to conditional as well as to legacies pure and simple, and the legatee must exist at the testator's death.

3. Under the corresponding article of the Louisiana Revised Civil Code, (article 1473,) a legacy was limited to the number of children born at the testator's death, although left to all the children of a person named.

4. The suspensive condition of the legacy inured only to the benefit of the children *in esse* at the death of the testator. Fisk v. Fisk, 3 La. Ann. 494.

5. As the right of the usufruct expires at the death of the usufructuary, the heir does not receive by descent, if the mother was a usufructuary.

6. If she became the owner, the legacy was null, as a prohibited substitution.

7. And if it was not a prohibited substitution, having sold the land, her heirs cannot recover it from the defendants, who hold under the purchase from their mother.

(*Syllabus by the Court.*)

Appeal from district court, parish of Tensas; S. CHARLES YOUNG, Judge.

Suit by A. J. Sevier and others against Mary B. Douglass to recover land. From a judgment for defendant, plaintiffs appeal. Affirmed.

Wade R. Young and *Don Caffery*, for appellants. *Lemuel P. Conner, Jr.*, for appellee.

BREAUX, J. Plaintiffs brought this suit to recover a tract of land described in their petition. They allege that they are the children of Sarah H. Sevier, who died in 1891; that by a former marriage she was the wife of Arva Wilson, who died in 1833. At the time of his death he was the owner of the land claimed. By his last will and testament he gave to his wife, who was their mother by second marriage, a life estate in all his property. The will contains directions and conditions which have given rise to this litigation. The testator bequeathed to his wife all his estate, to have and to hold the same during her natural life, and, in order to enable her to live with convenience and comfort, he made it a part of his will that she should enjoy as her own, subject to her control and disposal, all the interests, rents, or profits to arise from the estate; and he provided that, should such income be insufficient to support her in a style suited to her condition in life, an additional sum of $500 was to be annually allowed her by the judges of the orphans' court of Claiborne county. The estate was to be under "her own control and management during her natural life, but in no case chargeable with any incumbrance or debt, except as above provided." The testator directed that should his wife, at the time of her death, leave a child or children, his estate was to descend to them in fee simple; and, in the event of their dying without issue or before attaining the age of 21 years, his estate was to revert to trustees, after deducting particular legacies, small in amount, to two nieces; and he directed that, in case none "of the contingencies before mentioned prevent, the whole of my estate * * * which I may leave at the time of my death shall after the death of my wife be secured in trust for the education of the poor children of Claiborne county."

The propositions are, on the part of plaintiffs: (1) That testator bequeathed to his wife the life estate or usufruct of all his property for the term of her natural life. (2) That, if at her death she left a child or children, the property should descend in fee simple or full ownership to such child or children. (3) That, if at her death she left no child or children, the property should go to the persons designated as trustees to be disposed of, and the proceeds devoted to charitable uses. (4) That if such child or children died without issue, or before attaining the age of 21 years, the property should revert to the trustees for charitable uses, and that the condition contemplated by the testator has happened, and the wife died leaving children. The defendant contends that the testament is void: (1) Because the legacy of the life estate in favor of the wife, and the ownership in favor of the children, is a prohibited substitution. (2) That the legacy has failed, because the children were not in existence at the death of the testator. The exception of no cause of action was maintained. From this judgment plaintiffs appeal.

It being alleged in plaintiffs' petition that the will is valid in substance and form by the laws of Mississippi, in which state it was made, the allegation is taken as true, it being admitted by the exception for the purpose of its trial. The will being valid as to form in the place where it was made, questions of form are not at issue. Forms and the solemnities of instruments are governed by the *lex loci*. But that rule does not hold in determining as to the capacity of an heir to receive immovable property by last will. He must receive under the *lex rei sitæ*, it being a right of inheritance, to be governed by the laws where the land lies. It is not argued that one not in existence at the death of the testator is capable of receiving an unconditional legacy; but that, when the donation depends on the fulfillment of a condition, it is sufficient if the donee is capable of receiving at the moment the condition is accomplished. The child unborn at the testator's death is incapable of receiving a legacy. The birth of the child or children was made the condition of the will, and is pleaded as suspending the effect of the legacy until their birth some time after the death of the testator. In Succession of Strauss, 38 La. Ann. 59, referred to by plaintiff's counsel, the amount given to the testator's grandchildren was on the condition of their attaining the age of majority. In case either died, his portion was to be received by the survivor on his attaining the age of majority. In case the children died before reaching the age of majority, certain charitable institutions were instituted universal legatees. The question for determination was not as to the incapacity of the children to receive because of their nonexistence at the time of the testator's death, for all the legatees were alive, but as to whether the suspensive condition was a prohibited substitution. The court held that it was not. The institution of the heirs depended upon a suspensive condition among legatees capable of receiving at the time of the disposition. The suspensive condition was not accomplished after the death of the testator. The questions involved and discussed in Succession of Law, 31 La. Ann. 456, do not apply to conditional legacies, such as the one under consideration. It was decided in that case that the disposition, the property "to be used, enjoyed, and occupied" during the life of the legatee, was the legacy of the usufruct; that the legacy of this property and the suspensive condition caused by the usufruct was not a prohibited substitution.

In the case under consideration it is contended that the legacy was conditional, and that it was sufficient if the heir was capable of receiving it at the time the condition was fulfilled. The question would not present great difficulty were it an application of the principles of article 1474 to a conditional legacy to one *in esse* at the death of the testator, such as, for instance, a legacy to a *feme sole* dependent upon her marriage, or to an infant *en ventre sa mere;* for in that event, by the marriage or the birth, the condition is accomplished for the benefit of a person existing at the time the testator died. It does not conclusively appear that it was the will of the testator to bequeath his estate to children born by another marriage by his widow, subsequent to his death. He bequeathed to the children of his wife. In the second place, the future event, as it resulted, is a condition violative of the article of the Civil Code which provides that the capacity to receive must exist at the opening of the succession. The French system is invoked. We have not found that it sustains plaintiffs' contention. The proposition is broadly announced by Fuzier-Hermann, and a number of authorities are quoted by him, in its support, that jurisprudence the most recent maintains the general rule that the child not conceived at the death of the testator is incapable of receiving a conditional legacy, as he is incapable of receiving a legacy pure and simple. 2 Codes Annotes, art. 906, note, p. 445. "If it is sufficient, in matter of conditional legacies, that the legatee should exist at the moment of the fulfillment of the condition, it would not be difficult to elude article 906 of the Code [to which article 1473 of our Code corresponds] by a condition postponing indefinitely the date of the existence of the legatee." Id. It is true, says the commentator, that we recognize generally under article 1040 of the Code (1698 of our Code) that in conditional legacies it suffices that the legatee be capable of receiving at the moment that the condition is accomplished. "The induction which that article furnishes, although in the main correct, does not justify a derogation from the special rule of article 906 [1473 of Revised Civil Code] as to the necessity of the existence of the legatee at the death of the testator." 7 Aubry & Rau, p. 24. "It is sufficient, under article 906, if the capacity to receive exists at the death of the testator. What should be the decision if the legacy is conditional? The question is not free from doubt," says Laurent, (volume 17, p. 207, par. 159.) "The law requires that the legatee shall exist at the death of the testator, for the reason that the right of the former dates from that epoch. When the legacy is conditional, the right dates from the time it is accomplished. Must we not conclude that it suffices to be conceived at that moment? The opposite decisions are generally followed, and we must admit for historical reasons." Id. "Article 906 only generalized the disposition of the ordinance of 1735, which prohibits the institution of heirs not conceived." Id. D'Agnesseau explains the motive which prevailed in departing from a doctrine which had received the sanction of jurisprudence. "The first capacity is the existence of the legatee. It was objected that in conditional legacies the fulfillment of the condition has a retroactive effect, from which it followed that the instituted heir was to be considered capable of receiving from the date of the death of the testator." Id. D'Agnesseau replies to the objection "that this fiction cannot have any effect; is it not possible to maintain that a child not conceived is conceived?" "The ordinance applied only to instituted heirs, and, thus limited, the disposition explains itself; at the death

of the testator the hereditament must rest on some one." Id. "Article 906 applies to conditional as well as to legacies pure and simple." Court of Cassation, 4th February, 1884, (Journal du Palais, p. 1059.) Fisk v. Fisk, 3 La. Ann. 494, is an analogous case. The testator bequeathed an amount to be divided, at the death of the legatee, equally among the children of a younger brother. At the decease of the testator, only two of the plaintiffs were born. The court holds that under the terms of the will, and in accordance with the provisions of the Civil Code, arts. 1457–1459, 1469, the children living at the decease of the testator can alone take under the title. Those born after the death of the testator, but within the condition of the legacy, were excluded from the benefit of the legacy. We prefer to adhere to these principles. They are sustained by the weight of French jurisprudence. We have not found a case before this court extending the effect of a condition to an uncertain future, after the death of the testator, and thus suspending the fee simple or ownership of property.

An alternative plea is presented by plaintiffs to which we have given consideration. It is urged, if plaintiffs, not being born or conceived at the death of the testator, cannot take by devise from him, that, by disposition of the will, the property has descended to them as an estate of inheritance from their mother. They allege that their mother entered into possession of the land as usufructuary. Should it be held that the mother had the usufruct of the property under the will, it did not, on her death, pass to the heirs. It does not confer any rights upon them. The right of the usufruct expires at the death of the usufructuary. Rev. Civil Code, art. 606. Should we, on the contrary, decide that the bequest constituted an ownership, and vested the property in the mother, the case would fall within the prohibition, and the question would be within the grasp of the articles of the Code which prohibit the vesting of property in one person to vest in another at the death of such person. The principles laid down in Marshall v. Pearce, 34 La. Ann. 562, would then apply. "This implies, necessarily, the charge to preserve and return; and under the imperative mandate of Revised Civil Code, art. 1520, the disposition must be declared null." Either the usufruct was bequeathed to the mother, or the ownership, with the charge to preserve and return. It must necessarily be the one or the other. The plaintiffs are without right in either contingency. Lastly, if not a prohibited substitution, their ancestor having sold the land, her heirs cannot recover it from the defendant, who holds under the purchase.

Judgment affirmed, at plaintiffs' costs.

(44 La. Ann. 277)

SCHOLEFIELD *et al.* v. Succession of WEST *et al.* (No. 10,835.)

(*Supreme Court of Louisiana.* March 21, 1892. 44 La. Ann.)

MORTGAGES—SEIZURE AND SALE—LIEN FOR TAXES.

When the privileges by which taxes are secured are prescribed, such taxes become mere personal claims against the tax debtor, and mortgage creditors are not debarred from seizing and selling, nor the sheriff from executing title to, the property, by reason of the non-payment. They cease to be taxes due on the property, within the meaning of section 3615, Rev. St., which must be construed in connection with other laws *in pari materia*.

ON REHEARING.

1. When the sheriff sells property, he must retain in his hands a sufficient amount of the price, regardless of the amount for which the property sold, to pay the taxes due thereon prior to the adjudication.

2. When property is assessed in the name of a person not the owner, and the owner pays the taxes due thereon, he is estopped from disputing the correctness of the assessment.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Scholefield, Goodman & Co. sued the succession of B. J. West and foreclosed a mortgage given by deceased. The land was sold and adjudged to plaintiff Goodman, but the sheriff refused to make a deed until the taxes on the premises, due the city of New Orleans, were paid. Goodman took a rule on the city to show cause why the taxes should not be canceled. The rule was made absolute, and the city appealed. The judgment was modified, but on rehearing was affirmed.

Walter B. Sommerville, Asst. City Atty., and *Carleton Hunt*, City Atty., for appellant. *Carroll & Carroll* and *White, Parlange & Saunders*, for appellees.

MCENERY, J. B. J. West, during his lifetime, mortgaged certain property situated in the city of New Orleans to the plaintiffs. After his death the plaintiffs foreclosed their mortgage, and it was seized and sold, and adjudicated to plaintiff Goodman. The sheriff refused to make a deed to the plaintiff until the taxes due the city of New Orleans, prior to the seizure, were satisfied out of the proceeds of the sale of the property. F. B. Goodman, a member of said firm, and the adjudicatee, took a rule on the city, ordering her to show cause why the taxes, and liens and privileges for taxes, which he alleged had prescribed, should not be canceled and erased. The rule was made absolute for the tax liens of the year 1887 and prior thereto. The city has appealed.

The sheriff has in his hands a fund derived from the sale of property, upon which there was due at the time of the sale city taxes. These taxes are imprescriptible. Section 36, Act 96 of 1877; Act 26 of 1886; Succession of Stewart, 41 La. Ann. 128, 6 South. Rep. 587; Succession of Mercier, 42 La. Ann. 1135, 8 South. Rep. 732; Rivers v. City, 42 La. Ann. 1196, 8 South. Rep. 484. It is immaterial, therefore, under the facts of this case, whether or not the liens and privileges securing said taxes have prescribed. Section 3615, Rev. St., was in force when this adjudication was made. The duties of the sheriff are therefore controlled by it, and not by Act 88 of 1888, amending said section of the Revised Statutes, which is not a remedial statute, and therefore not retroactive. In the case of Laplace v. Laplace, 43 La. Ann. 286, 8 South. Rep. 914, in

interpreting section 3615, Rev. St., we said: "The law requires the sheriff to see that the taxes are paid on immovable property before he executes any act for the sale or transfer of the property. The tax ought to be paid before the adjudication, as this act transfers the title to the property. * * * If the sheriff fails to collect the tax himself, or is not furnished with the evidence of the payment, he must pay it out of the proceeds of the sale of the property, regardless of the amount for which the property sold." The rule prays for the cancellation of the taxes for the years 1882 to 1890, inclusive. After the death of West, the property was continued on the assessment roll in his name. So far as the sheriff is concerned, he is only interested in the payment of the taxes due prior to the adjudication to Goodman. Goodman has paid the state taxes due on the property since the adjudication to him, and also the tax of 1887. By so doing he has ratified and approved the assessment of the property, and is estopped from contradicting or disputing the same. The object of requiring a description of the property, and the name of the owner, when it is assessed, is for the purpose of identifying the property, so that the owner cannot be misled by the description of the property and the alleged ownership. If the property is assessed in the name of a person not the owner, and the real owner pays the tax thus assessed, he certainly has no reason to complain of the defective assessment. The object of the law has been accomplished in conveying to the real owner the knowledge of the assessment of his property.

Where there are two authorities levying the tax on the same assessment rolls,—the state and the municipality,—it would be a grave injustice to permit the tax debtor to continue on the rolls a defective assessment, which he recognizes by paying the tax assessed to the one, and then permit him to take advantage of the defective assessment, and escape the payment of the tax due to the other. Such would be the case here. The plaintiff in the rule on a defective assessment has paid the taxes assessed to the state. He now repudiates the assessment, and attempts to evade the payment of taxes due the city. His recognition and approval of the assessment by the payment of state taxes effectually estops him from denying the same assessment in favor of the city. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled so as to discharge the rule as to all taxes. In other respects it will be affirmed.

ON REHEARING.

The plaintiffs, mortgage creditors of the late B. J. West, seized and sold, under executory process, the property subject to their mortgage. The price realized is not sufficient to pay the mortgage of plaintiffs. The property is incumbered by inscriptions of taxes due the city of New Orleans for numerous years, and the sheriff declined to proceed in execution of the adjudication until the conflicting claims between the plaintiffs and the city should be settled. Thereupon the plaintiffs took this rule on the city to show cause why the inscriptions of these taxes as liens and privileges on the property should not be canceled and erased, on the ground that said liens and privileges were prescribed. Issue was joined, and, after trial, judgment was rendered rejecting plaintiffs' demands, so far as the taxes of 1888, 1889, and 1890 are concerned, recognizing the superior privilege of the city for the same, but making the rule absolute as to the taxes of former years. From this judgment the city appeals. The right of the plaintiffs to purge the property of prescribed privileges, apparently priming their mortgage, is not questioned. No objection is made to the mode of proceeding. The city admits that the liens and privileges for taxes of 1887 and prior years are prescribed; therefore we are relieved from the necessity of examining that question. We can discover no possible force in the city's contention that plaintiffs must be denied relief because it was stipulated in their act of mortgage that the mortgagor should pay the accruing taxes. That stipulation imposed no duty on the mortgagees, added nothing to the legal duty of the mortgagor, and took away nothing from the rights of the city. The city was entirely unaffected thereby.

The city further contends, as we understand it, that plaintiffs are entitled to no relief on account of the prescription of the privileges, because the taxes themselves are not prescribed, and section 3615 of the Revised Statutes prohibits the sheriff from passing sale of the property "unless the state, parish, and municipal taxes due on the same be first paid." Pretermitting the question, much controverted in argument, as to whether section 3615 remains in force or has been repealed by subsequent revenue laws, further reflection has convinced us that the terms "taxes due on the same," as used in the law, must be confined to taxes having a subsisting privilege on the property. The privilege in favor of taxes, like all other privileges, is derived from the law. The Code defines a privilege to be "a right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have a mortgage." Rev. Civil Code, art. 3186. The law granted this privilege to the city for its taxes, but the same law declares that the privilege should be prescribed by three years. If the law had not granted the privilege, the city would not have had the right to be preferred over mortgage creditors. While the privilege subsisted, the city had this right. After the privilege was extinguished by prescription, the city lost the right. To maintain the construction of section 3615 contended for by the city would render equally nugatory the laws granting privileges for taxes, and those prescribing such privileges; for if, under that section, mortgages can, in no event, be satisfied until the taxes are first paid, it seems absurd and superfluous either to grant or to prescribe privileges for such taxes. Obviously, when the privileges for the taxes were prescribed, the taxes became mere personal claims against the tax debtors, having no greater right

against this particular property than against any other property of the debtor. They were no more "due on" this particular property than on any other property. Such taxes do not fall within the provision of section 3615, which must be so construed as to harmonize with other laws referring to the same subject-matter. It is therefore ordered that our former decree herein be set aside, and it is now decreed that the judgment be affirmed.

(44 La. Ann. 361)

Succession of WADDILL. (WADDILL, Intervener. No. 10,999.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

STATUTORY ALLOWANCE TO WIDOW AND CHILDREN —WAIVER OF PRIORITY—NOTES—PROTEST FEE.

1. The widow and children, having proven their necessitous condition at the death of the husband of the former and the father of the latter, are entitled to the amount of $1,000 from the assets of his succession.

2. From this amount must be deducted the value of the property of the succession she has received.

3. The succession should not receive credit for the value of property, the title to which is not proven, nor that it was appropriated by the widow and tutrix.

4. The widow and minors' portion, being a provision for the destitute, cannot be waived in favor of a creditor, and carried in the account of administrator as a claim ranked after his.

5. Privilege on a crop must be paid from the proceeds of the crop on which advances were made, and not from the proceeds of crops of subsequent years.

6. Protest was not necessary. Fee cannot be charged.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Carroll; FIELD F. MONTGOMERY, Judge.

Succession of A. G. Waddill. The administrator filed a provisional account, which he petitioned to have homologated. Jane Waddill, widow and tutrix, intervened, joining the petition of the administrator. R. H. Hamlin, D. G. Tutt Grocery Company, and Chaffe & Powell opposed the account. From a judgment homologating the account the opponents appeal. Modified.

C. S. Wyly, for D. G. Tutt Grocery Co., appellants. *J. M. Kennedy* and *E. J. Delony*, for administrator and tutrix, appellees.

BREAUX, J. The succession of A. G. Waddill was opened in September, 1887, in which month the administrator qualified. The decedent left a widow and four minor children. The administrator in January, 1889, filed a provisional account, showing for distribution a balance of $2,660.04. On the tableau of debts and the distribution of funds, he placed the claim of the widow and the children of the deceased as creditors for $1,000, as being in necessitous circumstances, and as not possessing that amount in their own right. Jane Waddill, widow and tutrix, intervened, joining the administrator in his petition that the tableau allowing her $1,000 be homologated. R. H. Hamlin, D. G. Tutt Grocery Company, and Chaffe & Powell opposed the account and tableau. The administrator carried the account of D. G. Tutt Grocery Company on the tableau for the sum of $122.60, as ordinary creditors. This firm opposed on the ground that they had a right to $152.12. The court amended the amount by allowing $19.50. Total allowed, $142.10. The only remaining difference as to this creditor is with reference to a fee of protest of $3.02. The administrator carried the claim of Chaffe & Powell on the tableau for the sum of $1,411.33, with privilege on the crop as furnishers of supplies, and $414.73 as an ordinary debt. They opposed the account and tableau, alleging that under their contract they were to impute the payment as they saw proper; that, after exercising that right of imputation, they aver that they remained creditors of the succession for the sum of $1,853.45, being a balance of advances to make, gather, and prepare for market the crop in 1887, on which they claim a privilege and pledge under their contract. The opposing creditors to the account opposed the $1,000 to Jane Waddill, widow, and children, as not being in necessitous circumstances; and they alleged that she had taken possession of succession property exceeding said amount, disposing of part of same, and that she had not rendered an account thereof to the administrator. Judgment was rendered, homologating the account, amending the tableau, as before mentioned in so far as relates to the credit of D. G. Tutt Grocery Company, and dismissing the opposition of Chaffe & Powell. The latter have appealed.

The opponents admit that the administrator's account is in the main correct. The issue relates to the $1,000 allowed to the widow and minors; to the total due Chaffe & Powell, and the privilege they claim; and to a very small amount claimed by the Tutt Grocery Company, to which we have already referred.

The $1,000, widow and minor's claim. The widow and minor children, having proven their necessitous condition at the death of the husband and father, are entitled to this amount of $1,000, less the value of any property received by her. It is contended by the opponents that the value of six mules should be deducted from this amount. They charge that these mules were appropriated by the widow. It is not stated that they were appraised, and their value carried in the inventory as part of the assets of the succession. The administrator's acts are not complained of, and we have no reason to infer that he has not properly discharged his trust. He qualified a short time after the succession had been opened. Prior to qualifying, he was the custodian of the property. It is not stated that the least claim was made by him to these mules. There were still three of the mules remaining when the case was tried. Two had died. The number was five, not six, as claimed. Some time prior to the death of Waddill, these mules were assessed in the name of his mother-in-law. She claimed them, took them in her possession, and on the trial offered testimony to prove that they are hers. While the testimony is not conclusive as to her title, there is

no question that she was in possession of the three remaining when the case was tried, and that she took possession of the five as an owner. The succession cannot be credited with the value of property to which title is not proven, and which is not proven to have been appropriated by the widow and tutrix. The widow admits that she kept for the use of herself and children what little furniture there was. Its value was $40, with which she must be charged. It is not proven that the other items claimed by opponents as amounts which should be charged against the widow and tutrix were appropriated by her.

Alleged waiver. The widow and minors' portion under Act 17th March, 1852, is a provision for the destitute, and cannot be waived in favor of a creditor, and made subordinate to his claim, during the settlement of the succession. It must be paid without reference to any waiver.

Imputation of payment. The creditors Chaffe & Powell oppose the debit balance against the succession as shown in the tableau. Their witness states that on the 18th day of February, 1887, A. G. Waddill owed them a balance of $275.97, advances on the crop of 1886. They had in their hands, at the time of the crop of 1886, 10 bales of cotton, which they sold. The sale amounted to $416.79, leaving a balance of $137.82 to be credited on the account of 1887:

The amount of the account is	$1,863 45
Deducting amount for 1886	279 97
	$1,583 48
Balance credit balance, 1886	137 82
Balance	$1,445 66

—due by the succession.

Fee of protest. The note protested had been sent "for collection." It was not transferred. There was no necessity for protest, and the fee is not chargeable. "A promissory note not having been indorsed, there was no need of protest." Tied. Com. Paper, § 321.

It is ordered, adjudged, and decreed that the judgment appealed from be amended by charging the widow and tutrix, Jane Waddill, with the sum of $40, to be deducted from the widow's and minors' portion; that the claim of Chaffe & Powell be increased from $1,826 to $1,863.45; of that amount the privilege on the crop of 1887 is increased from $1,411.33 to $1,445.66. After amendment, judgment affirmed, at appellees' costs.

(44 La. Ann. 613)

PARISH OF CONCORDIA v. NATCHEZ, R. R. & T. R. CO. (No. 11,010.)[1]

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

DRAINS—OBSTRUCTION BY RAILROAD EMBANKMENT—POWERS OF POLICE JURIES—REPEAL OF STATUTE.

1. Police juries have the power to regulate the direction, the making, and repairing of the roads, bridges, causeways, dikes, and levees.

2. They also have authority to cause to be opened such ancient natural drains as have been obstructed by the owners of the adjacent lands on points of land on the Mississippi or other water courses divided among several proprietors; also to adopt a system of drainage.

3. The right sought to be vindicated is not included in any of these powers.

4. The police jury has no authority to institute suit to enforce a servitude by a servient estate, or to have embankments leveled, in matters of a private nature, and not included in its powers.

5. Prior laws are not repealed by subsequent ones, unless by positive enactments or clear repugnancy.

6. They should, if possible, be considered and construed together, and their differences reconciled.

(*Syllabus by the Court.*)

Appeal from district court, parish of Concordia; S. CHARLES YOUNG, Judge.

Suit by the parish of Concordia against the Natchez, Red River & Texas Railroad Company for the purpose of having removed certain obstructions and embankments. From a judgment for defendant, plaintiff appeals. Affirmed. Rehearing denied.

Luce & Lemle, for appellant. *Elam & Dagg*, for appellee.

BREAUX, J. The police jury of the parish of Concordia instituted this suit against the defendant company for the purpose of having removed all obstructions and embankments closing drains alleged as natural; these drains being sloughs, bayous, and low places, alleged as having been closed by defendant's railroad embankment. Plaintiff avers that the drainage of certain plantations, especially of the five plantations designated by name, viz., Concordia, Fletcher, Helena, Panola, and Clearmont, is obstructed and damaged, and that at times the plantations are flooded, and thereby made uncultivable; that the obstructions also impede the flow of water and drainage of other plantations than those named, which are also thereby damaged; that these plantations front on Lake Concordia,—now a part of the Mississippi river,—and drain through the obstructed places south or southwest of defendant's railroad embankment into Crocodile bayou and Red river; that the waters from several streams are obstructed and impeded by this embankment, thereby causing great damage. Petitioners pray that all obstructions and embankments closing the natural drains be removed. The owner of one of these plantations, the Helena, is also one of the parties to the suit, personally and as president of the police jury.

Defendant's exception, which was sustained by the court, in so far as the parish was concerned, and overruled as to the other plaintiff, presented as grounds that the police jury has no interest in the suit, and that in matter of drainage its authority is limited to the power delegated by Act 107 of 1888, and the amendment thereto, (Act 83 of 1890.) The defendant also alleges that plaintiffs have no cause of action. Police juries have the power to regulate the direction, the making, and the repairing of the roads, bridges, causeways, dikes, and levees. They also have authority to cause to be opened such ancient natural drains as have been obstructed by the owners of the adjacent

[1] Rehearing refused April 4, 1892.

lands in any town, or where a point of land on the Mississippi or other water course shall be divided among several proprietors, and to cause any water course which is not navigable to be filled for the purpose of a highway; and when there are 12 inhabitants of a town, suburb, or other place divided into house lots, or when a point of land on the Mississippi or other water course shall be divided among several proprietors, and it shall be found necessary to dig one or more common draining ditches, the said juries shall have the right to ordain that the said ditches be dug at the expense of the owners of the lots, and that the expenses be borne by a contribution among the owners, to be levied in such manner as the jury shall prescribe, saving to individuals or persons aggrieved the right of petitioning for the making or opening of such natural or artificial drainings when necessary or damaging to them. Police juries are limited to the exercise of the authority delegated to them, and its exercise must be by general ordinance. *Jura non in singules personas, sed generaliter constituuntur.* Their function should be exercised in parochial interests and others of a general and public character. "Police juries have only express powers, and those incidental to powers so expressly granted." The legislature has limited and defined the powers granted. State v. Miller, 41 La. Ann. 53, 5 South. Rep. 258, and 7 South. Rep. 672. In matter of roads, bridges, causeways, dikes, and levees they have full authority to have drains open when it becomes necessary to the protection of these interests. All drains which, by being closed, are damaging to roads, bridges, causeways, dikes, and levees may be opened. This does not confer the authority and the responsibility of acting when the interests are private, and no community or settlement has the least cause to be concerned. In establishing a general system of drainage, or in the building of dikes for the purpose mentioned, police juries can maintain suits. They also have authority to cause to be opened ancient drains on water courses on lands divided among certain proprietors. This does not give the right in a suit to vindicate rights of servitude in any case which may arise. In Sicard v. Chits, 13 La. 114, a large settlement was interested in reopening a navigable stream, "and that river a branch of the Mississippi river, and the only water communication between that stream and one of the oldest and largest settlements in the state." The use was public, and the right of the police jury to sue was maintained. Upon reference to the transcript of appeal in Avery v. Police Jury, 12 La. Ann. 556, we find that it discloses that more than 50 inhabitants were interested in lands in the vicinity, and that the area of land affected by the drain was large. The plaintiff had enjoined the enforcement of "an ordinance adopted for the purpose of draining a point of land on the Mississippi." It is not shown by plaintiff's petition that the suit seeks to vindicate a public right, or to enforce a system of drains, to be observed in reopening an ancient natural drain on a water course divided among several proprietors. The question is one strictly with reference to the servitude due to the alleged dominant estates, and, being a private matter, it does not devolve upon the police jury to institute suit to vindicate whatever right there may be.

The question of the repeal of the laws relating to drainage by Act 107 of 1888, and the amendment thereto, (Act 83 of 1890,) does not require consideration in this case. By these the police juries were authorized to divide the parishes into drainage districts. They are directed to appoint commissioners, whose duties are defined. The method of the enforcement of the law has been changed in some respect. The prior laws are not entirely repealed. "Prior laws are not repealed by subsequent ones, unless by positive enactment, or a clear repugnancy in their respective provisions." Johnson v. Pilster, 4 Rob. (La.) 77. This action is not maintainable, considered under the law,—the prior or the subsequent. Judgment affirmed, at appellant's cost.

(44 La. Ann. 399)

Succession of McKNIGHT. (No. 10,989.)

Appeal of CALHOUN. (No. 10,989.)

(*Supreme Court of Louisiana.* March 21, 1892. 44 La. Ann.)

APPEAL—JURISDICTIONAL AMOUNT — ACCOUNTING BY ADMINISTRATOR—FORFEITURE OF LANDS FOR TAXES.

1. The administrator of the succession of a deceased administrator filed his final account. It was opposed on the ground that the deceased administrator's succession was liable for the loss of certain real estate belonging to the former succession, which he had allowed, through his negligence, to be sold for taxes. The value of the property was $1,276. *Held*, that the opposition was a separate cause of action, an unliquidated claim presented against the last succession, which could have been urged in a direct action, and the jurisdiction of the supreme court must be determined by the amount involved, and not by the amount to be distributed in the succession account opposed.

2. There was no amount to be distributed, which was involved in the opposition to the account.

(*Syllabus by the Court.*)

Appeal from district court, parish of Grant; A. V. Coco, Judge.

Howard McKnight was administrator of the succession of Meredith Calhoun. McKnight died, and his widow, Elizabeth McKnight, administered his succession, and filed a final account of her administration. W. S. Calhoun, son of Meredith Calhoun, opposed her final account on the ground of her husband's indebtedness on account of his administration of Calhoun's succession. Opponent having died, his widow and executrix, Cora E. P. Calhoun, made herself a party to the opposition, and from the judgment she appeals. Appeal dismissed.

Hunter & Hunter, for appellant. *R. J. Bowman*, for appellee.

McENERY, J. Howard McKnight was the administrator of the succession of Meredith Calhoun. He died, and his widow, Elizabeth McKnight, administered his succession. She filed a final ac-

count of her administration. W. S. Calhoun, son of Meredith Calhoun, opposed the final account; the basis of the opposition being the indebtedness of said succession to him on account of the administration of his father's succession by Howard McKnight. He died, and Mrs. Cora E. P. Calhoun, widow and executrix, made herself a party to said opposition. She abandoned all the grounds alleged in the opposition, except one. There was no item on the account objected to, and there was no attempt made to disturb the distribution of the funds as proposed in the final account.

The ground retained and urged in the opposition is that Howard McKnight, administrator of the succession of Meredith Calhoun, through his fault and negligence, allowed certain real estate to be sold in the parish of Rapides for taxes. The real estate thus sold was inventoried at $1,276. There is no sum to be distributed in the succession of McKnight that is involved in this litigation. The opposition is only the statement of a cause of action against the deceased administrator's succession for illegal or wrongful acts while administrator of the succession of Meredith Calhoun. It is a matter which can be urged in a direct action. Succession of Sanchez, 41 La. Ann. 504, 6 South. Rep. 791; Succession of Scott, 41 La. Ann. 668, 6 South. Rep. 792; Succession of Pickett, 41 La. Ann. 882, 6 South. Rep. 655. As it is an unliquidated claim against the succession of McKnight for maladministration of the succession of Meredith Calhoun by the deceased administrator, and presented by way of opposition instead of by direct action for recognition, the test of our jurisdiction is the specific sum demanded. The amount is below the lower limit of our jurisdiction.

The appeal is therefore dismissed.

(44 La. Ann. 509)

SCHULTE v. NEW ORLEANS C. & L. R. CO.

(No. 10,904.)[1]

(*Supreme Court of Louisiana.* March 21, 1892. 44 La. Ann.)

STREET RAILROAD—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

1. A person who is afflicted with deafness, and who wears a protruding apparel, obstructive of the sense of sight, and who ventures, without looking right or left, to cross a street railway track, acts rashly, and is guilty of contributory negligence, and cannot recover damages in case of an injury sustained by a collision with a coming mule and car.

2. The driver had a right to presume the person sound of hearing, and that she would exercise her senses, so as to avoid an accident, by stopping in time to let the mule and car pass freely.

3. The verdict of a jury, in favor of the company, in such a case, will not be interfered with.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit by Henry Williams Schulte against the New Orleans City & Lake Railroad Company to recover damages for personal injuries to his wife. From a judgment on a verdict for defendant, plaintiff appeals. Affirmed. Rehearing refused.

Moise & Titche and *Sambola & Ducros*, for appellant. *Buck, Dinkelspiel & Hart*, for appellee.

BERMUDEZ, C. J. This is a suit in damages for $15,000. The substantial allegation is that on the morning of August 26, 1889, at about 10 o'clock, petitioner's wife, while in the act of crossing Royal street at its intersection with Bartholomew street, in the third district of this city, was suddenly and violently knocked down and injured by a car of said company, which passed over her, injuring her ankle, through the gross carelessness, neglect, fault, and management of the driver thereof, in the employ of the company. The petition proceeds to describe the injury sustained, the suffering endured, the nature of the damages experienced, etc. The answer is a denegation, and charges that plaintiff's wife, through the most reckless inattention, carelessness, and imprudence, contributed to and was the sole cause of the accident. The case was tried before a jury, who returned a verdict for the defendant, upon which, satisfied with the correctness of the finding, the district judge rendered judgment accordingly. The plaintiff appeals.

The evidence shows that plaintiff's wife was hard of hearing,—in point of fact, deaf,—wore a large sunbonnet, at the time mentioned, which covered both sides of her face, coming down over her shoulders. It is evident that she neither saw nor heard the approaching car while she was walking to cross the street, for, had she seen or heard it, she would either have stopped, or, at her peril, hurried through safely. It is not to be supposed that when the driver saw her he imagined she would not stop, and that he acted wantonly. He had a right to believe that she had exercised her senses, and would stop, and so avoid all accidents. The authorities are numerous that upon approaching a street crossing of a railway track it is the duty of a traveler to exercise his senses of sight and hearing, and to look and listen for the approaching train or car, and that his failure to do so is negligence, which, in case of collision, prevents the recovery of damages for injuries sustained. Herlish v. Railroad Co., 10 South. Rep. 628, (lately decided, No. 10,729, not yet officially reported;) Childs v. Railroad Co., 33 La. Ann. 154; Hearn v. Railroad Co., 34 La. Ann. 160; Gallaher v. Railroad Co., 37 La. Ann. 288; White v. Railroad Co., 42 La. Ann. 990, 8 South. Rep. 475; Brown v. Railroad Co., 42 La. Ann. 350, 7 South. Rep. 682; Peets v. Railroad Co., 42 La. Ann. 547, 7 South. Rep. 688. See, also, Whart. Neg. § 384; Beach, Contrib. Neg. § 63. Under the facts and the law, the plaintiff cannot recover.

Judgment affirmed.

[1] Rehearing refused April 4, 1892.

(44 La. Ann. 581)

STATE v. DEFFES. (No. 10,876.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

ENCROACHMENT ON PUBLIC MARKETS—VALIDITY OF ORDINANCE—RECORD ON APPEAL.

In case there is shown to have been no contestation in the recorder's court in reference to the constitutionality or legality of the city ordinance that is drawn in question, this court has no jurisdiction of the subject-matter of the controversy.

(*Syllabus by the Court.*)

Appeal from recorder's court of city of New Orleans; MARCIS S. BRINGIER, Judge.

Prosecution against S. Deffes for the violation of a certain ordinance of the city of New Orleans. From a judgment on conviction, defendant appeals. Affirmed.

Branch K. Miller, for appellant. *Henry Renshaw*, Asst. City Atty., and *Carleton Hunt*, City Atty., for the State.

WATKINS, J. The defendant is appellant from a sentence and decree of the recorder, finding him guilty of a violation of certain city ordinances, prohibiting the establishment of any private market within a given distance from any public market of the city. In the lower court the defendant's answer appears to have been oral, inasmuch as no answer or plea in writing is among the original papers which are brought up for our review; and a statement of facts, signed by the recorder, announces that "the issue presented, in case an appeal is taken, is whether the prohibited distance is six squares, as walked, of whatever length, or 2,100 feet." Prior to the submission of the case an order was made, directing *certiorari* to issue, requiring the recorder to produce and file certain original papers, said to contain an alleged plea of the defendant, denying the legality and constitutionality of the ordinance under which this prosecution is conducted, and which does not appear to form part of the record. To this rule the recorder filed an answer, and therein specifically stated that he has no recollection of any such plea having been made, and, having no such recollection, he caused testimony to be taken on the subject, in order to comply with the order of court; and he avers and represents that said testimony, when taken, failed to establish that any such plea was made. The recorder's return appears to be conclusive on the question, and to establish the fact that no such plea was ever made in this court. This question eliminated from the case, practically it is left without an appealable or jurisdictional issue. In State v. Clesi, 44 La. Ann. ——, 10 South. Rep. 409, we recently said that in case the record discloses that there was raised in the recorder's court no contestation as to the constitutionality or legality of the city ordinance under which the appellant is prosecuted, the appellate jurisdiction of this court does not attach, citing previous decisions. State v. Tsni Ho, 37 La. Ann. 50; State v. Burthe, 39 La. Ann. 341, 1 South. Rep. 656; City of New Orleans v. Hill, 32 La. Ann. 1162; State v. Romano, 37 La. Ann. 98; State v. Lazarus 35 La. Ann. 1190. The only thing left us to do is to affirm the judgment.

(44 La. Ann. 587)

HOBGOOD v. SCHULER. (No. 10,900.)

SCHULER v. SUTHERLIN. (No. 10,900.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

MORTGAGES—PAYMENT BY VENDEE—SUBROGATION.

1. A party who advances money to the mortgage creditor of his debtor, in the payment of interest accumulations on the mortgage debt, becomes legally subrogated, *pro tanto*, to the mortgage creditor's right.

2. A party who purchases property incumbered by mortgage and vendor's lien, and employs the price in the payment of the mortgage debt, becomes legally subrogated to the mortgage creditor's right also.

3. An unauthorized cancellation of a mortgage may be reinstated on proper proceedings, taken contradictorily with the recorder and other mortgage creditors.

(*Syllabus by the Court.*)

Appeal from district court, parish of De Soto; W. PIKE HALL, Judge.

Bill by Hobgood & Foster, C. P. Hobgood substituted, against Charles Schuler. The action was consolidated with one by Charles Schuler against George H. Sutherlin. From a decree for defendant, plaintiff appeals, and Schuler asks for an amendment of the judgment. Affirmed.

C. M. Pegues, for plaintiff, appellant. *E. W. Sutherlin*, for Schuler, appellant.

WATKINS, J. Alleging Charles Schuler's possession as owner of a tract of 320 acres of land, which he had acquired from one James, his judgment debtor, since the registry of his judgment against it as a judicial mortgage on the 28th of February, 1889, the plaintiff proceeds against said property by the hypothecary action in the foreclosure and enforcement of same. The defense set up is that, in 1882, James bought of Mrs. J. V. McKellor a tract of 560 acres of land for the total price of $3,356, of which $400 was paid in cash, and for the remainder he executed his several promissory notes, falling due, respectively, on January 1, 1884, 1885, 1886, and 1887, with interest, the payment of which being secured by a duly-recorded mortgage and vendor's lien upon the property. That for certain advances made for James, in cash, to make advanced payments on this property, and money advanced to enable him to put improvements thereon, Schuler took a title to 240 acres of said land on the 22d of January, 1885, though the consideration therefor is expressed in the act of sale as $1,800 in cash; being insufficient in amount to satisfy the whole of James' indebtedness to him. That on March 17, 1890, by deed recorded same date, he purchased of said James the remaining 320 acres of said original tract of land,—the land which is the subject of this contestation,—ostensibly for $3,200 in cash, as recited in the deed, while in reality the consideration was the balance of the original purchase price that James was due McKellor, "which was then estimated, in principal and interest, including sums previously advanced thereon by him, to be about that amount, but which in fact amounted to the sum of $3,232.56." That he thereafter executed a special mortgage on the entire tract of 560 acres and other

lands, to secure a loan of money one Thompson had made to him for the purpose of enabling him to pay off and discharge "the three last-mentioned notes of James, given as part of the purchase price (of the land) to McKellor, as aforesaid; and that respondent (Schuler) thereby became legally subrogated to the said McKellor's rights of vendor's privilege and special mortgage on the said remaining 320 acres of land to secure said last three notes executed by James to McKellor; and that he (Schuler) was thereby entitled to be paid the amount thereof, and sums previously advanced to him thereon, as aforesaid, out of said 320 acres of land, in preference to plaintiffs." As applicable to the foregoing statement, counsel further represent that the McKellor mortgage was, without due authority or his (Schuler's) consent, and also in error of fact, canceled and erased from the mortgage record, wherein it was in due time and seasonably recorded; and, in proper proceedings against the recorder and the plaintiff, he seeks its re-establishment and maintenance, with preference on the proceeds of sale over the mortgage of the plaintiff *quoad* the tract of 320 acres of land. In the matter of the rule on the recorder, the defendants urge a plea of no cause of action, which being overruled, there was a motion made to strike out Schuler's answer in the hypothecary action on somewhat similar grounds to those taken under the plea of no cause of action; and it was likewise overruled. The answer in the rule proceedings is, substantially, that from the proceeds of Thompson's loan to Schuler the James notes were paid, the McKellor mortgage canceled, and the rights of mortgagee and of mortgagor became united in Schuler as purchaser from James, and were extinguished by confusion; therefore the cancellation was correctly made, and cannot be revoked. On Schuler's motion the two cases were consolidated, and on the trial judgment was rendered recognizing plaintiff's judicial mortgage, and sale ordered of the 320 acres of land; but it further decreed that Schuler was legally subrogated to the rights of vendor's privilege and mortgage of McKellor "for the said three last notes of James to her in controversy, to take rank as of date of recordation on November 3, 1882, and that Schuler be paid the amount of said three notes in principal and interest out of proceeds of sale of said 320 acres of land in preference to Hobgood's judicial mortgage." No allowance is made for counsel fees, as prayed for in the answer of Schuler. From that judgment the plaintiff appealed, and in answer to the appeal Schuler requests an amendment in his favor, awarding him the 5 per cent. stipulated in the McKellor mortgage as counsel fees; praying that it be in other respects affirmed. On this presentation of the case there are two questions for determination: (1) Schuler's subrogation *vel non* to the McKellor mortgage; and, (2) if subrogated, the extent of his subrogation; for it seems to be plain that, if Schuler be subrogated to McKellor's right of mortgage, the question of cancellation is but of little practical importance, as both the theory of the plaintiff's and that of the defendant's counsel clearly indicate that it was erroneously made; that of the former being that Thompson's agent, with undue haste, acted upon an incompleted abstract of title, which made no disclosure of the Hobgood mortgage, the knowledge of which would have prevented its acceptance; and that of the latter being that, while he was the applicant for a loan of money from Thompson, he had no knowledge of plaintiff's mortgage, or of the abstract on which Thompson's agent acted in making the loan, and not only had no knowledge of the cancellation, but that its cancellation was adverse to his interest as a creditor of James.

1. There is but little dispute in regard to the evidence, and but little difference of opinion as to the law of subrogation. It seems to be conceded that whereas Schuler became a purchaser from James of the 320-acre tract of land affected by the plaintiff's judicial mortgage, and subsequent to the date of its registry, for a price stated to be cash, yet the real and true consideration thereof was the amount of the balance due McKellor on the last three purchase notes of James, capital and interest, and certain other sums previously advanced by Schuler to James, which together aggregated a little more than the amount named in the deed as the purchase price; and it also seems to be conceded that the amount of the said three purchase notes were paid from the proceeds of the Thompson loan, and that upon the faith of that payment the McKellor mortgage was canceled and erased, no other incumbrance on the property mortgaged appearing to interfere with the loan, and there being no part of the sum loaned coming to Schuler after the James notes were paid, and his own mortgage indebtedness upon other portions of his property discharged. We may therefore accept as a fact that Schuler purchased with the intention, and James sold with the understanding and expectation, that the sale would square their accounts, and, resting upon that fact, the principle of law is clear that "subrogation takes place of right * * * for the benefit of the purchaser of any immovable property who employs the price of his purchase in paying the creditors to whom this property was mortgaged." Rev. Civil Code, arts. 2161, 2162. Therefore Schuler, having employed the price he contracted to pay James in the satisfaction of the purchase notes he owed McKellor, became legally subrogated to the McKellor mortgage and vendor's lien on the property, and that lien and mortgage primes and ranks the judicial mortgage of the plaintiff.

2. Being legally subrogated to McKellor's right of mortgage and vendor's lien on the property, plainly implies that Schuler is to take the place of McKellor *quoad* that lien and mortgage; and McKellor's right was limited by the amount of his demand, as evidenced by James' purchase notes, and the stipulation of the act of sale. By a fiction of law Schuler became legally subrogated to the creditors'

rights and securities by employing the price he was to pay the debtor in discharge of his debts, and he thus became entitled to withdraw from the proceeds of sale just the sum the creditor was entitled to recover, and no more. But Schuler lays claim to the additional sum of $923.38 he alleges he had advanced to James from time to time, in cash, wherewith he paid interest accumulations to McKellor on the last three purchase notes, and whereby he is entitled to be paid from the proceeds of sale, because he was legally subrogated to the rights of McKellor under the provisions of the Code, as he, being himself a creditor, paid another creditor, whose claim was preferable to his own by reason of his privilege and mortgage. Rev. Civil Code, arts. 2161, 2162. The position of Schuler is thus concisely stated in his counsel's brief, viz.: "Although the title to the 320 acres recites that the sale was made from James to Schuler for $3,200 cash, in reality the consideration was that the sale was made to reimburse Schuler the $923.38 already paid, and Schuler was to employ the balance of his purchase price in liquidating the balance, $2,308.48, then due on the notes, aggregating $3,232.86, as afterwards calculated, and not $3,200, as approximated at the time. Schuler paid to James nothing of the purchase price, and Ford paid to Schuler nothing of the loan. The whole object of the sale of the 320 acres from James to Schuler was to reimburse to Schuler the $923.38 already paid by Schuler on the notes, and to which extent he was then legally subrogated, and to liquidate the balance—$2,308.48—due thereon. In truth, the sale was made from James to Schuler to enable Schuler to raise money by mortgage on his lands to Thompson, through Ford, agent, for these purposes. The whole loan obtained by Schuler from Ford was retained by Ford, and the whole of Schuler's purchase price from James was directly applied to these purposes in the hands of Ford, as contemplated and intended by all the parties; and Schuler thus employed the whole of "the price of his purchase in paying the creditors to whom this property was mortgaged." There appears to be no question as to the fact of said sum—$923.38—having been paid by Schuler to McKellor on the interest accruing annually on the last three purchase notes of James. Nor is there any question of the fact that Schuler paid the money to McKellor directly, and that he charged the amount thereof to James' account on his books. It is equally a matter beyond question that at the respective dates of these transactions James was indebted to Schuler upon their antecedent transactions not satisfied by the sale of the 240 acres of land first conveyed to him. The contention of the hypothecary creditor substantially is that, by becoming owner of the mortgaged property, and acquiring the debt, the latter became extinguished by confusion, (Rev. Civil Code, art. 3411,) the right of mortgage becoming merged into the higher right of ownership. To our thinking, that article does not apply to the present case; but if the relations of the parties had been different, and Mrs. McKellor, mortgagee, had acquired the ownership of the thing mortgaged, we would have had a case for the extinguishment of the mortgage. But, as Schuler and McKellor were both creditors of the common debtor, James, McKellor having the superior right and mortgage on the debtor's property, the law gave to Schuler the double right to pay McKellor her demands, and to purchase the property mortgaged from the debtor, and employ the price in satisfying McKellor's mortgage, and thereby, in either event, become legally subrogated to McKellor's higher right, as well as security. If there be any incompatibility between the provisions of the two articles of the Code, it is our plain duty to so construe them as to harmonize their construction. But, to our minds, there is no incompatibility between them. In our opinion, a clear case of legal subrogation is made out on the part of Schuler, both in respect to the capital and interest of the last three mortgage notes Mrs. McKellor held against James.

We do not think this a case for the allowance of attorney fees, because it is not a suit against James, the mortgagor, but an hypothecary action against the property which Schuler purchased in alleged satisfaction of his demands, with the debtor's consent, wherein another creditor with mortgage is contesting his right. The judgment pronounced by the judge *a quâ* is correct, and it is therefore affirmed.

(44 La. Ann. 612)

SIMPSON *et al.* v. PEOPLE'S ICE MANUF'G CO. (No. 10,937.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

CORPORATIONS—ESTOPPEL OF OFFICERS—PAYMENT OF TAXES.

Simpson and Vizard were the officers, the latter president, of a corporation. They owned bonds of the corporation which were issued while they were officers of said corporation. They foreclosed the mortgage on the property of the company securing the bonds, and purchased it. Tax liens and privileges were recorded for taxes due when they were officers. They took a rule to cancel them. *Held*, that they were not estopped from disputing the existence of the taxes, because they had not, as officers of said corporation, paid them. The corporation was a distinct entity from them as individuals, or as a commercial firm of Simpson & Vizard.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Simpson & Vizard were the holders of certain bonds of the People's Ice Manufacturing Company, secured by mortgage on property of the company. They caused such property to be sold under executory process, and bought it, and took a rule to cancel taxes assessed on such property by the city of New Orleans for the years 1886 to 1891, inclusive. The rule was made absolute as to taxes for the years 1889 and 1890, and the city appeals. Affirmed.

Walter B. Sommerville, Asst. City Atty., and *Carleton Hunt*, City Atty., for appellant.

MCENERY, J. Messrs. Simpson & Vizard, a commercial firm composed of John F. Simpson and Anthony Vizard, were the

holders of certain bonds issued by the defendant company, and which were secured "by mortgage on certain property belonging to the People's Ice Manufacturing Company, defendant." Mr. Anthony Vizard, one of the plaintiffs, was president of the People's Ice Manufacturing Company. Mr. John F. Simpson, the other plaintiff, was a stockholder of the company. Messrs. Simpson & Vizard caused the property of the company to be seized and sold under executory process, and they (the plaintiffs) bought it. Thereupon plaintiffs filed a rule to cancel city taxes, and the liens and privileges securing same, for the years 1886, 1887, 1888, 1889, 1890, and 1891, on two grounds: (1) Because of prescription; (2) because the property had been engaged during that time in the manufacture of ice, more than five hands being employed in the factory. The rule was made absolute as to the taxes, liens, and privileges for the years 1889 and 1890; the rule was discharged as to the city tax of 1888; and it was made absolute as to the liens and privileges only, for the years 1886 and 1887, reserving to the city the right to collect the taxes for those years from defendant. From this judgment the city prosecutes this appeal. The proposition of the city is that plaintiffs are not entitled to the relief sought, as Anthony Vizard was president of the company, and John F. Simpson was a stockholder in the same, and that it was their duty to see that the taxes were paid, and that they cannot take advantage of their own wrong; that the taxes of 1886 and 1887 were due anterior to the time of signing and issuing the bonds. Simpson & Vizard, as a commercial firm, was a distinct entity from the defendant corporation. Their acts as officers of the company were distinct from their acts as members of the commercial firm of Simpson & Vizard. Their official acts could not estop them, when acting in their individual capacities, or as members of a commercial firm. Judgment affirmed.

(29 Fla. 429)

DUNCAN v. STATE.

(*Supreme Court of Florida.* April 2, 1892.)

MALICIOUS BURNING OF RAILROAD BRIDGE—INDICTMENT—VENUE—DEMURRER TO EVIDENCE.

1. An indictment charging the willful and malicious burning of a bridge owned by a corporation is sufficient in its description of the owner when it gives the corporate name of the owner, and states, in substance, that the company named is a corporation doing business in this state. In such cases it is not necessary to allege in the indictment that such corporation was "duly organized or incorporated under the laws of any state or territory."

2. In the trial under an indictment charging the willful and malicious burning of a bridge forming part of the roadbed of a railway company named in the indictment as the owner of such bridge, the corporate existence of such alleged owner is sufficiently proven if it be shown that it was a corporation in existence *de facto*, and *de facto* in the exercise of corporate functions and franchises, whether it was a corporation *de jure* or not.

3. In criminal cases, when the accused has put himself upon the country by his plea of not guilty, he has made his election to be tried by jury; and, upon his subsequent demurrer to the evidence, it is the right of the state to hold him to his election, and to have the facts determined by a jury. In such cases it is discretionary with the state attorney whether he will consent to take the facts from the jury by joining in such demurrer. The court in such case cannot compel the state's counsel to join in such demurrer.

4. In criminal trials it is entirely discretionary with the court whether it will entertain a demurrer to the evidence, even though counsel for the prisoner and the state should both consent to it. In such case, whether the court's refusal to entertain such demurrer can be made the subject of review by this court, *quære?*

5. Where the evidence does not expressly locate the crime as having been committed in the county charged in the indictment, but there are in the evidence references to various localities and landmarks at or near the scene of the crime, known by or probably familiar to the jury, and from which they may have reasonably concluded that the offense was committed in the county alleged, it is sufficient proof of venue.

6. On a trial for the criminal burning of a bridge alleged in the indictment to be the property of a railroad corporation named therein, the proof of the ownership by such corporation is sufficient if it shows that such bridge forms part of the roadbed of the corporation named, and is in the actual use of such corporation in the passage of its trains.

7. Those structures forming parts of railway beds by which they span streams, chasms, ditches, etc., *held* to be "bridges," the willful and malicious burning of which is prohibited by section 4, p. 358, McClel. Dig.

(*Syllabus by the Court.*)

Error to circuit court, Columbia county; JOHN F. WHITE, Judge.

Joseph Duncan was convicted of maliciously burning a railroad bridge, and brings error. Affirmed.

A. J. Henry, for plaintiff in error. *W. B. Lamar*, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, Joseph Duncan, was indicted at the fall term, 1891, of the circuit court of Columbia county, as follows, omitting the formal parts of the indictment: "That Joseph Duncan, late of said county, laborer, on the 17th day of May, A. D. 1891, at and in the county, circuit, and state aforesaid, with force and arms, did then and there unlawfully, wantonly, and maliciously injure by setting fire to and burning the trestle of the Florida Central & Peninsular Railroad Company, a corporation doing business in the state of Florida, in such manner as to endanger the passage of the train of said company, and throw the same from the track of said railroad. And the jurors aforesaid, upon their oaths aforesaid, do further say that the said Joseph Duncan, at the time aforesaid, and in the county and state aforesaid, did then and there unlawfully, willfully, and maliciously set fire to and burn a bridge, the property of the Florida Central & Peninsular Railroad Company, a corporation doing business in the state of Florida, contrary," etc. The defendant was tried and convicted on December 2, 1891, and from the judgment and sentence has taken writ of error to this court.

Before the trial the defendant, by his attorney, moved to quash the indictment on the following grounds: "(1) The said indictment, in its first count, does not charge any criminal offense under the laws of the state of Florida. (2) The said indictment, in its second count, does not al-

lege any person, either artificial or natural, as owner of the bridge alleged to have been burned. (3) The indictment is otherwise so vague, indefinite, and insufficient as to mislead the accused, and to embarrass him in the preparation of his defense." The court sustained this motion as to the first count in the indictment, but overruled it as to the second count, and this latter ruling is assigned as the first error.

In urging this assignment here the defendant's counsel abandons the ground upon which his motion was made in the court below, that is, "that the indictment did not allege any person, either artificial or natural, to be the owner of the burned bridge," but, instead thereof, contends here that this count of the indictment is defective because it fails to allege the "due organization and existence of the Florida Central & Peninsular Railroad Company under the laws of some nation, state, or territory," that company being the one alleged in the indictment to be the owner of the bridge burned. There is no merit in this contention. The indictment is found under section 4, p. 358, McClel. Dig. The gist of the offense is the willful and malicious burning of such a structure that is useful to another, or, it may be, to the public; the validity of the tenure by which it is owned, or the legal right of the alleged owner to own such a structure, does not enter into or form any feature of the offense. The naming of the owner is material only as a part of the description or identification of the thing burned, as being within the prohibition of the statute. We apprehend that in such cases, even if the alleged owner, the Florida Central & Peninsular Railroad Company, was not a corporation *de jure*, it would be sufficient to show that it was a corporation *de facto* in the actual exercise of its functions as such, and that the bridge burned was in its actual use and control as part of its roadbed, necessary to the passage of its trains. It would, indeed, be a monstrous proposition that a party should be allowed to burn the bridges from under a railroad in actual operation, periling life and property with indiscriminate recklessness, and then be allowed to go scot free because the company operating such road had omitted to track the law in some particular in proceeding to acquire corporate existence. In such cases is is necessary only to allege in the indictment, in substance, that the company is a corporation, without any allegation as to the legality or regularity or fact, even, of its corporate organization. People v. Jackson, 8 Barb. 637. In Owen v. State, 5 Sneed, 493, where the party was indicted for the fraudulent possession of counterfeit bank notes of the Bank of Tennessee, and where the indictment did not allege either that the bank was a corporation or was duly chartered, it was held that in such cases it was not necessary either to aver or prove the corporate existence of such institution; but, being a public chartered institution of that state, its courts would take judicial knowledge thereof, and that what is judicially known need not be averred or proved. McLaughlin v. Com., 4 Rawle, 464; Fisher v. State, 40 N. J. Law, 169. In Johnson v. State, 65 Ind. 204, it is held that "an indictment for arson, charging the burning of property insured against loss by fire by an insurance company designated by a name apparently indicating it to be a corporation, need not affirmatively aver its corporate existence, nor whether it is a domestic or foreign corporation." State v. Van Hart, 17 N. J. Law, 327; State v. Weller, 20 N. J. Law, 521. There is some conflict in the decisions upon this question, but the greater weight of the authorities, and, as we think, founded upon the better reasoning, is that in such cases it is not necessary to aver in the indictment that the corporation alleged to be the owner "was incorporated," or "was duly incorporated." It is sufficient if the indictment states simply that it is a corporation; and the proof of this allegation, in such cases, we think is sufficient, if it shows that the company named was *de facto* in existence, and *de facto* exercising corporate functions and franchises.

After the state had introduced her evidence and rested, the defendant introduced no testimony, but stated orally to the court, through counsel, that he demurred to the evidence of the state, and demanded judgment of the court whether the state's evidence, if true, was sufficient in law to convict him of the crime charged. Upon this the court ruled that the question raised was one of fact for the jury, and not of law for the court, to decide, and declined to entertain the demurrer, and this ruling is assigned as the second error. In urging this assignment it is contended for the defendant that the court should have required the state attorney to join in the defendant's demurrer, and that the defendant was entitled to the judgment of the court as to whether the evidence, if taken as true, was sufficient in law to authorize a conviction. We do not understand the law to be, in criminal cases, that the court was obliged either to entertain the demurrer to the evidence, and thereby take the case from the jury, both as to its facts and the law applicable to them, or to compel the state attorney to join in such demurrer. When the accused put himself upon the country by his plea of not guilty, he has exercised his right, guarantied to him by our constitution, of having the facts of his case passed upon by a jury; and having, by his plea, made his election thus to be tried, it is the right of the state to hold him to his election, and to have the facts determined by a jury, and not by the court, whose function is to determine the law of the case. In such cases it is discretionary with the state attorney whether he will consent to take the case from the jury, and submit it for decision to the court, by joining in such a demurrer. The established rule is that the party demurring to evidence must admit on the record, not only that all the facts proven are true, but that every fact is also true that may fairly and reasonably be inferred from or deduced out of the evidence, or that the evidence reasonably tends towards establishing. If the demurrer will do this, and the state attorney, in his discretion, consents

that the facts thus admitted shall be submitted to the court, for its judgment as to whether, under the law, they will authorize a conviction of the crime charged, then the state attorney can exercise his consent by joining in such demurrer; but we do not understand that it is the province of the court to compel the state attorney to give his consent by joining in the demurrer. We think, too, that it is entirely discretionary with the court whether it will entertain a demurrer to evidence in criminal cases, and thereby take upon itself the performance or responsibilities devolving upon the jury, as well as those inherent in itself, even although the counsel for both the prisoner and the state should consent to it; and we doubt very much whether the court's refusal to do so can be made the subject of review in this court, where its refusal is *in limine* upon a demurrer to evidence, when the same result can be accomplished afterwards by motion for new trial, or in arrest of judgment. Gibson v. Hunter, 2 H. Bl. 187; State v. Soper, 16 Me. 293. In Fowle v. Common Council, 11 Wheat. 320, Judge STORY, delivering the opinion of the court, says: "The case made for a demurrer to evidence is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. The principal difference between them is that, upon a demurrer to evidence, a court may infer, in favor of the party joining in demurrer, every fact of which the evidence might justify an inference; whereas, upon a special verdict, nothing is intended beyond the facts found." Young v. Black, 7 Cranch, 565; Com. v. Parr, 5 Watts & S. 345; Higgs v. Shehee, 4 Fla. 382; Doss v. Com., 1 Grat. 557; Brister v. State, 26 Ala. 107.

The third assignment of error is that the court erred in overruling the motion for new trial. The motion for new trial was upon the ground that the verdict was contrary to the law, the evidence, and the charge of the court. Under this assignment it is contended that there was not sufficient proof of venue. Referring to the evidence sent up in the bill of exceptions, we find that the burned bridge is located by one witness as being "about the 62⅛ milepost from Jacksonville, about 2⅛ miles west from Lake City." In Bryan v. State, 19 Fla. 864, it is held that if the evidence raises a violent presumption that the offense was committed in the county charged it is sufficient. In Andrews v. State, 21 Fla. 598, it is held, in addition to the above, that, if it may be reasonably inferred from the evidence that the crime was committed in the county alleged, it is sufficient. In the case last cited there was no statement affirmatively placing the crime in the county alleged, but there were, in the evidence, references to various localities and landmarks at or near the scene of the crime that, the court says, were known by or probably familiar to the jury, from which, under the liberal rule laid down by the courts, they may have reasonably concluded that the offense was committed in that county. Applying this rule to the facts of the case before us, we think that the proof of venue was amply sufficient. The scene of the crime is located on the Florida Central & Peninsular Railroad, 2⅛ miles west of Lake City, the county site of Columbia county. From this the jury could not only reasonably infer that it was in that county, but the statement, with the jury's knowledge of location, amounted almost to positive proof of the fact.

Under the last assignment of error it is also contended that the evidence does not show the ownership of the property alleged to have been burned. In the testimony we find the following, from the state's witness H. L. Taylor: "I am a conductor in the employ of the Florida Central & Peninsular Railroad. On May 17, 1891, I was in charge, as conductor, of a passenger train on said road. The train was going east, about the 62⅛ milepost from Jacksonville, about 2⅛ miles west from Lake City. For some cause the train stopped. I went forward, and found that some one had set fire to a bridge under and supporting the railroad track, which bridge was on fire. The fire had been set to a stringer on one side of the railroad track. The stringer was on fire, and would have burned in two." Here we have this witness testifying that he, at the time of this crime, was in the employ of one of our well-known railway corporations, as conductor of one of its passenger trains "on said road." His train coming to a stop he went forward, and found that some one had set fire to a bridge under and supporting the railroad track. He had before mentioned the Florida Central & Peninsular Railroad, and was talking only about the road of that company; then he identifies the bridge as being under and supporting the track of that road. This we think clearly proved the bridge to be a part of the roadbed of the Florida Central & Peninsular Railroad Company, and that its ownership of the bridge in question was thereby sufficiently shown to leave no room for a reasonable doubt on the subject. And we think, too, from this evidence that it was sufficiently shown that the company named was *de facto* in existence, and *de facto* exercising corporate functions in operating trains over its road.

It is further contended that railway viaducts are not "bridges," within the meaning of the statute under which this indictment was found. The well-established rule is that the words of a statute are to be understood according to their ordinary meaning in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature had in view in enacting the law. End. Interp. St. § 73. The object of the statute under consideration was to prohibit incendiarism in all its forms, and to prescribe punishments therefor. In enumerating the divers objects or structures that might become the subject of the crime, the word "bridge" is included. The *gravamen* of the offense consists in

the malicious and willful burning; and we think the object of the statute was to prohibit the burning of any structure to which the term "bridge" could be appropriately applied. Turning to Webster's Dictionary, we find the word "bridge" defined to be: "A structure, usually of wood, stone, brick, or iron, erected over a river or other water course, or over a chasm, railroad, etc., to make a passageway from one bank to the other; anything supported at the ends, which serves to keep some other thing from resting upon the object spanned, which forms a platform or staging over which something passes or is conveyed." This expresses to our minds, very clearly and concisely, the definition of a bridge, in the sense in which the word is ordinarily used and understood, and we think applies with emphasis to those structures forming parts of our railway beds by which they span streams, chasms, ditches, etc. Certainly no bridge can be burned that would be more mischievously disastrous in its consequences than the one intended to support the rapidly passing train freighted with human life. Our only surprise is that a severer punishment is not prescribed for the burning of such structures than for that of the bridge spanning the ordinary wagon way. Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40; State v. Gorham, 37 Me. 451; Bish. St. Crimes, § 301.

We find no error in the record, and the judgment of the court below is therefore affirmed.

(20 Fla. 151)

GARVIN *et al.* v. WATKINS.

(*Supreme Court of Florida.* March 28, 1892.)

APPEAL IN CHANCERY—DECREE PRO CONFESSO—MARRIED WOMEN—SEPARATE ESTATE—JUDICIAL SALES—RIGHTS OF PURCHASER—REVERSAL OF DECREE—COSTS.

1. An appeal in chancery proceedings can be taken from a final decree rendered upon a decree *pro confesso*, and upon such appeal the legality of all proceedings prior to the default is open for review, and the appellant can take advantage of any reversible error apparent upon such proceedings.

2. The proceedings in a chancery cause, after a decree *pro confesso* regularly entered, are *ex parte*, and the party in default will not be entitled to notice of them; but, while such proceedings are *ex parte*, the final decree in the cause must be proper, and consequent upon the case made in the bill.

3. The separate statutory property of a married woman can be charged in equity with a demand for work done and material furnished on said property, whether in pursuance of her personal engagement, or on the contract of her husband, who acts as her agent, with her knowledge or approval.

4. A purchase made by a stranger to the record in a chancery proceeding, who has advanced his money at a public sale, under a decree rendered by a court of competent jurisdiction, and who has accepted a deed upon confirmation of the sale, cannot be avoided by a subsequent reversal of the decree for error, unless the decree be void.

5. W. filed a bill in chancery against Mrs. G. and husband to subject the separate statutory real estate of the wife to the payment of a demand for work and material furnished at the instance of the wife on her said property, and also for the payment of certain costs incurred in a suit at law. After a decree *pro confesso*, a final decree was entered ordering the sale of the wife's said property to pay the demand for work and material, and also said costs. The wife's property was sold under this decree, and W., a stranger to the record, bought it at a public sale made by a commissioner. The purchase money was paid, the sale confirmed, and a deed delivered to the purchaser before appeal taken. *Held*, without deciding whether or not there was error in not sequestering the rents and profits of the wife's separate estate, instead of decreeing a sale of the *corpus*, that the court had jurisdiction, both of the subject-matter and of the parties, and that the sale of the property under the decree rendered before appeal taken passed the title to the purchaser, and that it could not be affected even if the decree be reversed. *Held, further*, that the item of costs was not a proper allowance against the wife's property, and the decree should be modified to this extent.

(*Syllabus by the Court.*)

Appeal from circuit court, Orange county; JOHN D. BROOME, Judge.

Bill by S. C. Watkins against Sallie J. Garvin and Wade Garvin, her husband, to subject the separate real estate of the wife to the payment of a demand for work and material furnished at her instance on said real estate, and for the payment of certain costs. From a decree for plaintiff, defendants appeal. Affirmed.

E. K. Foster, for appellants. *A. M. Thrasher*, for appellee.

MABRY, J. The appellee, S. C. Watkins, filed a bill in equity in the Orange county circuit court on the 21st day of July, A. D. 1887, against appellants, Sallie J. Garvin and her husband, Wade Garvin. In this bill it is alleged that the appellee instituted a suit at law in the circuit court of Orange county against appellants to enforce a lien for work done and material furnished, and on the 5th day of April, A. D. 1886, obtained a judgment for $124.60 and costs of suit; that execution was issued on said judgment, and levied on a house and lot in Sanford, Fla., and which was sold under said execution at sheriff's sale to W. L. Thrasher for the sum of $160, and a deed executed to said purchaser conveying to him said house and lot; that afterwards said appellants, Sallie J. Garvin and Wade Garvin, filed a bill in chancery against appellee, Watkins, W. L. Thrasher, the purchaser at said sale, and the sheriff of Orange county, and alleged therein that said Sallie J. Garvin, at the time of the institution of the said suit at law and the filing of said bill, was a married woman, and that said house and lot, to wit, lot 1, block 11, tier B, was the separate statutory property and estate of said Sallie J. Garvin, and not liable or subject for any debt or demand against her husband, and could not be sold under said execution; and the prayer of said bill is that said judgment and execution at law, and all proceedings had under the same, be declared null and void, and that said sale be set aside, and that said W. L. Thrasher be ordered to reconvey said premises to Sallie J. Garvin, and, upon his doing so, that the said sheriff refund to him the purchase money paid by him for said house and lot.

Appellee, Watkins, further alleges in his bill that, by consent of counsel for all parties, the court decreed that the judgment

rendered in said suit at law in favor of S. C. Watkins against Wade Garvin and Sallie J. Garvin be annulled and set aside as to Sallie J. Garvin; that the execution issued thereon be quashed, and the said sale made thereunder be vacated and set aside. Further, that said Thrasher reconvey said premises to said Sallie J. Garvin, and said sheriff refund to Thrasher the purchase money he had paid on said purchase; that in said consent decree, however, it is adjudged that the said judgment at law in favor of S. C. Watkins shall stand confirmed as against the said Wade Garvin, and upon his failure to pay said amount and interest thereon and all costs, within 10 days after the record of the decree, that execution issue for said amounts.

It is further alleged by appellee, Watkins, that said Thrasher reconveyed said house and lot to said Sallie J. Garvin, and that said Wade Garvin failed and refused to pay said judgment, interest, and costs; that on the 1st day of February, 1887, execution issued on said judgment against Wade Garvin, and was levied on certain personal property, which was claimed by said Sallie J. Garvin as her separate property, and on a trial in reference thereto her claim was sustained, and the sheriff of Orange county returned said execution, with the indorsement that "search had been made, and no property could be found upon which a levy could be made."

The bill further alleges that the demand sought to be enforced in said suit at law, and on which said judgment was obtained, was for work done and material furnished by appellee for the benefit of the separate statutory property of said Sallie J. Garvin in building her dwelling house in the town of Sanford, Fla., on said lot 1, block 11, tier B, and which has been decreed to be the separate statutory property of said Sallie J. Garvin; and, further, that the contract or agreement under which said work was done and material was furnished was made by said Wade Garvin as agent for his wife, the said Sallie J. Garvin, and with her knowledge, approval, and consent. Further, that said Sallie J. Garvin has a large and valuable separate statutory property, consisting of said dwelling house on which said work was done, and for the construction of which said material was furnished on the said lot, and another house on said lot, from which large rents are received, and also valuable personal property.

The prayer of the bill is for process, and that by decree of the court the appellants be ordered to pay the sum of money due as aforesaid, with interest thereon, and costs, to appellee, on or before a short day to be therein named, and in default thereof that said statutory property of the said Sallie J. Garvin, or so much thereof as may be sufficient to pay said debt, be sold by a master of the court, and the proceeds applied to the payment of appellee's said claim, or that a receiver be appointed to take charge of the said separate statutory property of said Sallie J. Garvin, or so much thereof as may be deemed sufficient, and, out of the rents and profits arising therefrom, to pay the said demand of appellee, and all costs, including about $20 incurred by appellee in and about the levy of the execution and the trial of the claim interposed by said Sallie J. Garvin; and that appellee have such other and further relief in the premises as equity may require and shall seem meet.

Upon the filing of the foregoing bill, subpœna was regularly issued, returnable on rule day in August, A. D. 1887, and the same was served on both defendants, Wade Garvin and Sallie J. Garvin. An appearance was entered for said defendants on rule day in August, A. D. 1887; and, in default of plea, answer, or demurrer, a decree *pro confesso* was entered against said defendants on the 5th,—the same being rule day of September, A. D. 1887. At a subsequent date, on application of the solicitor for appellee, an examiner was appointed and testimony taken, *ex parte*, for the complainant below, appellee here. On the report of the testimony taken by the examiner, a final decree was rendered on the 24th day of January, 1888, as follows, viz.: "This day this cause came on to be heard on the bill and testimony, and upon consideration thereof it is ordered, adjudged, and decreed that the complainant, S. C. Watkins, do have and recover of and from the respondents, Sallie J. Garvin and Wade Garvin, the sum of one hundred and twenty-four and 60-100 dollars, with interest thereon from the 5th day of April, 1886, and thirty-two and 24-100 dollars for costs expended by complainant, and the costs of this proceeding, including a fee of fifteen dollars for the examiner for taking the testimony in this cause. And it appearing to the court that said sum of one hundred and twenty-four and 60-100 dollars is due for labor done and material furnished for the benefit of the separate property of the defendant Sallie J. Garvin, in default of the payment of said sums of money on or before the 25th day of February, 1888, it is ordered, adjudged, and decreed that the following described property, the separate statutory property of Sallie J. Garvin, be sold, and the proceeds of said sale applied to the payment of said sums of money, to wit, lot one, block eleven, tier B, on the corner of Pine avenue and Ninth street, in the town of Sanford, in Orange county, Fla., and that Andrew Denham be, and he is hereby, appointed a special master to advertise and sell said land, and the house thereon, according to law, and make report to this court of his actings and doings in the premises." In pursuance of this decree the said master advertised and sold at public outcry the real estate therein mentioned, to wit, lot 1, block 11, tier B, on the corner of Pine avenue and Ninth street, in the town of Sanford, Fla., on the first Monday in April, A. D. 1888, to R. H. Whitner, for the sum of $220; and upon the report thereof to the court this sale was confirmed on the 5th day of April, A. D. 1888. On a subsequent day, to wit, the 14th day of May, A. D. 1888, R. H. Whitner, said purchaser, filed in the office of the clerk of the circuit court aforesaid his petition for a writ of

assistance, based upon the refusal of the said Sallie J. Garvin to surrender to him the possession of said property. The court, upon consideration of this petition, after due notice, directed that a writ of assistance do issue to the sheriff of Orange county, commanding him to remove the said Sallie J. Garvin from the said premises, and to place the said petitioner, R. H. Whitner, in possession of the same, on or before the 20th day of May, A. D. 1888; and thereupon, on the 19th day of May, A. D. 1888, the said defendants, Wade Garvin and Sallie J. Garvin, entered an appeal from the final decree rendered on the 24th day of January, A. D. 1888, and the decree of April 5, 1888, confirming the report of sale, to this court.

In the petition of appeal filed here it is alleged that the court erred in granting the various decrees in said cause, both the interlocutory decree appointing an examiner, the final decree, the decree affirming sale, and in granting the writ of assistance.

As appears from the foregoing statement, after appearance, and upon a failure to plead, answer, or demur, appellee's bill of complaint was taken as confessed on the 5th day of September, A. D. 1887, and, no motion having been made to set aside the default within 20 days from that date, the decree became absolute under the rule, and the further proceedings in the cause, up to and including the final decree, were *ex parte*. Under our decisions it is settled that an appeal can be taken from a final decree rendered upon a decree *pro confesso* made absolute under the rule. Hart v. Stribling, 21 Fla. 136, and authorities cited. Upon such appeal the legality of all the proceedings prior to the default is opened for review, and the appellants can take advantage of any reversible error apparent upon those proceedings. If such error prior to the default be discovered, the subsequent decrees and proceedings may be set aside; but, if no such error be found, the proceedings after default are *ex parte*, and the defendant in default will not be entitled to any notice of them. But while the proceedings subsequent to a decree *pro confesso* are *ex parte*, and the defendant is not entitled to notice of them, and has no right to object to their regularity, yet the final decree in the cause must be proper and consequent from the case made in the bill. Betton v. Williams, 4 Fla. 11; Freeman v. Timanus, 12 Fla. 393; State v. Railroad Co., 16 Fla. 708; Marks v. Baker, 20 Fla. 920; Hart v. Stribling, supra. The proceeding here is in chancery to subject the separate statutory property of a married woman to the payment of a demand for work and labor performed in the improvement of said property at her instance and procurement. The testimony taken *ex parte* after the entry of the decree *pro confesso* shows that the sum of $124.60, for which the judgment at law was rendered, was for work and material furnished by appellee in building a dwelling house for Sallie J. Garvin on her separate property, described in the bill, with her knowledge and at her instance. In the former opinion in this cause, filed prior to the granting of the rehearing,[1] it was held that there was no error in the proceedings prior to the default; and that appellee was entitled, under the case made in his bill and sustained by the testimony taken *ex parte*, to a decree for the amount due for work and material furnished in building said house, and costs in this proceeding up to the appeal. It was further held that the chancellor committed an error in allowing, as a proper charge against the married woman's property, the sum of $32.24, costs in the suit at law; but as her separate property had been sold at a public sale by virtue of the decree of the chancellor to pay the said amount due for work and material and said costs, and had been purchased by a stranger to the record, and the sale confirmed before any appeal taken, a reversal of the decree on appeal would not affect said sale. Counsel for appellants asked for a rehearing on the ground that the court overlooked in its opinion the fact that the contract alleged as imposing the liability in this case was entered into under the rights of married women under the constitution of 1868, and the decree should have sequestered the rents and profits, and not ordered a sale of the married woman's property; and also that the judgment against the husband was obtained by suit commenced under the constitution of 1868, and the releasing the wife by consent from the effects of that judgment must be taken with all its force under that constitution, and no greater rights or remedies accrued to appellee by the adoption of the constitution of 1885.

The court did not overlook the fact that the indebtedness sought to be enforced in this suit arose while the constitution of 1868 was in force. The rehearing was granted in order that a fuller discussion might be had by counsel on the power of the court to order a sale of the *corpus* of the estate, instead of sequestering the rents and profits thereof. It is contended for appellants on the rehearing that the wife's separate property cannot be sold, under the constitution of 1868, to pay her husband's debt. This is true, unless she charges her separate property within an express lien, in the manner provided by statute for the payment of such debt. Our judgment does not proceed upon the theory that the wife's property was sold to pay her husband's debt. The demand, so far as for work and material furnished is concerned, is a proper charge against her own property, arising out of a contract of herself in reference to it. The fact that the contract was made in the name of her husband, who acted for her, does not change the liability. It is alleged that the contract was made for her, at her request, and the proof sustains this charge. Nor does a different result flow from setting the judgment at law aside as to the wife. This judgment was a nullity as to her, and it does not appear that it was set aside under any agreement that appellee would look alone to the husband. In the case referred to in the former opinion of Smith v. Poythress, 2 Fla. 92, the husband pur-

[1] Opinion withheld.

chased supplies and improvements for the wife's separate property, and executed notes in his name for the amount due. Judgment was obtained against him on the notes, and execution returned, "No property found on which to make a levy." After this a bill in equity was filed to subject the wife's separate real estate to pay the amount for which judgment had been obtained, and it was sustained. We have no hesitancy in holding, in the light of our decisions, that, under the allegations of appellee's bill and the testimony before us, he is entitled to a decree for $124.60, and interest thereon from the 5th day of April, A. D. 1886, at the rate of 8 per cent. per annum, and that the same is a charge on the separate property described in the bill of Sallie J. Garvin. Smith v. Poythress, supra; Merritt v. Jenkins, 17 Fla. 593; Blumer v. Pollak, 18 Fla. 707; Thrasher v. Doig, Id. 809; Harwood v. Root, 20 Fla. 940; Schnabel v. Betts, 23 Fla. 178, 1 South. Rep. 692; O'Neil v. Percival, 25 Fla. 118, 5 South. Rep. 809. We think the item of $32.24, costs in the law proceeding, should not have been allowed by the court as a charge against the wife's property, and that the decree *pro confesso* will not prevent her from taking advantage of this error on appeal. The appellee was entitled to such final decree as his bill justified. He can only charge the wife's property with such demands as the law allows her to impose upon it, and this cost item was not contracted on the credit of her property or for its benefit, and, as appears from the bill itself, is not a proper charge against it. The decree of the court was for the sale of the property, and not for the sequestration of its rents and profits. The wife's property was sold under this decree before any appeal was taken, and a stranger to the record bought it. The purchase money was paid, the sale confirmed, and the purchaser received a deed. The appeal was then entered from the final decree ordering the sale, and also the decree confirming the sale, and the purchaser, by agreement, is a party to this appeal. The questions thus presented extend beyond the propriety or the proper exercise of discretion on the part of the court in decreeing a sale of the property, instead of ordering a sequestration of its rents and profits. The question in reference to the purchase involves the power and jurisdiction of the court to order the sale, for we think the authorities sustain the rule that a purchase made by a stranger to the record, who has advanced his money at a public sale under a decree rendered by a court of competent jurisdiction, and who has accepted a deed, cannot be avoided even by a subsequent reversal of the decree for error, unless it be void. The rule at law is well established that the title of a purchaser at execution sale, under process issued from a court of general jurisdiction, is not affected by a subsequent reversal of the judgment from which the execution emanated. This was decided in Ponder v. Moseley, 2 Fla. 207, and abundant authority sustains it. In Jessup v. Bank, 15 Wis. 604, it was held that where a sale was allowed to take place upon a decree, without any steps taken to stay proceedings, the title of a stranger who purchases and advances his money will not be divested by a subsequent reversal of the decree. It is said in this case that some authorities make a distinction between cases where the purchase is by a stranger and those where a party to the record buys, holding that a subsequent reversal will not avoid the former, but will the latter. A similar distinction also seems to be made between cases where the sale rests wholly on the decree, such as private commissioners' sales and those where the purchase is made at a public judicial sale under a decree. The former will be avoided by reversal, while the latter will not. Debell v. Foxworthy's Heirs, 9 B. Mon. 228; Clark's Heirs v. Farrow, 10 B. Mon. 446. Here we have a sale made by a master in chancery at public outcry, under a decree, and a completed purchase by a stranger to the record before any appeal taken. This purchase cannot be avoided by any mere errors or irregularities in the decree not extending to the power of the court to render it. Ror. Jud. Sales, § 138; Leslie v. Richardson, 60 Ala. 563; Phillips v. Benson, 82 Ala. 500, 2 South. Rep. 93; Hammond v. Winchester, 82 Ala. 470, 2 South. Rep. 892; Gray v. Brignardello, 1 Wall. 627. Did the court have jurisdiction to render the decree for the sale of the wife's property? The bill shows that the separate property of Sallie J. Garvin was at the time yielding a valuable rental, and that she owned personal property. If the case was before us relieved from the effects of the sale under the decree, we do not intimate that it would not be reversed for error. Our inquiry, however, now is to ascertain if the court had the power to order the sale of the property. Counsel refer to the case of Harwood v. Root, 20 Fla. 940, as authority for his position that the married woman's property cannot be sold, but its rents and profits must be sequestered. In that case the demand sought to be charged on the wife's property was for the purchase money of personal property sold to the wife on the credit of her estate. The language used in the opinion is: "The rule prevailing in a court of equity, however, in a case such as this, is to sequester the rents and profits of the property, rather than to sell the *corpus* or body of the estate. This is the rule which would prevail in equity as to an estate with limitations like those contained in our statute, and we cannot conclude otherwise than that it should prevail here." The authority referred to on this point is the case of Coal Co. v. Dyett, 7 Paige, 9. In that case the property was vested in a trustee for the benefit of the wife for life, with remainder to her children, and it was held that she could not, without the assent of the trustee, contract any debt which would be a charge upon the remainder to the children, even for expenditures which are beneficial to the whole estate. It was further held in the same case that the separate estate of a *feme covert* is in equity chargeable with her debts contracted upon the credit of that estate, to the same extent that the

estate of a *feme sole* is chargeable with her debts by the common law. The decision in Harwood v. Root, supra, was rendered on demurrer to the bill before any decree had been entered for a sale of the wife's property, and the point we are now considering was not presented to the court. In O'Neil v. Percival, 25 Fla. 118, 5 South. Rep. 809, where the demand brought forward as a charge on the wife's separate property was for material furnished in the construction of improvements thereon, similar in this respect to the case now before us, it was said by the court: "Without meaning to admit that the *corpus* of the estate of a married woman cannot be sold for the payment of a debt of this character, we think that in this case the rents and profits of the property should be subjected to its payment." In Kelly on Contracts of Married Women (page 280) it is said: "In those states which hold that lands are chattels for the payment of debts, and subject to execution, and in those states which confer upon her, by statute, the general power to hold property and contract as if *sui juris*, there can be no doubt but that the *corpus* can be taken; but in those states where these do not exist, and the statute merely invests her with the legal title, instead of permitting the property to pass to the husband under the common law, the decisions are not harmonious." On the one hand, it is asserted that the *corpus* of her real estate is not liable for her debts; on the other hand, it is maintained that the *corpus* is liable when she holds the estate to her separate use, as she does under the statute, for the reason that, if she is allowed to contract indebtedness with respect to her separate property, it should be held liable to the extent of her interest, whether that be the *corpus* or the income, unless otherwise provided by statute. This author says (page 231) that between these two positions the latter is the best. It is settled by our decisions that the wife, possessed of separate statutory property, can contract indebtedness for improvements on the same, or charge it with a demand, where the debt is created on the credit of her estate. In Whitesides v. Cannon, 23 Mo. 457, the decision was that the separate real estate of the wife could be sold to pay a debt contracted by her on the credit of her separate estate. Phillips v. Graves, 20 Ohio St. 371, holds that a married woman possessed of a separate estate may charge it with her debts to the extent that the same were incurred for the benefit of it, or for her own benefit, when credit was given on the faith of her separate property. In this case it was said that the order in which the court will enforce the payment of such charges against the wife's separate property is—*First*, by appropriating the personal property; *second*, by sequestering the rents and profits of the realty; and, *third*, by a sale of the realty, when the same is necessary. A sale of the wife's separate property was allowed in the case of Yale v. Dederer, 21 Barb. 286. This case seems to have been thoroughly considered, and has received the approval of our predecessors. Blumer v. Pollak, supra; Staley v. Hamilton, 19 Fla. 275. See, also, Withers v. Sparrow, 66 N. C. 129.

As before remarked, we are only concerned now about the jurisdiction of the court to render a decree for the sale of the wife's property, and not so much to ascertain if there were reversible error in doing so. Our conclusion is that the court had jurisdiction both of the subject-matter and the parties, and that the sale of the property under the decree rendered, before any appeal taken, passed the title to the purchaser, and that it cannot be affected now, even if we were to reverse the decree.

The item of cost was improper, and we will modify the decree to this extent. It is therefore ordered that the decree of the chancellor for $124.60, with interest at the rate of 8 per cent. per annum from the 5th day of April, A. D. 1886, and the costs of this proceeding up to the appeal, be affirmed, and it is further ordered that appellee pay the costs of this appeal, and appellants pay the costs of the rehearing.

(29 Fla. 554)

HAWKINS v. STATE.

(*Supreme Court of Florida.* April 1, 1892.)

CRIMINAL LAW—ACCUSED AS WITNESS—EXAMINATION BY JUROR—REVIEW ON APPEAL—FORGERY.

1. Where the court passively permits a juror to question the prisoner while making his statutory statement of the matters of his defense, and permits the prisoner, while making such statement, at the request of a juror, to make figures to be compared by the jury with the forgery for which the trial is being had, and no objection or exception to such proceeding is interposed, taken, or noted until after verdict of conviction, the objection comes too late in a motion for new trial, and cannot be reviewed by this court upon writ of error; otherwise, if exception had been taken and noted in time.

2. Section 29, p. 519, McClel. Dig., permits to the party accused, in all criminal prosecutions, the right of making a statement to the jury under oath of the matter of his or her defense. This does not constitute the prisoner a witness, nor subject him to the rules applicable to witnesses, nor render him liable to cross-examination; and, while making such statement, the court should, *sua sponte*, prevent any interference with the prisoner, either by questions or suggestions from the jury, the state attorney, the prisoner's counsel, or from anyone else. Should such interference be permitted, over the objection of the accused, it would be reversible error.

(*Syllabus by the Court.*)

Error to circuit court, Suwannee county; JOHN F. WHITE, Judge.

Tyler Hawkins was convicted of forgery, and brings error. Affirmed.

J. C. Gallaher, for plaintiff in error. *William B. Lamar*, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, Tyler Hawkins, was indicted at the spring term, 1887, of the circuit court for Suwannee county, for forgery. He was tried and convicted in February, 1891, but the judgment was reversed upon writ of error to this court in July, 1891, (Hawkins v. State, 28 Fla. —, 9 South. Rep. 652,) and the cause remanded for new trial. He was again tried on the 10th of November, 1891, and was again convicted, and from this judgment and sentence the cause is again brought here by writ of error.

The only assignment of error from this last trial, and the only one insisted upon here, is that the court erred in permitting the defendant to be interrogated by a juror as to whether he could write while he was making his statement; and permitting the defendant, at the request of the juror, to write the set of figures that constituted the gist of the alleged forgery, and then permitting these figures to be used by the jury in comparison with the forged instrument. No objection was made, and no exception was taken, to this proceeding at the time it was going on, nor at any time during the trial, but the objection thereto was made for the first time after the verdict, in a motion for new trial. It was too late then to make or get any benefit from such an objection or exception, and, no exception being taken thereto during the trial, under the well-established rule, it cannot be assigned for error here. Had the defendant by his counsel objected to the proceeding at the time, and the court had then permitted what was done over such objection, we should have had no hesitancy in reversing the judgment for so patent and fatal an error. Our statute (section 29, p. 519, McClel. Dig.) permits to the party accused, in all criminal prosecutions, the right of making a statement to the jury under oath of the matter of his or her defense. In construing this statute this court, in Miller v. State, 15 Fla. 583, very properly held that the making of such a statement under oath did not constitute the prisoner a witness, nor subject him to the rules applicable to witnesses, nor make him liable to cross-examination; but that it is simply a presentation verbally, in his own language and manner, of the matters pertaining to his defense. In Bond v. State, 21 Fla. 738, it is further held that by this statute the prisoner is given an opportunity of stating whatever he may desire, bearing upon his case. He may omit what he pleases, may tell what he deems beneficial, and, should he withhold anything, it cannot be drawn from him by cross-examination, no matter what its character or effect may be. He cannot be made to testify against himself, as is allowed in some states where he voluntarily offers himself as a witness. With this construction of the statute we still fully agree. When this defendant, while making his statement, was interrogated by a juror as to whether he could write, the court *sua sponte* should have promptly stopped it, and should have seen to it that the prisoner was not interfered with while making his statement, either by questions or suggestions from the jury, the state's counsel, or his own counsel, or by any one else. Under the circumstances of this case the prisoner, by this proceeding, was very improperly and unfairly placed between a judicial Scylla and Charybdis. When questioned by the juror as to whether he could write, if he had declined to answer, or if his counsel had objected thereto, it would have tended strongly to prejudice him with the jury; while, on the other hand, in being required to write, by exhibiting his own formation of figures to the jury, he was erroneously led to furnish proof that might have been against, instead of in favor of, himself,—a contingency that is not contemplated by our statute. As the original forged instrument and the figures made by the prisoner at the trial are not before us, we have no means, by comparing them, to ascertain whether there is such similitude between them as to have made the figures of the defendant at the trial detrimental or favorable to him, or whether harm was done to him by the proceedings or not; but as we think there is an abundance of evidence, independently of this, to warrant a conviction, and as there was no objection made or exception taken to the interference with the defendant while making his statement, the judgment of the court below is affirmed. But again we repeat, had an exception upon the point been properly taken and noted, our decision would have been for reversal.

(29 Fla. 100)

JORDAN v. SAYRE *et al.*

(*Supreme Court of Florida.* March 26, 1892.)

FORECLOSURE OF MORTGAGE—LEGAL OWNER NOT A PARTY—RIGHTS OF PURCHASER—TAX TITLE.

1. A foreclosure proceeding resulting in a final decree and a sale of the mortgaged property, without the holder of the legal title being before the court, will have no effect to transfer his title to the purchaser at said sale.

2. A mortgagee, either before or after default in payment, has no title by virtue of his mortgage to the mortgaged real estate. His interest is simply a specific lien for the security of the debt mentioned in the mortgage, and he can acquire the legal title as against the mortgagor, or his grantees, only by outbidding every other person at the foreclosure sale.

3. A conveyance by the mortgagee of the mortgaged premises before foreclosure, or an attempted foreclosure, unless such conveyance contain a grant of the mortgage debt, or unless its terms are sufficient to carry this interest, and it was intended by the parties to have this effect, will be inoperative for this purpose.

4. Where the mortgagee, or a stranger to the record, purchases the mortgaged premises at a void sale under foreclosure proceedings, and then conveys by warranty deed said premises to a third party, he becomes subrogated in equity to the rights of the mortgagee in said mortgaged premises, as well as the mortgage debt thereon, to the extent of his purchase, and may demand a valid foreclosure of said mortgage for his protection. His right to be subrogated to the extent of his purchase, in such a case, to the mortgage security, does not depend upon a contractual assignment of the mortgage debt, but it comes about by operation of law.

5. A mortgagor or his grantees of the mortgaged premises cannot set up against the mortgagee or his assignee a tax title acquired at a sale for nonpayment of taxes which it was the duty of the mortgagor, or those holding under him, to pay.

(*Syllabus by the Court.*)

Appeal from circuit court, Duval county; JAMES M. BAKER, Judge.

Bill by Henry D. Sayre and others against Manuel C. Jordan to foreclose a mortgage. From a decree for complainants, defendant appeals. Affirmed.

The other facts fully appear in the following statement by MABRY, J.:

The appellees, Henry D. Sayre, Phillip Halle, and his wife, Minnie Halle, on the 21st day of May, A. D. 1887, filed in the circuit court for Duval county, Fla., their

amended bill against Loudwick Warrock, his wife, Adalina D. Warrock, and Manuel C. Jordan, to foreclose a mortgage. The bill was filed on behalf of the wife, Minnie Halle, and it alleges substantially that—

(1) On the 27th day of March, A. D. 1873, Loudwick Warrock, being indebted to one C. B. Benedict, executed to him a promissory note for $2,000, due 12 months from date, and to secure the payment of the same said Warrock and his wife executed and delivered to Benedict a mortgage on the east part of lot number six, (6,) in square seventy-one, (71,) according to Hart's map, said parcel of land being 80 feet east and west, and 105 feet in length from north to south, and fronting on Beaver street, in the city of Jacksonville, Duval county, Fla., and which mortgage was recorded in the register of mortgages for Duval county, in Book C of Mortgages, on page 211.

(2) That on the 18th day of June, A. D. 1874, said Benedict assigned and delivered said note and mortgage to complainant Henry D. Sayre, and that by the terms of said mortgage said Warrock and wife conveyed said parcel of land upon the condition that, should said Loudwick Warrock pay to said Benedict, his heirs or assigns, the money mentioned in said note, with the interest thereon, the said mortgage should be void; and also there is in the mortgage an express covenant to pay said money, and the expenses of collecting the same.

(3) That a certified copy of said mortgage and assignment is annexed to the bill, and prayed to be taken as a part of it.

(4) That on the 20th day of March, 1876, said Warrock and wife executed a warranty deed conveying said parcel of land to one A. Joseph Myers, and that said Myers afterwards, by deed of quitclaim, on the 16th day of August, 1884, released his interest in said lot to defendant, Manuel C. Jordan, who thereby claims to have become the owner in fee of the same.

(5) That on the 25th day of September, 1879, said Sayre attempted to enforce the lien of said mortgage by foreclosure proceedings in the circuit court for Duval county against said Loudwick Warrock and wife, and such proceedings were therein had that on the 1st day of December, 1879, a paper purporting to be a final decree was signed by the judge of said court, adjudging that the sum of $4,655.55 was due said complainant Sayre on said note, and that said parcel of land mentioned in said mortgage be sold by a master of the court to pay the same, as will appear by a reference to the record of said proceedings now remaining in said court, to which complainants beg leave to refer as may be deemed necessary.

(6) That under said decree a master, on the 5th day of January, 1880, made a formal sale of said property, and complainant Henry D. Sayre became the purchaser at the sum of $1,000, and said master executed and delivered to him a usual master's deed purporting to convey to him said parcel of land.

(7) That in said proceedings to foreclose said mortgage only Warrock and his wife were made parties defendant, although the legal title to said lot of land had been conveyed by said Warrock and wife to said Myers before the commencement of said proceedings, and was in him at the time, and no subpœna or notice of the same was served on him, and he was in no manner made a party thereto; that complainants are advised that the said title in said Myers was not affected by said proceedings, and did not pass to said Sayre by the said master's sale, and that said proceedings were utterly without effect to satisfy the said note and mortgage, and the same remains in force and effect as though no such proceedings had been had.

(8) That on or about the 25th day of September, 1883, said Henry D. Sayre executed and delivered to said Manuel C. Jordan a deed of conveyance with warranty of title, purporting to convey to said Jordan in fee the west 50 feet of said 80 feet of said lot six, (6,) in square number seventy-one, (71,) and that the consideration paid by said Jordan for said conveyance was $1,200, and that said Sayre conveyed by said deed to said Jordan whatever title Sayre had in said 50 feet, and discharged the same from the lien of said mortgage, and thereby reduced the amount due upon said note and mortgage to the extent of the sum so paid by said Jordan.

(9) That on the 10th day of June, 1884, said Sayre transferred by deed of conveyance, in consideration of $500, to said Minnie Halle, all right, title, and interest, and all claim and demand whatever in law and in equity in and to the east 30 feet of the east 80 feet of said lot six, (6,) in square seventy-one, (71,) and complainants allege that the only interest said Sayre had in said east 30 feet was the mortgage lien, and they insist that the said deed of Sayre to Minnie Halle was, and must be deemed and decreed to be, an assignment by said Sayre to her of the said note and mortgage, and the money due thereon, after deducting the amount paid by said Jordan to Sayre.

(10) That neither said Warrock nor any other person for him, has paid to the past or present holder of said note and mortgage the money therein mentioned, but the same remains due and unpaid, except the sum paid as aforesaid by the said Jordan to Sayre.

The prayer of the bill is that said defendants be required to answer the bill, and that the east 30 feet of the mortgaged lot be sold to satisfy the amount due thereon, to be ascertained according to the rules and practice of the court, and that said amount may be paid to complainants for the use of said Minnie Halle, and for such other and further relief as the nature of the case may require.

After service of subpœna on said defendants, a decree *pro confesso* was entered as to Loudwick Warrock and Adalina Warrock, and Manuel C. Jordan interposed a demurrer, assigning various grounds. This demurrer was overruled by the chancellor, and on appeal to this court (Jordan v. Sayre, 24 Fla. 1, 3 South. Rep. 329) the decree overruling the demurrer was

sustained. On the return of the mandate to the lower court the defendant, Jordan, filed an answer.

The allegations of the answer in reference to the 4th, 8th, 9th, and 10th paragraphs only of the bill need to be considered in the determination of the questions here presented.

The 1st, 2d, 3d, and 6th paragraphs of the bill are admitted to be true. In reference to the fifth it is admitted that Sayre was, on the 25th day of September, A. D. 1879, the holder and owner of the note and mortgage executed by Warrock and wife, but it is alleged that the original record of the proceedings mentioned in said paragraph is the best evidence thereof, and, as respondent is informed and believes, is the only legal evidence of the same, and that the legal effect thereof can be determined only on a production and examination of the record.

As to the seventh paragraph, it is alleged the legal effect of the proceedings therein mentioned can only be determined by the production and examination thereof; but the legal effect of said proceedings, as respondent is advised and believes, as alleged in said paragraph, is denied.

As to the eighth paragraph of the bill, respondent says that on the 25th day of September, A. D. 1883, said Sayre executed and delivered to respondent the original deed appended to the answer as part thereof, by which the west 50 feet of said lot 6 was conveyed to him in consideration of $1,200, then paid by respondent to said Sayre; that it is not true as matter of fact, or as respondent is advised, informed, and believes, as matter of law, the effect of said deed was merely to convey to respondent whatever title said Sayre had in said parcel of land, and to discharge the same from the lien of said mortgage, and thereby to reduce the amount due upon said note and mortgage to the extent of said consideration.

As to paragraph 9, the answer says that respondent has no knowledge of the execution of the conveyance, or the consideration paid therefor, as alleged, from said Sayre to said Minnie Halle, nor has respondent any knowledge of the contents of said alleged conveyance; but respondent avers, on information and belief, that said Sayre had no interest whatever in said lot alleged to have been conveyed to said Minnie, other than such as acquired (if he acquired any) by virtue of the said master's deed to Sayre; that, as matter of fact, said Sayre, by said deed to Minnie Halle, did not sell or convey said note and mortgage, or any part of the same.

Respondent further avers on information and belief that said Sayre did not by said conveyance intend to convey, and that said Minnie Halle did not intend to purchase or receive, said note or mortgage, or any part of the same; and respondents insist that said deed from said Sayre to Minnie Halle was not in fact, and cannot and should not be considered or decreed to be, an assignment to her of the said note and mortgage and the money due thereon, or any part thereof, as to the said east 30 feet of said lot, as claimed in said paragraph.

Further answering paragraph 9, respondent alleges that if it be true, as set up in said paragraph, that the effect of the simple deed from Sayre to Minnie Halle *proprio vigore* was to assign to said Minnie said note and mortgage, because the lien of the same was, as alleged, the only interest Sayre had in said lot at the time he executed said deed, the warranty deed, executed on the 25th day of September, 1883, by said Sayre to respondent, when Sayre had the whole note and mortgage, undiminished by the payment of a transfer of any part thereof, and had no other interest in said west 50 feet so conveyed to respondent than said mortgage lien, must *proprio vigore* have assigned to respondent said note and mortgage; and so it is, respondent avers, that it is not true said Sayre at the time of the alleged execution of the deed to Minnie Halle had a mortgage lien upon the lot so sought to be conveyed to her.

Further answering paragraph 9, respondent says that neither said Warrock nor said Myers consented to, nor were they or either of them consulted about or privy to the negotiations or price paid for the said purchase by Minnie Halle and respondent; and so respondent avers that at the time said conveyance was made to Minnie Halle the said Sayre had no debt or other claim against said Warrock capable of being ascertained or enforced against said east 30 feet.

As to the tenth paragraph, respondent says he does not know, and has no information, as to whether said Warrock has paid to the past or present holder, if there be a present legal holder of said note, the sum therein mentioned, but he says it is not true that said note and mortgage remain unpaid, except the sum paid by respondent to Sayre, and that no ascertained sum or sums capable of being ascertained now remains due upon said note and mortgage, if there be any sum due thereon.

As to the fourth paragraph, it is alleged that said Warrock, on the 20th day of March, 1876, being then in possession of the entire portion of said lot, conveyed it by full warranty deed to A. Joseph Myers, and that thereafter Myers conveyed the same by deed to respondent, the originals of said deeds being attached as part of the answer.

Further, respondent says it is not true that he claims title to said lot solely through the deed executed to him by said Myers; that he purchased in good faith from Sayre the west 50 feet of said lot, taking from him a deed thereto with full covenants of warranty, and subsequently respondent discovered that said entire east half of said lot had been sold on the 28th day of July, A. D. 1879, to the state of Florida, for taxes duly assessed thereon for the year 1879, and that the title thereto was in the said state of Florida; and thereupon respondent purchased the same from the state, for which purchase a deed was executed and recorded, as is shown by certified copy appended as part of the answer. Respondent avers that by virtue of said deed he acquired a title paramount to said mortgage, and that he took possession of said lot of 80 feet under said

deed, and has continuously held possession of the same.

On the 2d day of April, A. D. 1888, complainants below filed the general replication to said answer, and on the 25th day of May, A. D. 1888, they set the cause down for hearing on bill, amended bill, answer, and exhibits thereto, the record of proceedings in the foreclosure suit of Henry D. Sayre vs. Loudwick Warrock, and the deed from Sayre to Minnie Halle. Service of notice of setting the cause down for hearing was accepted by solicitors for respondent, and on the day the cause was set down a hearing was had, and the chancellor decreed in favor of complainants that the property described in the bill is subject to the mortgage sought to be enforced for the balance of said debt. A reference was made to a master to ascertain and report what is due complainants for balance of the principal and interest on the note and mortgage after deducting the sum of $1,200 paid by respondent, costs and attorney's fee, as provided in the mortgage.

Jordan appeals, and assigns here that the court erred in rendering said decree, and in not dismissing the bill.

A. W. Cockrell & Son, for appellant. *Walker & L'Engle*, for appellees.

MABRY, J., (*after stating the facts.*) The former proceedings on the part of Sayre to foreclose the mortgage executed by Warrock and wife to Benedict, and assigned to Sayre, were futile, and the sale thereunder did not pass any title to him. Jordan v. Sayre, 24 Fla. 1, 3 South. Rep. 329.

Sayre first executed and delivered to Manuel C. Jordan, appellant, a warranty deed for the west 50 feet of the east 80 feet of lot 6, in square 71, according to Hart's map, in the city of Jacksonville, Duval county, Fla., being the lot described in the Warrock mortgage, and then executed and delivered to Minnie Halle, one of the appellees, a warranty deed to the remaining 30 feet of said 80-foot lot. At the time of the conveyance to Jordan the situation of Sayre with respect to the entire 80-foot lot was that of mortgagee by virtue of the assignment from Benedict. After the execution of the deed to Mrs. Halle, Jordan obtained a conveyance from Myers, who had purchased from Warrock, for the entire 80-foot lot, and thereby became the holder of the legal title, at the same time being in possession of a prior warranty deed from Sayre, the mortgagee, for the west 50 feet of said lot. Under this condition of affairs, Sayre and the Halles, husband and wife, file a bill to foreclose the Warrock mortgage for the use of Mrs. Halle, to whom Sayre had executed a warranty deed on the east 30 feet of said lot, and asking that the sum of $1,200—the purchase money paid by Jordan for the other portion—be credited on the mortgage debt. It is alleged in the bill that the only interest Sayre had in the said 30 feet of said lot at the time he executed the deed to Mrs. Halle was the mortgage lien, and complainants insist that the deed from Sayre to Mrs. Halle was, and must be deemed and decreed to be, an assignment to her of said note and mortgage, and the lien thereof on said 30 feet, after deducting the amount paid by Jordan to Sayre.

The consideration of two questions will be sufficient to determine the matters now before us. The *first* one is, what is the effect of the deeds executed by Sayre to Jordan and Mrs. Halle, under the circumstances presented here, on the present foreclosure proceedings? and, *second*, what efficacy must be given to the alleged tax title acquired by Jordan?

When the case was here before on appeal (Jordan v. Sayre, supra) it was said: "It is true that an assignment simply of the mortgage, or of the mortgagee's interest in the land, without the debt, is held to be a nullity. In the case at bar, however, we have before us as complainants both the assignor and the assignee, and upon the record the assignment of both the balance of the debt and the lien as to the east 30 feet is admitted; and the terms of the deed as set forth in the bill are sufficient to carry the mortgage interest as to the land involved in this suit, and should be held to do so." Counsel for appellant contend that this decision was made on a demurrer to the bill, but, as it is averred in the answer that as matter of fact Sayre did not sell or convey to Mrs. Halle, by his deed to her, said note and mortgage, and that he did not intend by said deed to convey, and Mrs. Halle did not intend to purchase or receive, said note and mortgage, and that said conveyance was not in fact, and cannot and should not be deemed as, an assignment to her of said note and mortgage, an issue is presented which must be determined in favor of appellant on a failure of proof to sustain the allegations of the bill. It appears that counsel for complainants in the court below set the cause down for hearing before the expiration of the time fixed for taking testimony, on bill, answer, exhibits, the record of the former proceedings of Sayre against Warrock and wife, and the deed from Sayre to Mrs. Halle, and both parties went to hearing on this submission. Looking to the entire record, including the answer of appellant, is any valid objection to the foreclosure proceedings shown? Complainant Sayre executed to Mrs. Halle a warranty deed to the land, which he did not own, though he may have mistakenly supposed he did, but on which rested the lien of the mortgage which had been assigned to him, together with the mortgage debt. Sayre unites with Mrs. Halle in a bill to foreclose said mortgage for her benefit on the part of the lot which she had attempted to buy from him, and for which she held his warranty deed. They allege that the only interest Sayre had in the lot at the time of his said conveyance was the mortgage lien, and that the deed to Mrs. Halle was and must be decreed an assignment of said mortgage debt, except $1,200, paid by appellant to Sayre. Appellant says, in opposition to their right to maintain the suit, that they did not intend the deed to Mrs. Halle to be a conveyance of the mortgage debt. Does this, in the face of what is admitted in the record, constitute any

defense? With us the mortgagee, either before or after default, has no title by virtue of his mortgage to the mortgaged real estate. His interest is simply a lien for the security of the debt mentioned in the mortgage, and he can acquire the title, as against the mortgagor or his grantee, only by outbidding every other person at the foreclosure sale. At the time of the execution of the deed to Jordan by Sayre he had no title to convey, and his interest in the land was a lien of a mortgage to secure the payment of a note which he held against Warrock; and the same is true of Sayre's situation in reference to the east 30 feet of the lot, and the attempted sale to Mrs. Halle, unless his previous deed to appellant produced a different result. It is furthermore true, under the existing conditions with us in respect to the rights of mortgagor and mortgagee, that a conveyance by the latter of the mortgaged property before foreclosure, or an attempted foreclosure, unless such conveyance contain a grant of the mortgage debt, or unless its terms are sufficient to carry this interest, and it was intended by the parties to have this effect, will be inoperative for this purpose. The mere conveyance by the mortgagee of the mortgaged premises alone will not *per se* operate as an assignment of the debt secured by the mortgage. Hill v. Edwards, 11 Minn. 22, (Gil. 5;) Everest v. Ferris, 16 Minn. 26, (Gil. 14;) Purdy v. Huntington, 42 N. Y. 334; Smith v. Smith, 15 N. H. 55. On the other hand, it has been held by many cases, and seems to be sustained by the decided weight of authority, that where a void sale has been made of the entire mortgaged premises under proceedings to foreclose a mortgage, a third party purchasing at said sale succeeds to the title and rights of the mortgagee in said property, and may enforce them as the mortgagee could have done, had no sale taken place. And it appears that, where the mortgagee becomes the purchaser of the entire mortgaged premises at a void foreclosure sale, and then sells and attempts to convey such premises, his deed operates as an assignment of the mortgage debt, as well as the mortgage securing the same to the grantee in the deed. Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. Rep. 889; Cooke v. Cooper, 18 Or. 142, 22 Pac. Rep. 945; Stark v. Brown, 12 Wis. 572; Brobst v. Brock, 10 Wall. 519; Hoffman v. Harrington, 33 Mich. 392; Jackson v. Bowen, 7 Cow. 13; Robinson v. Ryan, 25 N. Y. 320; Winslow v. Clark, 47 N. Y. 261. This doctrine seems to rest upon certain equitable considerations between the mortgagee and the purchaser. In Stark v. Brown, supra, in speaking of the right of the mortgagee to assign his debt, it is said: "If he sees fit to invoke the agency of the law, not only to accomplish that assignment, but to divest all adverse rights, and transfer them to the purchaser, if by any reason he fails to accomplish the latter object, should that also defeat the former? It seems to us not. * * * Where the mortgagee has assented to the sale in that manner, and taken the purchaser's money, this conclusion would seem to rest safely on the doctrine of equitable estoppel, whatever irregularities there might be in point of form." In Frische v. Kramer's Lessee, 16 Ohio, 125, it was held that the purchaser at judicial sale of the mortgaged premises becomes invested with the interest of the mortgagee in the land, and, so far as the land is concerned, is subrogated to all the rights of the mortgagee. In Smith v. Hitchcock, 130 Mass. 570, it was decided that the conveyance by the mortgagee of a part of the mortgaged premises operated as an equitable assignment of the mortgage to secure the purchaser in the amount he had paid for the land. In one of the opinions delivered in Wilson v. Troup, 2 Cow. 195, it was said, in reference to the effect of a conveyance of a part of the mortgaged premises by the mortgagee, "it produces a suspension of the exercise of the power as to the part conveyed in hostility to the right of the grantee; that is, the grantor shall not defeat his own grant. But the operation of a suspension of the power, whether it applies to the whole or a portion of the estate, is merely to postpone the vesting of the estate or interest created by or acquired under the power in possession. It does not suspend or affect the right to execute the power, and perfect the title to the estate." In this case the mortgagee had conveyed by warranty deeds parts of the mortgaged premises to persons who had not acquired the equity of redemption in the parts so purchased, and it was decided that the mortgagee could sell the entire estate, but, should he acquire title to the portions which he had conveyed, it would inure to the benefit of such purchasers.

It was clearly the duty of Sayre, under the covenants in his deed to Mrs. Halle, to perfect the title to the part of the lot which she had purchased, and it was legitimate for him, conceding that he had an interest in the mortgage debt, with her co-operation, to foreclose and buy in the legal title with that debt if he could. His warranties in the deed would estop him, of course, from asserting any interest in the land in hostility to her, and, should he acquire the legal title, it would at once pass to her. According to the authorities above cited, Mrs. Halle would, in equity, be entitled to be subrogated, to the extent at least of the lot described in her deed and the amount paid for the same, to the rights of Sayre in the debt and mortgage securing the same on said lot. Her rights under her warranty deed, accruing by operation of law, would be the same, to the extent of her purchase, as her grantor had, and it is clear that all he had was a right to foreclose his mortgage on said lot. To this extent it is clear Mrs. Halle would have an equitable right to have the mortgage foreclosed for her benefit. It would manifestly be no defense to a bill, filed by Sayre and herself to foreclose the mortgage on the lot, to allege that the deed from the former to the latter was not intended by them to operate as an assignment of the mortgage debt, when in equity, as we have seen, she becomes subrogated to the mortgage security to the extent of her purchase. She might not necessarily, by operation of law, under her purchase, acquire the entire in-

terest in the mortgage debt, as it may be large enough to protect her rights in the lot and leave a balance over. Her right, however, to be substituted, to the extent of her purchase, to the mortgage security, does not depend upon a contractual assignment of the mortgage debt, but it comes about by operation of law. The answer of appellant, in so far as the allegations in reference to the assignment of the mortgage debt extend, shows no defense against the right to foreclose the mortgage. If we were to concede that the parties did not, as a matter of fact, intend the deed to Mrs. Halle to operate as an assignment of the mortgage debt, it does not deprive the transaction of its legal effect in equity of subrogating her to the rights of the mortgage security to the extent of her purchase. She can only avail herself of her rights in this respect by a foreclosure, and, as equity gives her this remedy, she is in the proper forum. Nor does Sayre in any way obstruct her in this remedy. He joins in the suit and asks that the court decree a foreclosure in her favor, and that his conveyance to her be decreed as an assignment of the balance of the mortgage debt. Within the authority of Wilson v. Troup, supra, Sayre, who is before the court as complainant, can maintain the foreclosure suit. There is no objection to him as being an improper party here. Mrs. Halle is the only person, so far as this record shows, who has any right to object to the foreclosure of the mortgage on the part of the lot involved in this suit. Though she may not have acquired any legal title to the part of the lot by her deed from Sayre, yet, as between them, she has acquired rights which he is bound to respect, and interests which it is his duty to protect. They are both before the court as complainants, asking that the mortgage be foreclosed for the benefit of Mrs. Halle, and under the terms of Sayre's deed to her, to the extent of the property therein attempted to be conveyed at least, they maintain an equitable *status* in the court to foreclose the mortgage.

Much of the discussion of the counsel for appellant is based on the theory that appellant by his deed from Sayre acquired a large part, if not all, of the mortgage debt from the latter. It will be remembered that appellant first purchased from Sayre 50 feet of the lot described in the mortgage. There is here no invasion of this 50 feet. Appellant's warranty deed will protect this part against unfriendly action on the part of Sayre, or any one claiming subsequently under him. If it appeared that the title in the portion of the lot described in the deed from Sayre to appellant was outstanding, and it was necessary for his protection that the mortgage security should be foreclosed on this portion of the lot also, he would have a right, upon proper allegations, to a decree to this effect. His rights, however, would attach to the mortgage security only to the extent of his purchase. His subrogation, under such circumstances, would spring from, and be measured by, the warranty deed to him from Sayre. It would arise from the fact that Sayre, the holder of a mortgage lien on the lot, had sold it to him for $1,200 in cash; and the latter, in equity, would be entitled, under the circumstances, to have the mortgage security enforced on the land, to secure him in his purchase. But no such case is presented for appellant. He has already acquired, by conveyance from Myers, who purchased from Warrock, the original mortgagor, the legal title to the portion of the lot described in the deed from Sayre.

As to the 30 feet now sought to be subjected to the lien of the mortgage, appellant occupies the position of mortgagor, having derived title from him, with knowledge of the mortgage.

It is not claimed in the answer that Sayre intended to, or did in fact by his deed to appellant, assign any portion of the mortgage debt. It is true the answer says that if the deed to Mrs. Halle *proprio vigore* assigned to her the debt and mortgage, then the former deed to appellant must likewise be deemed to have transferred to him said debt and mortgage, or, as it is argued, the major part of it. But we do not hold that the deed to Mrs. Halle operates, *proprio vigore*, to assign the debt and mortgage to her. We hold that the purchase by Mrs. Halle from Sayre operates as a subrogation to his rights in the mortgage security to the extent of protecting her in the portion of the lot described in her deed. This protection can only be had, as shown here, by a foreclosure of the mortgage. It nowhere appears that it is necessary for the protection of appellant in his purchase from Sayre that any portion of the mortgage debt be decreed to exist for his benefit; on the contrary, it appears that no part of the mortgage security is necessary to secure him in the 50 feet described in his deed from Sayre; and, as it is not shown that appellant has any interest in the debt and mortgage, it becomes unnecessary for us to devote any discussion to the case as presenting this aspect. While the warranty deed from Sayre to appellant protects him in the portion described therein, it does not affect the residue of the debt, nor the lien of the mortgage as to the remainder of the land. As to this, he is in the place of the mortgagor, and the abortive foreclosure proceedings are no bar to another action to enforce the lien of the mortgage. Aside from the tax title, the other allegations in the answer call for no discussion. The hearing was had upon the record of the proceedings in the foreclosure suit, and what is alleged in the answer in reference thereto constitutes no defense.

It is contended, in the second place, that after appellant obtained his deed from Sayre he discovered that the entire lot had been sold to the state of Florida for the nonpayment of taxes assessed thereon for the year 1878, and that he obtained from the state a tax deed, which is paramount to the mortgage. A certified copy of the tax deed is attached to the answer as a part thereof, and is executed by the clerk of the circuit court of Duval county on the 19th day of August, 1884. It is contended by appellees that appellant could not, by reason of his relation to the property and the parties here, acquire a

tax title as against their interest, and that the acquisition of the same amounted to a redemption of the property from said tax sale. Appellant's deed from Myers bears date the 16th day of August, 1884, and the tax deed is dated August 19, 1884. By the purchase from Myers appellant became invested with the title of the mortgagor. In Jones, Mortg. § 680, it is laid down as a rule that "a mortgagor cannot, by acquiring a tax title upon the land, defeat the lien of the mortgagee. It is his duty to pay the taxes, and he is not allowed to acquire a title through his own default. The same obligation rests upon one who has purchased the land of the mortgagor. * * * The mortgagor, or any holder of the equity standing in his place as a purchaser or a second mortgagee, cannot set up such title against the prior mortgagee." Burroughs, in his work on Taxation, § 123, p. 353, announces the same view. If a person is in possession of land claiming the same as his own, it is his duty to pay the taxes, and, under such circumstances, he cannot acquire an outstanding title by neglecting to pay the taxes, and allowing the land to be sold for the same, and purchasing the same. Some decisions go to the extent of holding that, if he be a trespasser in possession claiming the land, he cannot neglect to pay taxes, and then acquire a title by purchasing the same at tax sale. Douglas v. Dangerfield, 10 Ohio, 152; Bassett v. Welch, 22 Wis. 175; Barrett v. Amerein, 36 Cal. 322. In Spratt v. Price, 18 Fla. 289, it is said that the terms, duty and obligation to pay taxes, are used, first, in reference to the government imposing the tax, and, second, in reference to the relation existing between individuals. The legislature fixes the duty to the state, and the relation, legal or equitable, between individuals gives rise to the obligation between parties. Here it was held that a mortgagee not in possession could acquire a valid tax title at a second sale, based upon an assessment against the mortgagor in possession, as against a stranger who had purchased at a former tax sale. The question here presented involves the right of a purchaser from a mortgagor to acquire a tax deed as against a mortgagee or his assignee. In Avery v. Judd, 21 Wis. 262, it was decided that one in possession of mortgaged land under a deed from the mortgagor, subject to the mortgage, cannot take, as against the mortgagee, a tax title for taxes which the mortgagor or those holding under him were bound to pay. In this case the mortgage was executed and recorded in 1853, and through mesne conveyance from the mortgagor Judd came to be the owner of the equity of redemption in 1859. The mortgaged premises were sold to the county at tax sale in 1858, for the taxes of 1857, and a tax deed was issued to Judd in 1862, as assignee of the tax-sale certificate. When Judd purchased the mortgage premises through mesne conveyances from the mortgagor in 1859, they had been previously sold to the county for the taxes of 1857. In speaking of the relation of the parties in this case, DIXON, C. J., said: "It is a relation of trust, arising from the nature of the contract as a security, and the situation of the parties with respect to the property upon which the security is given. The mortgagor, and those in possession under him, subject to the payment of the mortgage, hold the estate clothed with a fiduciary duty. The estate, to the extent of his interest, belongs to the mortgagee; and the mortgagor and his grantees are intrusted with the care of it; and, being so intrusted, they are bound in equity and conscience to do no act, and to suffer none to be done, which shall destroy the mortgagee's title, or impair his security. * * * Judd, as the holder of the estate by conveyance from the mortgagor subject to the mortgage, was precluded from acquiring title by tax deed as against the mortgagee. He stood in the place of the mortgagor, whose duty it was to have paid the taxes. This was the duty of the mortgagor in possession, not only by virtue of that relation, but more particularly because of the covenant which he had made to pay all taxes. The same duty devolved upon Judd upon conveyance of the premises to him subject to the payment of the mortgage." This view finds support in the following authorities: Lacey v. Davis, 4 Mich. 140; Bank v. Bacharach, 46 Conn. 513; Stears v. Hollenbeck, 38 Iowa, 550; Cooley, Tax'n, 500; 1 Blackw. Tax Titles, § 591; Black, Tax Titles, § 138.

The tax title set up as a defense here covers the entire lot, and, as appears from the record, at the time Jordan obtained it he owned, freed by his warranty deed from the mortgage lien, the west 50 feet of the lot. The tax title is an entirety, and covers property then owned by appellant, as well as that part now involved. In 1 Blackw. Tax Titles, § 592, it is said that one who owns any portion of the equity of redemption from a mortgage cannot buy a tax deed that will be valid against the mortgagee. In Bank v. Bacharach, supra, it is declared "that any party who sustains such a relation to the property that he has a right to redeem, and, if redeeming, may be required to refund to the mortgagee the taxes paid by him, cannot be a purchaser of the property if sold for taxes." Furthermore, the copy of the tax deed attached to the answer shows that the lot was sold in 1879 for the nonpayment of taxes levied and assessed thereon for the year 1878, and that the assessment was to L. Warrock. The deeds exhibited as parts of the answer show that Warrock had previously sold the property, and that A. Joseph Myers was at the time of the assessment the owner of the property. On the record here there is apparently an erroneous and void assessment.

Upon a consideration of the entire record, our judgment is that the decree of the chancellor should be affirmed, and it is so ordered.

RANEY, C. J., (*concurring.*) It is fully adjudicated by the authorities cited in the main opinion that, where the owner of the mortgage interest purchases at a foreclosure sale under a decree in which he is

complainant, but to which the owner of the legal title of the land is not a party, and obtains a deed purporting to convey the land to him, and afterwards he executes a deed with covenants of warranty, conveying the land to another, his deed operates as an assignment of the mortgage claim to the last supposed purchaser; and authorities cited even show that he is a necessary party to a bill brought by the owner of the legal title to redeem the mortgage. Where, as here, the assignment of the mortgage interest—the debt and the lien on the land—is asserted on the record by both the grantor and the grantee, and the terms of the deed are sufficient to carry such interest, the mere holder of the legal title cannot, in my judgment, question the mere intent to assign the mortgage interest. Upon these pleadings Jordan is, as to the 30 feet in question, no more than a mere holder of the legal title. The intent to assign is a matter of immateriality to Jordan, in so far as he is shown to be concerned, in the face of the deed and the admission referred to. Had Sayre continued to hold the mortgage, he could have foreclosed it as to the 30 feet, even as against Jordan under the circumstances of this case, excluding the assignment to Mrs. Halle. Jordan shows no interest which is in any wise affected by the transfer, nor any fact altering the law of the case, (Wilson v. Fridenberg, 21 Fla. 386,) as settled by the decision made when it was here before, (Jordan v. Sayre, 24 Fla. 1, 3 South. Rep. 329.) This decision adjudged that, upon the case as then made, the deed operated as an assignment to Mrs. Halle of the mortgage interest remaining in Sayre. The only parties who, upon the face of this record, can ever claim any interest in the remainder of the mortgage interest sought to be foreclosed are before the court, and they, as against Jordan, are forever concluded by the decree from asserting that the transfer has not been made. Jordan not only does not show any interest of his which can suffer from the assignment, but he does not pretend that there is any one not before the court who has any interest in the controversy.

There is no controversy in the record between Sayre and Mrs. Halle as to the extent to which the mortgage claim held by Mrs. Halle, at the time the deed was executed, was assigned to her; nor, as shown by the main opinion, is there any such controversy properly made between Jordan and complainants. Upon this question, and as to what right Sayre might have to enforce of himself the mortgage for the benefit of Mrs. Halle, and as to the exact principle upon which the deed can be said always to operate in cases of this kind, I express no opinion.

While I concur fully in the conclusion that the decree appealed from should be affirmed, and am of the opinion that the real effect of the deed, under the circumstances of its execution, and of the case as it is made by the pleadings, was to assign the mortgage interest of Mrs. Halle, and that, as is indicated by the main opinion, there is nothing in the answer, outside of the effect of the tax deed, to merit any attention but the question of intent, I do not think that Jordan can, under the case made by the pleadings, question this intent; and this view is, in my judgment, the one properly controlling the decision of the issue thus attempted to be raised by the answer.

JOSEPH v. DAVIS *et al.*

(*Supreme Court of Alabama.* April 18, 1892.)

CORPORATIONS — LIABILITY OF SUBSCRIBERS TO STOCK—RIGHTS OF CREDITORS—GARNISHMENT.

1. A subscription for stock in a corporation, though payable in property at a fictitious valuation, and not enforceable against the subscriber by the corporation in its own interest, because in violation of Const. art. 14, § 6, and Code, § 1662, prohibiting the issue of stock except for money or property at a reasonable value, is not void as against a creditor of the corporation, and cannot be set up as a defense by the subscriber in garnishment proceedings by such creditor.

2. An unpaid subscription to stock of a corporation is an asset of the corporation, and accessible by garnishment proceedings against the subscriber by its creditors.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Davis Bros., having recovered a judgment against the Montgomery Furnace & Chemical Company, instituted garnishment proceedings against W. F. Joseph, as a subscriber to the stock of said corporation. From a judgment against him the garnishee appeals. Affirmed.

J. M. Falkner, for appellant. *Tompkins & Troy*, for appellees.

COLEMAN, J. The facts presented in the present record differ but little from those considered when the case was here on a former appeal. 8 South. Rep. 496. Davis Bros. recovered judgment against the Montgomery Furnace & Chemical Company. Upon the return of execution indorsed "No property found," the plaintiffs caused W. F. Joseph to be summoned as garnishee. The record states that the garnishee "denies that he is indebted to the said defendant." This was the sole issue upon the contest of his answer. That the garnishee subscribed for $1,000 of the bonds of the "Montgomery Charcoal, Iron, Furnace & Chemical Company," as shown in Exhibit 1, offered in evidence by plaintiffs, and that this subscription has not been paid, is admitted by the garnishee. His contention is that he never subscribed to the "Montgomery Furnace & Chemical Company," the judgment debtor. The agreement of subscription evidenced by Exhibit 1 refers to the "Montgomery Land and Improvement Company," and to the "Standard Charcoal, Iron, and Chemical Company at Nashville,"—the former to donate 30 acres of land, and the latter a "license covering the Pierce patents,"—for which stock was to be issued. Exhibits 2 and 3, introduced in evidence by plaintiffs, when taken in connection with the evidence of Woolfolk, the secretary and treasurer of the Montgomery Furnace & Chemical Company, show very conclusively that the "Montgomery Charcoal, Iron, Furnace, and Chemical Company," to which the garnishee did subscribe, was organized and chartered

as the "Montgomery Furnace & Chemical Company." The evidence shows there was no material departure in the character or purpose of the corporation as organized and chartered from that which was contemplated as shown in Exhibit 1. In fact, the only difference seems to be in the abbreviation of the name. In addition to this, the garnishee paid three several calls to the secretary and treasurer of the Montgomery Furnace & Chemical Company, accepting receipts for the payment given in the name of this corporation. Knox v. Land Co., 86 Ala. 184, 5 South. Rep. 578. Exhibits 1, 2, 3, in connection with the evidence of Woolfolk, were competent to show the identity of the proposed corporation to which garnishee subscribed with that organized and chartered. Knox v. Land Co., 86 Ala. 184, 5 South. Rep. 578; Cook, Stocks, §§ 184, 503; 8 South. Rep. 496, supra. This court, following the weight of authority as declared in other tribunals, and which seems to us to be based upon sound principles, has recently decided that a subscription for stock, payable in property at a fictitious valuation, and which could not be enforced against the subscriber by the corporation in its own interest because violative of article 14, § 6, of the constitution, and section 1662 of the Code,[1] is not void as against a creditor, and cannot be set up as a legal defense against a creditor of the corporation. Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 497, 9 South. Rep. 129; Parsons v. Joseph, 92 Ala. 404, 8 South. Rep. 788. That the unpaid subscription for bonds were assets of the company liable to its debts, and accessible to the process of garnishment, was decided on the former appeal. See, also, Curry v. Woodward, 53 Ala. 372; Cook, Stocks, § 201. We find no error in the record, and the judgment must be affirmed.

(95 Ala. 191)

SIBLEY v. ALBA.

(*Supreme Court of Alabama.* April 6, 1892.)

SUIT FOR PARTITION — DEFENSES — ADVERSE POSSESSION BY COTENANT—RES JUDICATA.

1. Where plaintiff in partition claims through a cotenant of defendant, owning an undivided half of the land, the fact that plaintiff acquired his title by a champertous agreement is no defense, since such fact cannot affect defendant.

2. The possession of a tenant in common is not adverse to that of his cotenant, where there is no ouster, or act equivalent thereto.

3. Where plaintiff claimed title as a purchaser at a foreclosure sale under a mortgage executed by defendant's original cotenant to one B., and by the latter assigned to plaintiff, a plea by defendant that the debt was fully paid by the original cotenant to B. is bad, since the decree of foreclosure is, as to third persons, conclusive that the debt was unpaid.

Cross appeals from chancery court, Mobile county; W. H. TAYLOE, Chancellor.

Suit for partition by Origen Sibley against Peter F. Alba. The ground of the fourth plea was that E. S. Barnes should be made a party. Decree holding the third plea good, and the first, second, and fourth insufficient. Both parties appeal. Reversed.

Harmis Taylor, for plaintiff. *Richard P. Deshon*, for defendant.

STONE, C. J. This case was submitted to the chancellor on the sufficiency of four several pleas. The first, second, and fourth were held insufficient, while the third was pronounced a good defense to the bill. There are cross assignments of error, and the sufficiency of each of thy pleas is thus presented for our decision. Sibley's title, as alleged, arose as follows: In October, 1869, one Duvall executed to Brown a mortgage on an undivided half interest in certain lots of land in Mobile county, to secure a debt of $2,500, due in one and two years. That mortgage was duly recorded. In November, 1888, Brown having died, his executors conveyed and transferred the mortgage and all it secured to Sibley. This mortgage was foreclosed by suit in chancery, instituted by Sibley in 1889, and at the sale under the decree he became the purchaser, and received a conveyance. In October, 1890, he instituted this suit.

Partition is the object of the present suit. The bill sets forth Sibley's claim and chain of title, as briefly sketched above. It avers that the other undivided half interest in the lots belongs to Alba, the defendant. Only the two, Sibley and Alba, are made parties to this suit. In the bill and transcript before us, the reference to the foreclosure suit does not disclose who were defendants, other than Barnes, the administrator of Duvall. It speaks of that suit as "the case entitled 'Origen Sibley v. E. S. Barnes, Administrator, et al.'" We are nowhere informed who were the other parties defendant. We suppose they were the heirs at law of Duvall, the mortgagor; for unless they were before the court their title could not be divested. We will, therefore, treat this case as if they were before the court. It is proper that we should state that no intimation has been given, either in the pleadings or argument, which questions the presence of all necessary parties in the foreclosure suit. It is not shown in the record, or averred in the pleadings, whether or not Duvall and Alba were original tenants in common of the lots sought to be partitioned, or whether Alba claims to have acquired his interest at a later time. Neither is it denied that Duvall, when he executed the mortgage to Brown, owned an undivided half interest in the lots, nor is it claimed or averred that Alba has ever acquired that half interest by purchase or descent. The only right he relies on for maintaining his possession is that he "went into adverse possession of said undivided one half interest in, the lands claimed by complainant in this suit, and was claiming said interest adversely to all the world during the remainder of said year 1877, and during the time that has since transpired, and is now holding the same adversely." The bill charges that Alba and Sibley each own an undivided half interest in the lots, the latter by virtue of his purchase at the foreclosure sale; and the foregoing extract from

[1] Const. art. 14, § 6, and Code, § 1662, prohibit a corporation from issuing stock or bonds except for money or property at a reasonable value.

plea No. 2 is the only statement of fact interposed by defendant that can be construed into a denial of the averment that Duvall and Alba were tenants in common. Under this state of the pleading we feel forced to treat this case as if Duvall and Alba were originally coequal tenants in common.

The first plea interposed sets up the alleged champertous agreement between Sibley and Barnes, which led the former to purchase and become the owner of the Duvall claim and mortgage. That agreement might raise very grave inquiries in any dispute that may spring up between Sibley and Barnes. It cannot in the least affect Alba, a mere stranger to the negotiation and to its consequences. The result of the authorities bearing on this question is correctly summarized in 3 Amer. & Eng. Enc. Law, 86, in the following language: "When an action is brought directly upon a champertous contract, champerty is a good defense, and may be set up by way of answer; and if the true character of the contract appears upon the face of the pleading, such pleading may be successfully demurred to. The better opinion would appear to be that the defense of champerty can only be set up when the champertous contract itself is sought to be enforced." See the many authorities cited, note 3. The chancellor did not err in disallowing this plea.

Plea No. 2. We have copied above the averment found in this plea in reference to Alba's adverse holding. It is wholly insufficient to constitute his possession adverse against a tenant in common. "The seisin and possession of one tenant in common is the seisin and possession of the other or others, and an uninterrupted, exclusive possession by one is not usually deemed adverse, unless accompanied by circumstances indicating an expulsion or ouster of the other." Brady v. Huff, 75 Ala. 80; Abercrombie v. Baldwin, 15 Ala. 363. "The possession of a tenant in common is not adverse to that of his cotenant, unless there is an actual ouster, or refusal to let the cotenant occupy." Burrus v. Meadors, 90 Ala. 140, 7 South. Rep. 469; Newbold v. Smart, 67 Ala. 326; Stevenson v. Anderson, 87 Ala. 228, 6 South. Rep. 285. "The possession of one tenant in common, though exclusive, being consistent with the right of his cotenant, does not amount to a disseisin of the cotenant; and an ouster, or some act which the law deems equivalent to an ouster, is necessary to constitute a disseisin of his cotenant by a tenant in common." 1 Amer. & Eng. Enc. Law, 232; Duncan v. Williams, 89 Ala. 341, 7 South. Rep. 416. The averments of the plea fail to show a holding by Alba adverse to the rights of his cotenant, Brown.

But if this averment were sufficient, that would not oust the jurisdiction. The chancellor would suspend proceedings until the question of disputed ownership could be settled on an issue to be made up and submitted to a jury. McMath v. De Bardelaben, 75 Ala. 68.

Another view: If, when the sale was made under the foreclosure proceedings, any person other than Sibley had purchased, it would scarcely be contended, under the facts shown in the pleadings in this case, that such purchaser could not maintain a suit for partition. Can the fact that Sibley purchased make a difference? The rule against recovery on a title acquired while the property was held adversely does not apply when the property was purchased at judicial sale. Humes v. Bernstein, 72 Ala. 546.

The third plea sets up, in defense of this suit for partition, that the alleged mortgage debt from Duvall to Brown had been paid long before Sibley asserted claim to it, or procured a foreclosure of the mortgage, which culminated in his purchase of the undivided half interest. In the foreclosure suit the heirs of Duvall were necessary parties. We suppose they were parties, and, as we have before stated, we will treat this case as if they were parties. The record before us shows that Barnes, the administrator, was a party to that suit. Plea No. 1 charges champerty, collusion, and fraud between Sibley and Barnes, by which they acquired the ownership of the alleged mortgage debt, and procured the decree of foreclosure and sale under it. If the mortgage debt had been paid, and if, by collusion and fraud between Barnes and Sibley, the decree of foreclosure and the sale were brought about, then a great wrong was inflicted on Duvall's heirs; and unless, by failure to move at the proper time, they have forfeited their right to have the questions retried and the wrongs redressed, the courts and their process are open to them, and they can obtain ample redress and relief from Sibley and Barnes. This, on the cardinal principle that fraud, if properly assailed, vitiates all transactions, no matter what form they may be made to assume. Standing, however, as the record does, and assuming that the heirs of Duvall were parties to the foreclosure suit, that record is conclusive evidence that the mortgage debt was unpaid, alike against Duvall's estate, and against all other persons who cannot connect themselves with his title. If, however, Alba has succeeded to Duval's title or rights, not by mere adverse holding, but by purchase or conveyance, or by a subsisting, unpaid, and unbarred moneyed demand, this may open the door to him to show that the debt from Duvall to Brown had been paid before the decree in foreclosure was rendered. Mead v. York, 57 Amer. Dec. 467, and note. The third plea presents no bar to this suit, and the decretal order of the chancellor holding that plea sufficient must be reversed. Let the appellee pay the costs of the appeal. Reversed and rendered.

(95 Ala. 331)

WARD *et al.* v. WARD *et al.*

(Supreme Court of Alabama. April 6, 1892.)

WILLS—CONSTRUCTION—ALLOWANCE FOR SUPPORT AND EDUCATION—ACCOUNTING BY TRUSTEE.

1. A will provided that the executor should support testator's widow, and support and educate his children. The widow and children filed a bill praying that the trustee be required to increase their allowance, and upon reference to a master he reported that a larger gross allowance

was necessary. The widow thereupon withdrew as a party, and filed an application, dissenting from the will, and choosing to take her distributive share. *Held*, that as the widow was a necessary party, and was not properly joined, after her withdrawal, by her subsequent petition, the court properly dismissed the same and denied the motion of the children for a reference to ascertain the amount necessary for their support and education; and the prior report, including in it the amount necessary for the support of the wife, being insufficient as to the needs of the children only, they were properly denied relief.

2. Where a will provided that, "if agreeable to the parties concerned," "my mother, father, and sister shall continue to reside with my family," and "my trustee shall contribute towards their support as I do at this time," such support was not conditioned upon their residence with the widow and family; and contribution to their support "in the same manner in which the testator had done in his lifetime" was proper as to amount.

Appeal from chancery court, Mobile county; W. H. TAYLOE, Chancellor.

Bill by Rebecca E. Ward and the three minor children of Rebecca E. Ward and Benjamin Ward, deceased, against Alfred G. Ward and others, praying to have the further execution of the trust and management of the estate of Benjamin Ward, deceased, removed from the probate court of Mobile county into the chancery court. The bill also prayed the construction of the will of Benjamin Ward, deceased, and that the executor and trustee thereunder be required to account for his management of said trust, and that he be required to make better provision for the widow and three children. The three items of the will which are more particularly involved in this cause are as follows: "*Second*. I desire him [the executor] to furnish my beloved wife with means sufficient to maintain her in a comfortable manner, suitable to her station in life. *Third*. I desire him to see to the support and education of such children as I may leave surviving me. *Fourth*. I desire, if agreeable to the parties concerned, that my mother, father, and sister shall continue to reside with my family, and that my trustee shall contribute towards their support, out of my estate, as I do at this time." The court ordered a reference to the master to examine into the affairs of the estate, and the condition in life of the complainants at that time, and their condition before the death of Benjamin Ward; and to report what amount, under the provisions of the will, and the condition of the estate, would be a proper monthly allowance for their maintenance and education. The master reported that $250 per month would be a proper and reasonable allowance to the complainants for their proper maintenance and education. The chancellor refused to act upon this report until the final hearing of the cause on its merits. Mrs. Rebecca E. Ward thereupon withdrew from the litigation as a party complainant, and filed an application for her distributive portion of the said estate, dissenting from the will, and choosing to take the portion allowed by law, rather than to take under the will. The three complainants subsequently moved the court to refer the matter to the master, for the purpose of ascertaining and reporting to the court the amount which should be allowed said three complainants for their support, maintenance, and education. The cause was submitted for decree upon the petition of Mrs. Rebecca E. Ward and said motion of the children, and upon pleadings and proof. The chancellor overruled and denied the petition of Mrs. Rebecca E. Ward, and also denied and overruled the motion of the children, and decreed that the defendant A. G. Ward see to the support and education of the complainants, and contribute to the support of the father, mother, and sister of the said Benjamin Ward, in the same manner in which the testator had done in his lifetime, and that the said Alfred G. Ward file with the register his account and voucher for partial settlement, and that the register make a report of said settlement. All other questions were reserved for consideration when they should arise in the progress of the suit. Mrs. Rebecca E. Ward and the three complainants appeal. Affirmed.

Overall & Bestor, for appellants. *Clarke & Webb*, for appellees.

MCCLELLAN, J. We do not understand from this record that the chancery court declined to assume jurisdiction and control over the trusts created by the will of Benjamin Ward for the support of his wife and children, to the end of determining what provision would be reasonable and proper in that behalf, and compelling the trustee to make such provision. On the contrary, we find that the lower court virtually asserted its right and power to determine what allowance should be made by the trustee for the maintenance of the testator's widow and children, and for the education of the children, and, of consequence, its authority to compel such allowance to be made, though counsel argue the question whether this matter should be left entirely to the trustee's discretion, as if they understood the position of the chancellor differently; and there can, in our opinion, be no doubt the right and power thus asserted reside in the chancery court, and should be exercised by it whenever it is clearly made to appear that the trustee is not adequately providing for the well-being of the *cestuis que trustent* according to the terms and spirit of the trust instrument. McDonald v. McDonald, 92 Ala. 537, 9 South. Rep. 195, and authorities there cited. What the court really decided in this connection, however, was that a case had not been made by the evidence which required or authorized the exercise of this jurisdiction, it not being made to appear that the trustee had failed or was omitting to make proper allowance for the support and education of the *cestuis que trustent*. When the cause came on for hearing, the widow was no longer a party to it; she had had herself eliminated from the bill as a party complainant, she was not a defendant, and she was asking no action of the court looking to an increase of the allowance for support theretofore made to her by the trustee. Before this

withdrawal on her part a reference had been had in response to the prayer of the bill as originally exhibited, to determine what would be a reasonable allowance for her and her three children, and the master had reported that $250 per month should be allowed, instead of the $150 per month which the trustee was then paying on that account. The evidence taken on this reference, and the report made, however, had relation to an allowance in gross for the children and for the widow. No evidence was adduced and no report made as to what should be allowed for the support and education of the children, who were the sole complainants in the bill at the hearing, and who only were demanding an increase of the provision made by the trustee for them. The court did not pass on the master's report while Mrs. Ward remained a party complainant to the cause. Whether, had she maintained her original attitude, the additional allowance to her and the children reported by the master should have been decreed, is a mere abstraction on this appeal,—an inquiry not presented for our consideration. There was nothing in the report or in the evidence supporting it which could afford a basis for determining what provision was proper for the children alone. This depended upon testimony which they had the *onus* of adducing. As was said by the chancellor, they are not entitled under the will to any fixed allowance, (Elierbe v. Ellerbe, 40 Amer. Dec. 623;) and having failed to show what amount they were entitled to, or that the sum allowed by the trustee was indequate, the refusal of the chancery court to increase that allowance, or indeed to make any decree fixing their allowance, was inevitable.

Nor was there error in the construction given to the fourth clause of Benjamin Ward's will, which is as follows: "I desire, if agreeable to the parties concerned, that my mother, father, and sister shall continue to reside with my family, and that my trustee shall contribute towards their support, out of my estate, as I do at this time." It cannot be that the testator, solicitous for the maintenance of his father, mother, and sister, and who had contributed largely to their support during his life, intended to make their future well-being to depend upon their continuing to reside in the same house with his widow, and to make such continued residence dependent upon the fact of its being agreeable to her, who was a stranger to their blood, and whose interests would be conserved by defeating his laudable purpose in respect to them. We concur with the chancellor that the support of the testator's father, mother, and sister provided for in this clause of the will was not conditional upon their continued residence with the widow and her family; and with him, also, on the showing of the answer that the provision made for them by the trustee was such as was being made for them by the testator at the time of executing the will, and hence within its expressed limitations.

At the time of filing her petition dissenting from the will and claiming a distributive share in her husband's estate, Mrs. Ward was not a party to the cause pending in the chancery court; she was as much a stranger thereto as if she had previously had no connection therewith. Yet she was a necessary party to that cause. There could be no settlement of the trusts of the will or the administration of the estate without her rights being before the court, and represented by her as a party litigant in the widest sense of the term. Whether she dissents from the will or takes under it, her rights as a party to the cause are coextensive with those of any other of the necessary parties in the sense of shaping the litigation, being heard upon any action taken, and any decree to be rendered in it. Her claim is not of a specific sum to be paid out of a fund in court, as in the case of a receivership which has become indebted to a person having no interest in the controversy between the complainants and defendants to the cause, and which may be preferred by a mere petition, since it involves no element either of prosecution or defense in the case presented by the bill and answer,—Thornton v. Railway Co., (Ala.) 10 South. Rep. 442,—but if she comes into the cause at all it is for all the purposes of prosecution or defense, as the case may be; and she cannot make herself a party for such purposes by a petition. She can only get into this cause, strictly speaking, by the action of the present complainants through an amendment of their bill; or, failing that, she may effectuate whatever rights she may be entitled to by an original bill in its nature suppletory to the present litigation. The chancellor properly dismissed her petition. Cowles v. Andrews, 39 Ala. 130; Renfro v. Geotter, 78 Ala. 314; Ex parte Printup, 87 Ala. 148, 6 South. Rep. 418.

Affirmed.

(95 Ala. 608)

LOUISVILLE & N. R. CO. v. MORGAN.

(*Supreme Court of Alabama.* April 6, 1892.)

ASSUMPSIT—DETECTIVE WORK—EVIDENCE.

1. Where a detective contracts to work for defendant railroad company in ferreting out theft from defendant's cars, evidence that the persons arrested by the detective were convicted of stealing from the cars of another company, and that the latter company delivered to defendant a box containing shoes similar to two pairs claimed to have been stolen from defendant's cars, and that a shortage was found in the box when delivered, is insufficient to warrant a finding for the detective in *assumpsit*.

2. A letter, written by defendant's superintendent to the detective, stating that proof that the car breakers stole defendant's goods would have to be furnished before defendant would pay any bill, was not at variance with his testimony that by the contract compensation was contingent upon the arrest and conviction of thieves who had stolen from defendant's cars.

3. It was competent for the detective to testify as to what property was identified by the employe to whom he was referred by defendant's agents.

Appeal from circuit court, Jefferson county; JAMES B. HEAD, Judge.

Assumpsit by W. B. Morgan against the Louisville & Nashville Railroad Company

to recover for his services, as a detective, in ferreting out thefts which were alleged to have been committed from the Louisville & Nashville Railroad cars. Judgment for plaintiff. Defendant appeals. Reversed.

Upon the introduction of the plaintiff as a witness in his own behalf, and after testifying that he had arrested three parties for theft from the cars, and had in his possession goods which had been stolen, and that he had gone to one of the employes of the defendant to have the goods identified, the plaintiff's attorney then propounded this question to him: "State what goods, if any, he identified,"—meaning the employe of the Louisville & Nashville Railroad Company. The defendant objected to this question, and excepted to the court's overruling his objection. It was shown by the plaintiff that the said employe of the defendant identified two pairs of shoes, and that the parties he had arrested were convicted in the criminal court. The employe of the defendant who identified the two pairs of shoes testified that they bore the same mark of some other shoes which were found in a car of the Georgia Pacific Railroad Company, which had been turned over to them when the said car was opened, and that an "exception" against the Georgia Pacific had been made for the shortage of said shoes. The defendant introduced in evidence the record of the criminal court, which showed that the parties whom the plaintiff had arrested were convicted in that court for burglary from the Georgia Pacific cars, and for stealing property which belonged to the Georgia Pacific Railroad Company. The plaintiff then introduced in rebuttal a letter written him by W. M. Newbold, superintendent of the Louisville & Nashville Railroad Company, as follows: "Yours of the 16th received. I cannot find any proof of any of the car breakers you mention having broken into our cars, or stolen our goods. Please furnish me with this proof, which I will have to have before paying any bill."

Hewitt, Walker & Porter, for appellant.

COLEMAN, J. This is an action in *assumpsit* under a contract of employment for personal services. The parties differ as to some of the material stipulations, but agree in an important statement as to the inducement which led to the formation of the contract. The plaintiff, Morgan, testifies as follows: "I went to Mr. Newbold, superintendent of the Louisville & Nashville Railroad Company, and told him I had caught on to some stealing from the Louisville & Nashville cars, and he said, if I would go to work on the case, he would pay me what it was worth." Mr. Newbold testified "that in September or August last the plaintiff came to me and stated that he had caught on to some stealing from the Louisville & Nashville Railroad cars, and asked me what I would be willing to do about it. I told him [he says] if he caught any one stealing from our cars, and restored the property to us, and it was identified, and if he caught the thieves, and got them convicted, I would pay him what was reasonable." The material difference as to the terms of the contract as stated by the contracting parties consists in the plaintiff's claim to compensation for services rendered, without reference to the result of the services to be performed, while the defendant insists that the compensation depended upon the recovery and restoration of the property and the conviction of the thieves by the plaintiff. Whether the one or the other gives the true version of the contract in this respect, it is evident that both understood the contract of employment was entered into with reference to a larceny from the Louisville & Nashville Railroad cars. This is manifest, not only from the statement of both witnesses, but, as confirmatory of this view, the plaintiff called upon the defendant's agent to identify the recovered property. There is nothing in the record which would authorize the conclusion that Newbold, the superintendent of the Louisville & Nashville Railroad Company, would have employed the plaintiff to work on a case of larceny from the cars of the Georgia Pacific Railroad Company. We have examined the record very carefully, and we find no satisfactory evidence to show that the goods recovered were stolen from the cars of the defendant. It is clear that the parties arrested by plaintiff were tried and convicted of burglary of the cars of the Georgia Pacific Railroad Company. It is not pretended that any of the goods recovered were taken from the cars of the defendant, except two pairs of shoes, and the proof shows, without serious contention, that the box of shoes delivered by the Georgia Pacific Railroad Company to the defendant, in which were shoes of a similar brand to those stolen, was checked "short" when delivered to the defendant, and an exception for the shortage was made against the Georgia Pacific Railroad Company at the time of the delivery of the box of shoes. If this evidence be true, and we find nothing in the record which conflicts with it, or which would justify us in discrediting it, the plaintiff has failed to lift the burden which the law imposes upon every suitor to prove his case.

We do not see how the letter of Newbold of September 17, 1890, in any way, in its legal effect, is at variance with the contract as testified to by him.

We think the grounds of objection to the question, "State what goods, if any, he identified," not tenable, and there was no error in overruling the objection. The plaintiff applied to the superintendent for a proper person to identify the property, who referred him to another. This person took the plaintiff to Mr. Weaver, who was at work at the freight depot, as the proper person to make the identification of the property, and Weaver's own testimony shows he was the proper person. A part of the evidence of the plaintiff as to what Weaver said was mere hearsay, and if it had been objected to at the proper time no doubt would have been excluded, or it might have been introduced upon a proper predicate as contradictory or impeaching evidence. We do not think the evidence as it is stated in the record authorized a judgment for the plaintiff.

Reversed and remanded.

LADD v. SMITH.

(*Supreme Court of Alabama.* April 6, 1892.)

TRUSTEES—ACTION ON BOND—FAILURE TO ACCOUNT FOR MONEYS ALREADY RECEIVED—PLEADING—DEMURRER—EVIDENCE—OBJECTIONS WAIVED.

1. Since, under Code 1886, p. 791, in suits on bonds with conditions, it is only necessary to allege the date and execution of the bond; to set out the condition concisely; to allege that the condition of the bond has been broken by the defendants; to state concisely the breach or breaches complained of; and to conclude with the averment that the plaintiff has thereby suffered damage,—in an action against a surety on a bond alleged to have been given by "L., as trustee under the will of C., in the chancery court of M. county," it was sufficient to aver that he had broken a condition thereof by failure to pay over moneys to said court in obedience to its orders, without showing the authority of said court to make such orders, when L., by his bond as executor, was required to account to the probate court.

2. In an action against a surety on two bonds given by L., as executor and trustee, respectively, a demurrer addressed to the sufficiency of the averments of the complaint as to the executor's bond, only, was properly overruled.

3. Defendant could not have been prejudiced by an adverse ruling on such demurrer, when the executor's bond was not offered in evidence, and there was no recovery thereon.

4. Where a trustee's bond was conditioned that he should "account and pay over all moneys received by him as trustee, and as ordered by" the court, liability attached upon his failure to pay over and account for moneys received before its execution.

5. Objections to evidence are waived unless made when it is introduced.

6. Where, in an action against a surety on a trustee's bond, the uncontroverted evidence showed a breach of the bond, and that plaintiff had suffered damage in a sum greater than the amount of the bond, the court properly directed a verdict for the entire penalty.

Appeal from circuit court, Mobile county; WILLIAM E. CLARKE, Judge.

Action by Daniel E. Smith, trustee, etc., against John M. Ladd, surety on certain bonds executed by Edwin C. Lyles, as executor and trustee of the estate of Frank Conlan, deceased. The latter died, having made a will, which was duly admitted to probate. Edwin C. Lyles, one of the three executors appointed in said will, qualified as such, and undertook to administer the said estate, the other named executors refusing to qualify, or resigning. Lyles afterwards filed a bill in the chancery court, and had the administration of said estate removed into that court. By a decree of that court on February 4th, the said E. C. Lyles was required to execute a bond, as trustee, in the sum of $5,000. Lyles continued to administer the estate until he sold the real estate and converted the property into money, after which time he left the state. Mrs. Conlan, widow of deceased, having dissented from the will of her husband, and having had her dower and such portion of the personal estate as she was entitled to given her, steps were taken on behalf of the minor children to have an account of said Lyles, as trustee, stated, and to have the trustee removed. Subsequently Daniel E. Smith, plaintiff in this suit, was appointed trustee to succeed Lyles. After the register made his report, as ordered by the chancellor, a final decree was rendered, fixing the amount due by said Lyles at the sum of $5,889.15. This decree also contained the following order: "It is further ordered, adjudged, and decreed that the present trustee, Daniel E. Smith, have and recover from the said Edwin C. Lyles the sum of five thousand eight hundred and eighty-nine dollars and fifteen cents, for which let execution issue. It is further ordered, adjudged, and decreed that, upon the return of an execution against Edwin C. Lyles of no property found, then said Daniel E. Smith, as trustee in this court of the will of Frank Conlan, deceased, shall bring suit against William Turner and J. M. Ladd, or either of them, the sureties of said Edwin C. Lyles on his bond given as trustee." Execution was issued against said Lyles in conformity with the said decree, but the sheriff, being unable to find any property of said trustee, made a return of the execution "No property found." Thereupon the said D. E. Smith, as trustee, brought the present action. The complaint is in the following language: "The plaintiff, as trustee of the estate of Frank Conlan, claims of the defendant five thousand eight hundred and eighty-nine 12-100 dollars for the breach of the condition of two bonds made by said defendant as surety on the bond of Edwin C. Lyles, executor and trustee under the will of Frank Conlan; one bond made by Edwin C. Lyles, as principal, with John M. Ladd and others as his sureties, on the 9th day of December, 1876, with condition that said Lyles shall faithfully execute and perform all the duties imposed upon him as executor of the last will and testament of Frank Conlan, deceased; the other bond made on the 8th day of February, 1886, by Edwin C. Lyles, as trustee under the will of Frank Conlan in the chancery court of Mobile county, with John M. Ladd and others as sureties on said bond, with condition that said Edwin C. Lyles shall faithfuly execute and perform all the duties of the trust imposed upon him, and obey the orders of the chancery court in respect to said trust, and account and pay over all moneys received by him as trustee, and as ordered by that court. The plaintiff says that the conditions of these bonds have been broken by the defendant, in this: That said Edwin C. Lyles failed to pay over all moneys received by him, and as ordered by the chancery court; that, by a decree of the said chancery court, made on the 18th day of June, 1890, said Edwin C. Lyles was decreed to be indebted to plaintiff, as trustee of the estate of Frank Conlan, deceased, in the sum of five thousand eight hundred and eighty-nine 15-100 dollars, which he has failed and refused to pay. Execution of said decree has been issued out of the said chancery court for Mobile county, and been placed in the hands of the sheriff of Mobile county, against said Edwin C. Lyles, and has been returned into said chancery court with the sheriff's return of 'No property found.' Said decree, with interest thereon, still remains unpaid, to the damage of the plaintiff, as above stated." The defendant demurred to the complaint on the grounds—*First*, that it shows that one of the bonds sued on was given by said Lyles, as executor of the estate to said

Conlan, to the judge of probate of Mobile county, and there is no allegation that there was any decree in the probate court against Lyles, as executor, which would authorize the suit against the defendant and the sureties on his bond as such executor; *second*, that there was nothing in the complaint showing what authority the chancery court had to order Lyles, as executor, to pay over the moneys, when, by his bond as executor, he was required to account to the probate court; *third*, that as the only indebtedness shown by the complaint is through Lyles, as trustee, there is no proper allegation of any breach of his bond as executor; *fourth*, that it does not appear in the complaint that there has been any breach by Lyles of his bond as executor. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Overall & Bestor, for appellant. *Thos. H. Smith*, for appellee.

WALKER, J. As to the bond of Edwin C. Lyles, as trustee, upon which the defendant is sued as surety, the complaint is in substantial compliance with the Code form for complaints on bonds with conditions. Code 1886, p. 791.[1] "In suits on bonds with conditions, ordinarily it is only necessary to allege the date and execution of the bond by the defendants; to set out the condition *in hæc verba*, or in substance; to allege that the condition of the bond has been broken by the defendants; to state concisely the breach or breaches complained of; and to conclude with the averment that the plaintiff has thereby suffered damage." Dothard v. Sheid, 69 Ala. 185. As to the bond above mentioned the complaint fully comes up to the requirements just stated. There is no merit in the second ground of demurrer, which is the only one addressed to the averments of the complaint so far as this bond is concerned. As to the other three grounds of demurrer it is enough to say that they do not answer the whole complaint. They go only to the sufficiency of the complaint as to the bond given by Lyles as executor. A demurrer to an entire complaint which is not an answer in law to the whole of it is properly overruled. Kennon v. Telegraph Co., 92 Ala. 399, 9 South. Rep. 200. Furthermore, the defendant could not have been injured by the ruling on the demurrer, so far as it touched only the claim on the executor's bond, as that bond was not offered in evidence, and there was no recovery thereon. The bond given by Lyles, as trustee, recited the decree of the chancery court in obedience to which it was given. This bond was executed and approved on the 8th day of February, 1886, and the condition thereof was in the following words: "Now, therefore, if the said Edwin C. Lyles shall faithfully execute and perform all the duties of the trust imposed upon him, and obey the orders of this court in respect to said trust, and account and pay over all moneys received by him as trustee, and as ordered by this court, then these premises are to cease, determine, and be void; otherwise to be and remain in full force and effect." On July 10, 1889, a decree was rendered in the cause in which the bond was given charging Lyles, as trustee, "with the sum of five thousand five hundred and thirteen 74-100 dollars, from and on the 4th day of May, 1889." On December 5, 1889, Lyles was removed as trustee, and on January 15, 1890, Daniel E. Smith, the plaintiff in this suit, was appointed trustee to succeed him. On June 18, 1890, a decree was rendered against Lyles in favor of his successor in the trust for the sum of $5,889.15, and execution was ordered to issue thereon. An execution on this decree has been returned "No property found." The record evidence disclosing the facts here summarized was admitted without objection on the part of the defendant, and was wholly uncontroverted. The failure of Lyles to satisfy the decree rendered against him was a breach of the condition of the bond, as it was a failure on his part to obey an order of the chancery court in respect to the trust, and to pay over, under an order of the court, money received by him as trustee. These defaults were clearly covered by the bond, and occurred after it was given, and while it was in force. There is nothing in the terms of the instrument to confine the responsibility of the sureties to defaults of the principal in reference to orders or decrees for the payment of money received by him after the date of the bond. Such orders or decrees, whether in reference to money received by the trustee before or after the execution of the bond, are clearly within its terms. No objection was made to the introduction in evidence of either of the decrees because of the failure to prove the register's report upon which it was predicated. Conceding that there would have been merit in such an objection, it was waived by the failure to suggest it. The uncontroverted evidence clearly showed a breach of the condition of the bond of Lyles, as trustee, and that the damage amounted to more than the sum in which the defendant was bound as surety. The general affirmative charge to find for the plaintiff for the whole amount of the penalty of the bond was properly given. Affirmed.

[1] Following is the form given by Code 1886, p. 791, for the complaint in an action on a bond with condition, omitting title of cause: "The plaintiff claims of the defendant —— dollars for the breach of the condition of a bond, (or agreement, as the case may be,) made by the defendant on the —— day of ——, payable to the plaintiff, in the sum of —— dollars, with condition, (here state the condition concisely.) And the plaintiff says the condition of the said bond (or agreement) has been broken by the defendant, in this, (here state concisely the breaches complained of, first, second, third, etc.,) to the damage of the plaintiff, as above stated. E. P., Atty. for Plff."

(95 Ala. 269)

TYGH *et al.* v. DOLAN.

(*Supreme Court of Alabama.* April 7, 1892.)

PROBATE PRACTICE—ALLOTMENT TO WIDOW IN LIEU OF HOMESTEAD—JURISDICTION.

1. Where after commissioners appointed by the probate court, on application of the widow to allot to her lands in lieu of homestead exemption, have made the allotment and reported to the court, and persons interested in the estate afterwards file exceptions thereto, a plea to the jurisdiction of the probate court, on the ground

that the chancery court has assumed jurisdiction of the administration, need only state that a bill invoking the jurisdiction of the chancery court has been filed therein, and that the court has assumed the exercise of such jurisdiction; whether or not the bill is sufficient to that end being a question which will arise on the trial of the plea.

2. Where a bill has been filed in the chancery court invoking its jurisdiction in the administration of an estate, and a cross bill is filed asking affirmative relief, cross complainants, on afterwards seeking relief as to the estate in the probate court, are not in a position to deny the general jurisdiction of the chancery court, and to claim that the probate court has jurisdiction.

3. Where a bill is filed in the chancery court invoking its jurisdiction in the administration of an estate for any purpose, that court has jurisdiction for all purposes, and though the bill does not specifically ask the court to take control of that part of the administration having reference to the setting apart of lands in lieu of homestead to the widow, it acquires such jurisdiction, and the probate court has no jurisdiction thereafter to hear exceptions to a report of commissioners appointed by it setting apart such lands.

Appeal from probate court, Mobile county; PRICE WILLIAMS, Judge.

Mary Dolan filed an application in the probate court wherein she represented that her husband, Thomas Dolan, died without leaving a homestead exempt to her, and that he left other property, out of which she claimed the right to have property assigned to her in lieu of homestead exemption, and prayed the court to appoint commissioners as provided by law. Thereafter commissioners were appointed, and set apart certain property to her as exempt, in lieu of homestead. Within the time prescribed by law, Mary Tygh and others objected to said allotment, and filed exceptions to the report of the commissioners, and the same were set for hearing before the judge of the probate court. Afterwards the widow filed a plea to the jurisdiction, for the reason that jurisdiction had been assumed by the chancery court of the settlement of the estate of Thomas Dolan, deceased, including the hearing of said exceptions. A motion to strike the plea from the file was overruled, as was also a demurrer to the plea. Issue was joined on the replication to the plea, and the court, after hearing the evidence, sustained the plea, and refused to hear the exceptions. Mary Tygh and others appeal. Affirmed.

W. E. Richardson and *Thos. H. Smith*, for appellants. *H. Taylor*, for appellee.

MCCLELLAN, J. It cannot be doubted that the plea to the jurisdiction of the probate court was sufficient to present the issue whether the chancery court had taken jurisdiction of the administration of Thomas Dolan's estate. All that is necessary to such a plea, we apprehend, is that it should state the facts that a bill invoking the jurisdiction of the chancery court has been filed therein, and that court has assumed the exercise of such jurisdiction. Whether the bill to that end is sufficient is a question which properly arises on the trial of the plea. It cannot be necessary that such plea should set out the bill *in extenso;* and to hold the plea here insufficient would logically lead to such requirement There was no error in the rulings of the lower court on the motion and demurrers, which were addressed to the sufficiency of the plea.

The only other action of the probate court which this record presents for review is its judgment sustaining the plea on the evidence. And the only argument made against the correctness of that action really admits that the chancery court had acquired control of the administration generally, and thereby ended the jurisdiction, in a general sense, of the probate court. Indeed, the appellants, having themselves not only submitted to, but affirmatively invoked, the interposition of equity by a cross bill, were in no position to deny the general jurisdiction of the chancery court. But the contention is that the bill does not specifically pray the chancery court to take control of that part of the administration having reference to the setting apart of lands in lieu of homestead to the widow, and hence that as to that matter the jurisdiction of the probate court remained intact. If it were conceded that the bill made no reference to this particular part of the administration, the conclusion sought to be drawn from that fact cannot be sustained. It needs no argument and no citation of authority to show that the setting apart of homestead, or lands in lieu of homestead, is as much a part of the administration of an estate—as much in the way of settling the affairs of the decedent and disposing of property left by him as the law prescribes—as any other act the personal representative and the courts may do in the administration. And when an administration is removed into the chancery court for any purpose or in any part, it is there in whole and for all purposes. There can be no splitting up of an administration any more than of any other cause of action; it is one proceeding throughout, in a sense, and the court having paramount jurisdiction of it must proceed to a final and complete settlement.

But aside from the consideration that the argument for appellants is addressed solely to the proposition that a part of the administration—that part which they desired the probate court to act upon—was not removed into the chancery court, and looking to the bill to determine whether that court really had jurisdiction at the time the probate court so held, the conclusion must be that the ruling assigned as error was proper. The bill makes a case in respect of the widow's dower right of which the probate court has no jurisdiction. It alleges that dower cannot be assigned by metes and bounds, and thus makes a case for exclusive equity jurisdiction. Wood v. Morgan, 56 Ala. 397. There is no error in the record, and the judgment of the probate court is affirmed.

(94 Ala. 79)

WARREN v. STATE.

(*Supreme Court of Alabama.* ——, 1892.)

CARRYING CONCEALED WEAPONS—WHAT CONSTITUTES.

One who carries a pistol concealed in a satchel supported and carried by a strap over his shoulder is guilty, under an act making it unlaw-

ful to carry a weapon "concealed about the person," and the fact that the satchel is locked, and cannot be opened without the key, which he has in his pocket, is immaterial.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

Jack Warren was convicted of carrying a weapon concealed about his person, and appeals. Affirmed.

Wm. L. Martin, Atty. Gen., for the State.

MCCLELLAN, J. This appeal is from a judgment of conviction of the offense of carrying a weapon concealed about the person. The evidence was, without conflict, to the effect that the defendant carried a pistol concealed in a small hand satchel, which was supported and carried by means of a strap which passed over his shoulder. Manifestly, the weapon was being carried about the person, in the sense of moving with the person, and this is the test by which that question is determined; and being confessedly concealed, the offense was complete. Diffey v. State, 86 Ala. 66, 5 South. Rep. 576; Ladd v. State, 92 Ala. 58, 9 South. Rep. 401. It is of no consequence whether a pistol, so carried, is of easy and ready access to the person carrying it. The statute denounces the act of carrying a weapon concealed about the person, irrespective of any consideration as to the ability of the person to readily avail himself of and use it. The fact, therefore, that defendant's satchel was locked, and could not be opened without the key, which he had in his pocket, is of no importance in this case. The action of the court in giving the general affirmative charge for the state, which is the only matter presented for review, was free from error, and the judgment is affirmed.

(96 Ala. 598)

MOBILE & BIRMINGHAM RY. CO. v. WORTHINGTON.

(*Supreme Court of Alabama.* April 7, 1892.)

CONTRACTS — ACTION FOR BREACH — EVIDENCE — BILL OF EXCEPTIONS.

1. Since Act Feb. 22, 1887, (Sess. Acts, 126,) providing that the court in term time may fix the time within which bills of exceptions may be signed, also provides that "the judge in vacation may, for good cause, extend the time fixed in term time," and is silent as to the manner of showing or authenticating the judge's order of extension, a purported copy of the judge's order of extension, embodied by the clerk in the transcript, will be regarded as *prima facie* correct.

2. In an action against a railroad company for breach of a contract with plaintiff by which he was to erect certain trestles for defendant, where plaintiff alleges that, after doing part of the work, he was prevented by defendant from doing the balance, and was put "to great expense and trouble in the maintenance of necessary teams," and where the bill of particulars gives notice of items of corn, etc., for which compensation is claimed, defendant cannot object to evidence on the part of plaintiff that teams were necessary in order to do the work required by the contract on the ground that there is no such specification in the bill of particulars, since the pleadings and bill give it sufficient notice of the claim to prevent surprise.

3. In an action against a railroad company for breach of a contract with plaintiff by which he was to erect certain trestles for defendant, defendant denied any contract with plaintiff, claiming that it had contracted for the entire work with one P., and that the work plaintiff did was done under P.'s contract, or by permission of P. The evidence as to whether there was an independent contract with plaintiff was conflicting. *Held*, that a letter written by P. to plaintiff in regard to his settlement with defendant was not admissible on behalf of plaintiff against defendant.

4. In such case evidence of what P. told defendant, while settling with it, in relation to his contract with plaintiff, and the extent of his authority to represent him, was admissible as original testimony as part of the *res gestæ*.

5. In such case testimony of defendant's engineer, with whom plaintiff claimed to have made the contract, that plaintiff "never gave any bond or security to the company, because they were only demanded where contracts were made, and no contract was ever made with him," was admissible as tending to show whether there was a concluded contract with plaintiff, and its exclusion was error.

6. It was error, in such case, to strike out the testimony of defendant's engineer, with whom plaintiff claimed to have made the contract, that the contract was given by P to plaintiff at witness' special request, and because of his previous negotiations with plaintiff; that the amount of work done for P. by plaintiff was the identical amount of work that plaintiff would have done for the company had the company contracted directly with him, instead of with P., and that plaintiff's extra claim was, from an engineering standpoint, preposterous.

7. In such case it was error to exclude testimony that, while plaintiff was working on the trestle, P. gave him instructions, and that plaintiff made no objections, since it would tend to prove defendant's contention that plaintiff was a subcontractor under P., and not an independent contractor with defendant, as claimed by him.

8. In such case the publication for bids for the work was competent evidence for either party,—for plaintiff, because it gave no notice that contracts, to be binding, had first to be submitted to and approved by defendant's president, and for defendant, because it notified bidders that security would be required,—it appearing that plaintiff did not give security for the performance of his alleged contract.

9. The fact that a publication for bids to do work for a railroad company gave notice to bidders that they would be required to give security for the performance of contracts is not conclusive against the existence of a contract claimed to have been made with the company by one who did not give such security, since the jury may find that security was waived by the company.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

Action by Charles M. Worthington against the Mobile & Birmingham Railway Company, for breach of contract. Judgment for plaintiff. Defendant appeals. Reversed.

This suit was commenced on July 27, 1888, by the appellee, Charles M. Worthington, against the appellant, the Mobile & Birmingham Railway Company, to recover $18,144.52, as damages for the breach of an alleged contract, which was, in substance, as follows: That, in consideration of the plaintiff's agreeing to do the work mentioned, the railway company would allow him to do the work of constructing trestles over Lewis' and Bassett's creeks and the Bigbee river, on the line of the railroad which the defendant was then preparing to construct between Mobile and Jackson, Ala., and points beyond, which works the railway company guaranteed would average 3,000 feet, board

measure, to the "bent;" the railway company to furnish all material and lumber necessary for the construction of the trestles, and to cut the piles, and to level them up to the road level for the superstructure; also, that the defendant would furnish said foundations and lumber and material necessary in time to enable the plaintiff to commence work on November 15, 1886; and would pay plaintiff $9 per thousand feet, board measure, for said work, and a reasonable sum for all other such work as would be performed by plaintiff at the request of defendant. The plaintiff then averred in his complaint that he has been ready and willing to comply with the contract on his part, but that the defendant has failed to comply in several particulars, as follows: *First*, it has failed and refused to furnish plaintiff the larger portion of said work which it had contracted to so furnish, and refused to permit him to perform the same; *second*, it has failed to furnish the lumber and material at the time it had contracted to furnish the same, thereby postponing the plaintiff, and putting him to great expense and trouble in the maintenance of necessary teams, and maintenance and compensation to his laborers; *third*, that it has failed and refused to pay the plaintiff the $9 per thousand feet for the work specified in the contract, and the reasonable compensation for such work as was done by the plaintiff at the request of the defendant, and which was not specified in said contract; *fourth*, that it wholly failed and refused to furnish to the plaintiff the necessary timber and material to enable him to perfect the larger portion of the work specified in said contract; *fifth*, that it otherwise hindered, delayed, and prevented plaintiff in the performance of said work, to the great damage of plaintiff. The plaintiff also claims a like sum under the common counts,—upon account stated, for work and labor done, for money paid by plaintiff for the defendant, and upon open account. The defendant filed two pleas in abatement, setting up in abatement to the whole cause the fact that Thomas P. Miller & Co. had obtained a large judgment against the plaintiff in the chancery court of Mobile, and had had issued thereon garnishment, which had been served upon the defendant prior to the bringing of this suit. The plaintiff demurred to each of these pleas, but, this court not considering the rulings of the lower court upon these pleas and the demurrers thereto, it is not deemed necessary to set them out in full in this statement of facts.

The testimony set out in the bill of exceptions is very prolix, but it is not considered necessary, under the decision of this court, to state all of the exceptions to the rulings on the testimony, or to copy any of the charges given and refused. The claim of the plaintiff, as shown by the evidence introduced in his behalf, may be summarized as follows: That he had made a verbal contract with the railway company for the construction of 2,321 "bents" of trestle work, which would contain a guarantied average of 3,000 feet, board measure; that he was to be paid therefor at the rate of $9 per thousand feet, or an aggregate of $62,667; that this contract as made with one Patton, the chief engineer of the road, and that, after entering into the contract, the plaintiff was ready and willing to do the work, and that the railway company, in violation of the said contract, made another contract with one J. W. Putnam to build these trestles, and had changed the character of the trestles; that he, the plaintiff, did, in fact, build a great deal of the superstructure on the trestles, Putnam having built the pile foundations, and was paid by Putnam at the rate of $9 per thousand feet, board measure, as far as the same was allowed to Putnam in the estimates of the engineers. The plaintiff claims damages for the failure of the company to execute its contract with him, and claims a profit of $4 per thousand feet, board measure, upon the amount of framing which he was to have done on the frame trestle work as originally contemplated in said contract, deducting the number of feet of framing on superstructure upon the trestle work for which he actually received pay. He also claims for loss of time, and extra expenses for delays, and for doing additional work as directed by defendant. In detailing the statement of Patton out of which plaintiff seeks to show his contract, he stated that the agreement was to be in writing, but it never had been reduced to writing. It is also shown that there was no discussion, statement, or agreement as to the details of the work; nor was there any bond entered into to secure the faithful performance on the part of plaintiff. The railway company, for its defense, denies that it ever made any contract with Worthington, or ever intended or contemplated making such a contract as is alleged in his complaint, and as shown by the testimony; that Patton, the chief engineer, had several conversations with Worthington, who had desired a contract upon the road, and in which the said Patton said that he thought the company would be able to give him some work when they got in a position to know what they wanted; that Worthington was known then to be largely insolvent, and irresponsible as a contractor for so large an undertaking; that after the company had determined what was needed it made a contract with one J. W. Patton for the trestle work, and that Patton, in order to assist Worthington, arranged the contract with Putnam so that he should let Worthington have the framing of the superstructure of the trestles over Lewis' and Basset's creeks, and for this Putnam paid Worthington the sum of $9 per thousand feet; that this agreement between Patton and Putnam was made known to Worthington, and he readily acquiesced therein; and for all of the work done by Worthington for Putnam the company, in its monthly estimates, allowed the same to Putnam; and that Putnam overpaid Worthington for such work. As to delays on account of defendant not complying with its alleged contract with plaintiff, the company disavows any contract with Worthington in reference to the build-

ing of the trestles in question, and the company further contends that it paid Putnam for this work that Worthington had done for Putnam, and Putnam had paid Worthington for more work than he had done, to the amount of several hundred dollars. The claim of the defendant is that Worthington, in his testimony, fails to show that there was any complete contract in the premises, and that he does not show an undertaking on the part of Patton, the chief engineer, to give him the contract, and that he does not show he bound himself to faithfully perform said contract, by the giving of a bond as was required, and he fails to show that the contract which he alleges was in contemplation and under negotiation was ever executed. The letter of March 22, 1888, which was introduced in evidence against the objection and exception of the defendant, was in the following language: "I succeeded in getting to a settlement with the R. R. people finally. They cut down more than I wished to stand, but I thought it better than a suit. In the items which I drew from your account, they paid me $3,290, which I place to your credit. They paid me on account of the work, and I will send you a statement upon what accounts they paid. They paid it without regard to you, ignoring you, except as a subcontractor. I am sorry that I could not get something more out of them. The item for taking out the timber to construct the new work should have been made out differently, and charged per thousand for the whole amount,—say $5.00 per M or such sum as you think it worth. I tried to get them to allow that price per M on 250,000, b. m. It leaves your claim for changing contract and giving you more expensive work to do as it stood before." There was a verdict and judgment thereon in favor of the plaintiff in the sum of $9,807.97. The defendant brings this appeal, and assigns as error the various rulings of the lower court.

Gaylord B. Clark, *Francis B. Clark*, and *J. M. Falkner*, for appellant. *Gregory L. & H. T. Smith*, for appellee.

STONE, C. J. The motion to strike the bill of exceptions from the transcript must be overruled. The act of February 22, 1887, (Sess. Acts, p. 126,) which provides that the court in term time may fix the time within which bills of exceptions may be signed, contains the further clause that "the judge in vacation may, for good cause, extend the time fixed in term time;" but in no case to allow more than six months beyond the adjournment of the term at which the case is tried. The statute is silent as to the manner of showing or authenticating the judge's order of extension. Whenever, as in this case, the clerk embodies in the transcript what purports to be a copy of the judge's order of extension, we think it our duty to regard and treat it, at least, as *prima facie* correct.

The main purpose of this suit by Worthington was to recover damages of the railroad company for the breach of an alleged contract. Worthington claims to have been a bridge builder, and that he made a contract with Patton, the chief engineer of the road, to construct three trestles at or near certain named streams, to be crossed by the railroad track. The complaint contains a special count setting forth the alleged terms of the letting; avers that, although plaintiff "has at all times been ready and willing to comply with all the provisions of said contract on his part, and has so complied so far as he has been permitted so to do by the defendant, the defendant had failed to comply with the following provisions thereof." The complaint then assigns five several breaches, and among them the following: That "it has wholly failed and refused to furnish to the plaintiff the larger portion of said work, * * * and refused to permit him to perform the same. * * * It wholly failed to furnish the said timber and material, at the time that it had contracted to so furnish the same, and thereby postponed and delayed the plaintiff, and put him to great expense and trouble in the maintenance of necessary teams, and the maintenance and compensation of laborers. * * * It wholly failed and refused to furnish to the plaintiff the necessary timber and material to enable him to perform the larger portion of the work specified in the contract." The plaintiff also claimed that he had been permitted to do, and had done, some of the work contracted to be done, and had done other work outside of the contract which had been received; and the complaint contains common counts for the purpose of recovering for such work done.

The defendant demanded a bill of particulars under the statute, and one was furnished. Testimony was offered to prove that teams were necessary to do the work set forth in the complaint; and it was objected to as not specified in the bill of particulars. The objection was overruled, the testimony received, and this raises the first question we need consider. It is assigned, as part of one of the breaches of the special contract alleged to have been made, that defendant had put plaintiff "to great expense and trouble in the maintenance of necessary teams." There was some proof that teams were a necessary power in raising large timbers in the construction of trestles of the height here required. True, there was no testimony tending to show that 17 yokes of oxen were needed, but the record presents no ruling on that question. The bill of particulars gave notice of items of corn, oats, and bran consumed, for which compensation was claimed. These were suitable food for teams. The question propounded for and to plaintiff, as a witness in his own behalf, was as follows: "Explain whether or not it was necessary or proper to have teams up there to do anything on the work." Objected to, because not specified in bill of particulars, objection overruled, answered affirmatively, and exception reserved. We think there was nothing in this exception. Defendant had sufficient notice of this claim to prevent it from being surprised. Code 1886, § 2670; Robinson v. Allison, 36 Ala. 525; Fountain's Adm'r v. Ware, 56 Ala. 558.

Plaintiff offered in evidence a letter writ-

ten by Putnam to himself, bearing date March 22, 1888. Defendant objected, and the objection was overruled, the court remarking that it was permitted to be put in evidence, "as it might tend to show whether or not Worthington knew that Putnam was making any settlement with the railroad company." Defendant then objected to each sentence of the letter separately, this objection was overruled, and separate exceptions reserved. The letter was read in evidence. Reserved as this exception was, it is probably our duty to treat it as a general exception to the whole letter. Maybury v. Leach, 58 Ala. 339. The most important issue of fact in this case, as developed in the pleadings and testimony, was whether Worthington had an independent contract with the railroad company to build the trestles, or whether he did what work he is shown to have done under Putnam's contract, or by permission of Putnam. Worthington testified that he made and concluded an independent contract with Patton, the chief engineer, to construct the three trestles. The special count in the complaint is framed on that basis, and claims damages for not being permitted to do the work. Patton denied making such contract with Worthington, and claimed that the only contract he concluded was with Putnam. In making settlements with Putnam he and his successors recognized him as contractor, and refused to recognize Worthington as a contractor, save as an employe under Putnam. On the issue of original contract *vel non* with Worthington, his testimony and that of the engineer were in direct conflict. It is claimed by the parties to these opposing versions that they were severally more or less corroborated by other testimony. This was purely a question for the jury. In settling with the railroad officials for work done under his contract, Putnam testified that he was not authorized to agree on a binding settlement of Worthington's claim, but was authorized to receive any amount the authorities would pay him for work done by the latter. Some moneys on this account were paid to, and received by, Putnam, and he testified that he subsequently accounted to Worthington for such collections. The witnesses were not agreed as to the nature of Putnam's settlement, whether it was entirely on his own account, as contractor to build the trestles, or in part as the representative of Worthington under the latter's independent contract. Extra work, not embraced in any original contract, had been done by Worthington, and there was no dispute about Worthington's right to be paid for that. The point we are now considering has nothing to do with the claim for such extra work. Presented before the court and jury as the issue of fact above stated appears to have been by the testimony, it may be that Putnam's letter to Worthington of March 22, 1888, would have been competent evidence for the defendant, if offered by it. It was not competent evidence for the plaintiff, and should have been excluded.

What Putnam testified he told the railroad officials while settling with them, in relation to his contract with Worthington, and the extent of his authority to represent him, was part of the *res gestæ*, —was original testimony, and rightly received, without any special predicate being laid for its introduction.

Patton, the engineer, on being asked whether a bond had been given by Worthington, answered: "Worthington never gave any bond or security to the company, because they were only demanded where contracts were made, and no contract was ever made with him." His testimony had been taken by deposition. This answer, on motion of plaintiff, was excluded from the jury, and defendant excepted. In this we think the city court erred. Whether he had given a bond or not was a circumstance the jury should know and consider, in determining whether there had been a concluded contract or mere negotiation looking to the formation of a contract. The balance of the answer had been previously deposed to by Patton, and it was no error to repeat it. Nor was it improper to state, as fact, that the company required bonds from contractors only.

The witness Patton gave two answers, each of which, on a separate motion of plaintiff, was stricken out, and exceptions severally reserved. The answers were as follows: The first answer: "This contract was given to Worthington by Putnam, at my special instance, and because of my previous negotiations with Worthington. The amount of work done for Putnam by Worthington on the trestles is the identical amount of work that he would have done for the company, had the company contracted directly with him instead of with Putnam for the framing, as he did all the framing that was to be done on the trestles." Second answer: "But, at all events, the entire claim is erroneous, if it pertains to the construction of the Bigbee river, Bassett's, and Lewis' creek trestles, or any part of them, as the entire work of those trestles was done under contract with Putnam, as far as the railroad company was concerned; and even Putnam himself would have no claim to these items. The claim is, from an engineering standpoint, preposterous." Patton was the chief engineer at the time the contract was let out. If Worthington was an original contractor, he made his contract with Patton, and no one else. He, Patton, testified that he negotiated with Worthington about the work; price per M feet was concurred in, but that no contract was consummated. (As to what constitutes a binding contract, see Rutledge v. Townsend, 38 Ala. 706.) He testified, further, that, when he let the contract to Putnam, he requested him to give to Worthington the construction of these trestles. In the first answer above he simply reiterated the manner in which he had said Worthington obtained the job on the trestles, and he then added that Worthington had done all the work on the trestles which he would have done if he had himself become the contractor with the company. There was certainly nothing illegal in this. It was all, in form, a statement of fact, although, to some extent, a col-

lective statement. This is permissible, and, to avoid prolixity, frequently desirable. Pollock v. Gantt, 69 Ala. 373; Elliott v. Stocks, 67 Ala. 290. The second answer was but a repetition of the statement that the railroad's contract was with Putnam, not Worthington, with the superadded statement, as an engineer and expert, that a particular item, for which a separate charge was made, was improper, whether the work was done by Putnam or Worthington. The city court erred in each of these rulings. As we have said, an important issue in this case was whether Worthington was an independent contractor, or a subcontractor under Putnam. The witness Slaughter had, for a time, had some agency or supervision in connection with the erection of the trestles. In answer to a proper question he testified: "I certainly recollect he [Putnam] was giving him [Worthington] instructions." He was then asked this question "Did Mr. Worthington make any, and if so, what, objections in your presence to Putnam giving him instructions or directions about the manner of doing pile work at Lewis' creek, and about the manner of his doing the superstructure on that pile work,—the framing of the trestles?" On objection from plaintiff the witness was not allowed to answer this question, and defendant excepted. This was error. If Worthington submitted to direction and control at the hands of Putnam, it was, at least, a circumstance to be weighed by the jury in determining whether he was working under an independent contractor under Putnam.

The publication for bids was competent testimony for either party,—for the plaintiff, in that it gave no notice that contracts, to be binding, must first be submitted to and approved by the president of the railroad; for the defendant, in that it notified the bidders who were induced by it to make bids that "sufficient security to insure the prompt and proper execution of the work will be required." The answer to this question ought to have been received.

We consider it unnecessary to notice any other exceptions to rulings on testimony. The court affirmatively charged the jury, at the instance of plaintiff, "that a verbal contract is as valid and binding as a written contract." There were also two charges requested by defendant and refused, to the effect that there was not sufficient evidence in this case to authorize the jury to find a contract was made with Worthington to build the trestles. It was certainly one of the terms of the advertised letting that the contractor should give "sufficient security to insure the prompt and proper execution of the work." If, at the time of the interview between Patton and Worthington, that or any other term of the contract was left open for future agreement or action, then no contract was completely made and agreed on, and could not be, until Worthington executed the required security, or tendered its execution. Even if the negotiation had progressed so far that the terms were all agreed on, and Worthington was promised the job on his giving the required security, this would preclude him from maintaining an action for a breach of the contract, unless, within a reasonable time, he executed, or offered to execute, said security. This provision of the offer was inserted for the benefit of the railroad, and it was competent for that party to waive it. We cannot affirm, as matter of law, that it was not waived. We therefore hold that the plaintiff's failure to prove that the security was given or tendered was, at most, a circumstance to be weighed by the jury, in determining whether a concluded contract was agreed on with Worthington. Whenever, under the terms of the law, or of the agreement made, a writing is necessary to complete the contract, or to make it binding, it would be error to charge the jury that "a verbal contract is as valid and binding as a written one." But inasmuch as security could have been waived in this case, the only criticism the charge is subject to is that it did not take in all the bearings of the question. It may have presented a proper case for an explanatory charge, but the giving of it was not a reversible error. There is nothing in any of the charges given or refused which calls for a reversal. For the erroneous rulings on the admission of evidence, pointed out above, the judgment of the city court must be reversed. Reversed and remanded.

PER CURIAM. The bill of exceptions in this transcript is unnecessarily long. Let the judgment show that the appellee is taxed with only half the cost of copying the bill of exceptions in the transcript. The other half must be paid by the appellant.

(95 Ala. 213)

JOSEPH v. HENDERSON.

(*Supreme Court of Alabama.* April 7, 1892.)

WRONGFUL ATTACHMENT—TRESPASS—ACTION ON THE CASE—PLEADING—POSSESSION OF ATTACHED PROPERTY.

1. A count, in a complaint for wrongful attachment, alleging that "plaintiff claims of defendant $5,000 damages for wrongfully taking the following goods and chattels, the property of plaintiff, viz., a stock of general merchandise formerly owned by A., consisting of dry goods, groceries, hardware," etc., in a certain town and building, is a good count in trespass, under the Code of Alabama.

2. The owner of goods wrongfully attached cannot maintain trespass therefor, where, at the time they were attached, they were not in his actual possession, but were in the possession of the sheriff, under prior attachments by other of his creditors.

3. The owner of goods wrongfully attached may maintain an action on the case for damages, though at the time of the attachment the goods were in the possession of the sheriff under prior attachments by other of his creditors.

4. Under Code, § 2956, providing that, in case of an attachment issued by a justice of the peace for an amount exceeding his jurisdiction, and not more than the amount of the penalty of the constable's bond, the justice may direct that it be executed by the constable, who shall return the same to the court to which it is returnable; and section 2958, providing for the sale of property levied on by order of the court, and that the proceeds of the sale shall be retained by the sheriff; and section 2959, authorizing the sheriff to sell property under certain conditions without an order of court,—property levied on by

a constable, and delivered to the sheriff, is in the latter's possession as sheriff, and not as mere bailee of the constable, though the statute does not expressly direct the constable to turn the property over to the sheriff.

Appeal from circuit court, Randolph county; JAMES R. DOWDELL, Judge.

Action by Samuel Henderson against M. Joseph to recover damages for the alleged wrongful levy of an attachment upon a certain stock of goods. As originally filed, the complaint contained but one count, which was as follows: "The plaintiff claims of the defendant five thousand dollars damages for wrongfully taking the following goods and chattels, the property of the plaintiff, viz., a stock of general merchandise formerly owned by A. J. Langley & Bro., consisting of dry goods, groceries, hardware," etc., "in the town of Roanoke, and in the Dane Manly building." The complaint was afterwards amended by adding the two following counts: "(2) The plaintiff claims of the defendant the further sum of five thousand dollars, for this: that heretofore, to wit, on the —— day of ——, 1889, the defendant wrongfully caused an attachment sued out by himself against A. J. Langley & Bro. to be levied on a certain stock of goods in Roanoke, Ala., said stock being general merchandise, which was the property of the plaintiff; and plaintiff avers that said goods were at the time of said levy in the possession of the sheriff of said county under a prior attachment sued out by other parties, which had been levied on said goods. Plaintiff avers that, by reason of said wrongful levy of said defendant, said goods were lost to this plaintiff by the sale of said goods by the sheriff under defendant's attachment; wherefore he sues." "(3) The plaintiff further claims of the defendant five thousand dollars damages for the conversion by him on the —— day of ——, 1889, of the following chattels: Certain goods, wares, and merchandise which were in Roanoke, Ala., in a building known as the 'Manly Building,' the property of the plaintiff." Defendant demurred to the complaint as amended, on the grounds that there was a misjoinder of counts, in that the first and second counts were in trespass and case, and the third in trover, and that the counts did not sufficiently describe the property levied on; and that, under the facts stated in the second count, plaintiff was not entitled to recover the goods claimed to have been levied on at the instance of defendant; because it is alleged in said count that the goods were not in the possession of the plaintiff, but were in the custody of the law under a prior attachment, which had been levied on them. The first-mentioned grounds were sustained by the court, and the others were overruled. The plaintiff amended his complaint by striking out the third count thereof. It appeared from the pleadings that plaintiff was the assignee of A. J. Langley & Bro., who had made an assignment of their stock of goods to him for the benefit of their creditors; that at the time of the levy of the attachment at the suit of defendant the goods were not in the possession of plaintiff, but were in the hands of the sheriff, having been previously levied upon under writs of attachment issued at the suits of three several creditors of the firm of A. J. Langley & Bro.; and that while so in the possession of the sheriff, under the prior writs of attachment, the attachment, at the instance of defendant, was levied upon them, subject to the three prior attachments. From the rulings of the court on the demurrers, defendant appeals. Affirmed.

J. M. & E. M. Oliver, for appellant. *N. D. Denson*, for appellee.

COLEMAN, J. The record brings up for review only the rulings of the trial court upon the pleadings. The complaint was amended by striking out the count in trover, leaving only the first and second counts of the complaint. The first count is in trespass, and in the usual form, as prescribed by the Code. All assignments as cause for demurrer to this count, or to the complaint as a whole, were properly overruled. There is some contention as to whether the second count is in case or trespass. Trespass and case may be joined under section 2673 of the Code. The averments of the second count show that the plaintiff was not in possession of the property, and did not have the right to the immediate possession when the levy complained of was made, but, whether in case or trespass, the demurrer to the second count raises the question as to its sufficiency to show a cause of action. A creditor who causes an attachment to be wrongfully levied upon property is equally guilty of a trespass as the officer who makes the levy. The second count does not negative the fact that the prior attachment sued out against A. J. Langley & Bro., and which was levied upon the stock of goods, the subject of controversy, was wrongfully sued out, or wrongfully levied upon the goods. Applying the rule that the pleadings must be construed strictly against the pleader, we are of opinion that this count shows that, the sheriff being rightfully in possession of the stock of goods by virtue of the prior levy at the suit of other creditors, the defendant sued out at his own instance an attachment against Langley & Bro., and wrongfully caused the same to be levied upon the goods in question, and had the goods sold under his attachment, to the damage of the plaintiff. The goods being *in gremio legis*, and plaintiff not being in actual possession, and not having the immediate right of possession according to the averments of his second count, he could not maintain trespass. Davis v. Young, 20 Ala. 151; Nelson v. Bondurant, 26 Ala. 341; Harmon v. McRae, 91 Ala. 409, 8 South. Rep. 548.

Will case lie against one who causes an attachment to be wrongfully levied upon goods which are *in gremio legis*? The ownership of the defendant debtor of his chattels is not divested by the levy of an attachment; the levy only creates a lien upon the property in favor of the plaintiff. Code, § 2957. The lien is dependent upon the judgment to be recovered, and when recovered it relates back to the levy.

Scarborough v. Malone, 67 Ala. 572; Cordaman v. Malone, 63 Ala. 556. Any loss or damage sustained by the owner, the result of neglect or misconduct on the part of the sheriff, or the wrongful act of any other person while the goods are rightfully in the possession and under the control of such sheriff as an officer of the court, may be recovered by the owner by an action on the case. Property claimed by a vendee of a defendant debtor, in some instances, may be rightfully levied upon at the suit of one creditor, and not subject to attachment at the suit of another person. When property of a defendant debtor is in the possession of the sheriff by virtue of a levy of attachment or execution, and subsequent writs of attachment or execution are received by him against the same defendant, returnable to the same court, and to which the property is liable, a second levy by the sheriff, and indorsement thereof on the writ subject to the prior levy, does not disturb or in any manner interfere with the *custodia legis* under the first levy. If the sheriff should undertake to displace or subordinate the prior lien secured by the first levy, he might render himself liable to the creditors holding the prior lien. 67 Ala. supra; 63 Ala. supra. This principle, however, is wholly unlike those in which, to prevent a conflict in the jurisdiction of different courts, it is held that property *in gremio legis* of one court cannot be seized under process of another court, or where replevy or other bonds have been executed by the defendant in the suit, or by a stranger, by which the actual custody of the property is taken from the officer, and placed in the possession of the obligors, and held upon condition that the property be returned, etc. In cases of the latter character, the property cannot be levied upon by attachment or executions against the original debtor or the claimant. The reasons are fully stated in the authorities cited. Rives v. Wilborne, 6 Ala. 38; Pond v. Griffie, 1 Ala. 678; Cordaman v. Malone, 63 Ala. 558; Kemp v. Porter, 7 Ala. 138; Dollins v. Lindsey, 89 Ala. 219, 7 South. Rep. 284; Harmon v. McRae, (Ala.) 8 South. Rep. 550. We are of opinion that the second count, when construed as an entirety, presents a complaint in case. True, the first clause would indicate an intention on the part of the pleader to count in trespass, but the further averments show that the injury complained of, and which damaged him, was the wrongful levy and sale of the property caused by the defendant under his attachment, while the property was rightfully in the possession of the sheriff under prior attachment. As we have seen, to recover damages sustained under such circumstances, case will lie.

Section 2956 provides, in cases of attachment issued by justices of the peace for an amount exceeding the jurisdiction of the justice, and not more than the amount of the penalty of the constable's bond, that the justice may, by indorsement on the process, "direct that it be executed by the constable of the precinct, who shall return the same to the court to which it is returnable." Section 2958 provides for the sale of the property levied upon by order of the court, and "the proceeds of the sale be retained by the sheriff," etc., and under section 2959 the sheriff is authorized to sell property under certain conditions without an order of court. We are of opinion that the property levied upon by the constable was properly delivered by him to the sheriff, and that when so delivered it was in his possession as sheriff, and not as a mere bailee to the constable. The statute does not expressly direct the constable to turn the property over in such cases to the sheriff, but a fair construction of the several statutes, and of the duties imposed upon the sheriff, and of the fact that the writ should be directed to the sheriff, lead to the conclusion that the authority of the constable in such cases ends when he delivers the property to the sheriff, and makes his return to the proper court. It is unnecessary to adjudicate in detail all the questions raised by the assignment of errors. We at first thought, and so stated, that the case ought to be reversed; but, after careful examination of the facts as stated in the pleadings, we are satisfied that the trial court held to the same conclusion reached by this court, and that his rulings are free from error.

Affirmed.

(95 Ala. 311)

SMITH v. DICK.

(*Supreme Court of Alabama.* April 12, 1892.)

ASSUMPSIT—PLEADING—APPEAL—OBJECTIONS TO VERDICT.

1. Under Code, p. 792, which provides that, in an action on an account, the complaint shall allege that the claim is "for merchandise, goods, and chattels sold by the plaintiff to the defendant," a complaint was sufficient which alleged that plaintiff claimed "of defendant the sum of one hundred dollars for a mule that plaintiff sold to defendant."

2. A plea to such count, alleging that plaintiff gave defendant certain mules to sell, the profits arising therefrom to be divided between the parties, and that there had been no accounting between them, is insufficient on demurrer.

3. The objection that the amount of the judgment and verdict was more than the amount claimed in the complaint cannot be raised for the first time on appeal.

Appeal from circuit court, Lee county; J. M. CARMICHAEL, Judge.

Action by C. W. Dick against A. J. Smith on an account. From a judgment on a verdict for plaintiff, defendant appeals. Affirmed.

This action was brought by the appellee, C. W. Dick, against the appellant, A. J. Smith, and counted upon the common counts in the following language: "The plaintiff claims of the defendant the sum of one hundred dollars due on account stated before the commencement of this suit, on, to wit, the ——— day of February, 1888. The plaintiff claims of the defendant the sum of one hundred dollars for a mule that plaintiff sold to defendant." The suit was commenced in the magistrate's court, and was appealed to the circuit court by defendant. The defendant demurred to the first count of the complaint upon the ground that it did not aver the day upon which the account

therein alleged was stated. The defendant also demurred to the second count of said complaint, on the grounds that it fails to show in what manner the defendant is liable in the sum claimed for the mule; *second*, that said count fails to aver that plaintiff sold the mule named therein for the sum claimed; *third*, that said count does not show that defendant was liable in the sum claimed for the mule mentioned in the count. The plaintiff was granted leave to amend his first count in the complaint, and the demurrers to the second count of the complaint were overruled. The defendant pleaded the general issue, and by special plea set up the defense that, by an agreement between the plaintiff and defendant, a certain number of mules were placed in the defendant's care for sale, with the understanding that, after the plaintiff paid back the purchase price of the mules, and the defendant was paid the expenses incurred in keeping them, the plaintiff and the defendant were to divide the net profits among themselves; and the defendant averred in the special pleas that there had not been any settlement of the profits between plaintiff and the defendant. The judgment entry recites that the plaintiff's demurrer to defendant's plea No. 4 was sustained, but the record does not contain the demurrer referred to. The judgment also recites that upon the jury finding for the plaintiff, and assessing his damages at $124, the court proceeded to render judgment for that amount against the defendant and the sureties on his appeal bond from the justice's court to the circuit court.

J. M. Chilton and *S. O. Houstin*, for appellant. *T. L. Kennedy*, for appellee.

WALKER, J. 1. The second count of the complaint follows substantially one of the Code forms for the common counts, the claim being for "one hundred dollars for a mule that plaintiff sold to the defendant." In one of the Code forms the language is, "for merchandise, goods, and chattels sold by the plaintiff to the defendant," etc. Code 1886, p. 792. "The declaration or statement in case of appeal from a justice of the peace is not subject to the technical rules of pleading. If it shows, in general terms, a debt due or contract to be performed, and a breach, it is sufficient." 1 Brick. Dig. p. 114, § 77; Telegraph Co. v. Meyer, 61 Ala. 158. Certainly, the second count of the complaint in this case conformed to this requirement, and the demurrer thereto was properly overruled.

2. The demurrer to the fourth plea is not copied into the record. When the grounds of the demurrer do not appear on the presumption in favor of the ruling of the primary court, its action in sustaining the demurrer will be affirmed, if there be any sufficient cause of demurrer. Sessions v. Boykin, 78 Ala. 328. The fourth plea was not an appropriate answer to the whole complaint. It was not so framed as to apply to the cause of action stated in the second count.

3. It is assigned as error that the judgment was for more than the amount claimed in the complaint, with interest thereon. The judgment was for the amount found by the verdict. The objection now urged was not made in the lower court. It cannot be made on appeal for the first time. The remedy in such case is by motion for a new trial in the court below, where the error may be cured by a release of the excess, or such other order made as the justice of the case may require. As the complaint contains a substantial cause of action, the judgment cannot be set aside for a matter not previously objected to. Code, § 2835; Ritch v. Thornton, 65 Ala. 310; Government Street R. v. Hanlon, 53 Ala. 70.

Affirmed.

(96 Ala. 214)

ATKINSON *et al.* v. JAMES.

(*Supreme Court of Alabama.* April 12, 1892.)

ATTACHMENT—ISSUANCE BY CLERK—LANDLORD'S LIEN ON CROPS.

1. Code, §§ 2929, 2931, provide that any civil action may be commenced by attachment, and authorize a clerk of the circuit court to issue such attachment for the collection of "any moneyed demand," the amount of which can be certainly ascertained. But in actions to recover "damages for a breach of a contract, when the damages are not certain or liquidated," or when "the action sounds in damages merely," only the judge or chancellor can issue the attachment. *Held*, in an action to recover damages for the removal of four bales of cotton on which plaintiff held a landlord's lien for rent and advances, that the clerk had authority to issue an attachment.

2. Code, § 3056, provides that a landlord has a lien which is paramount to all other liens on the crops grown on rented lands for rent for the current year and for advances. *Held*, where W. was a tenant of plaintiff, and was indebted to him for rent and advances, and defendants knew of such tenancy, that they were charged with constructive notice of such indebtedness, and W.'s mortgage to defendants on such cotton for additional advances would not give them any right as against plaintiff.

3. The fact that the cotton was delivered to defendants in Georgia could avail them nothing.

Appeal from circuit court, Chambers county; JAMES R. DOWDELL, Judge.

Action on the case by Lee L. James against Atkinson & Turner to recover damages for the removal of four bales of cotton. From a judgment on a verdict for plaintiff, defendants appeal. Affirmed.

A demurrer was sustained to the defendants' plea in abatement. The testimony, as shown by the bill of exceptions, was that the plaintiff, James, rented a farm to one Frank Washington in the year 1890. On February 18, 1890, the defendants took a mortgage on the crop of said Washington, and in the fall of the year the defendants, who were residents of West Point, Ga., received from the said Washington four bales of cotton grown on the land, and applied it to the payment of said Washington's account, which was secured by the mortgage, as above stated. It was also shown that the defendant had notice that the said Washington was a tenant of the plaintiff, and that the cotton sold them by Washington was raised on the rented premises. The court, at the request of the plaintiff, gave the general affirmative charge in his behalf, to which the defendants duly excepted. Defendants also reserved an exception to the court's

refusal to give the general affirmative charge in their favor.

M. D. Denson, for appellants. *Wm. J. Sanford* and *Wm. H. Thomas*, for appellee.

COLEMAN, J. This is an action in case to recover damages against appellants for having purchased and removed four bales of cotton upon which the plaintiff held a landlord's lien for rent and advances. The suit was begun by attachment, issued by the clerk of the circuit court. The defendant pleaded in abatement that the clerk had no authority to issue the attachment. Under our statute, any civil action, whether arising *ex contractu* or in tort, under proper conditions, may be commenced by attachment. Code, § 2929. A clerk of the city or circuit court is authorized to issue the attachment "to enforce the collection of a debt, whether due or not," and for the collection of "any moneyed demand the amount of which can be certainly ascertained." When the action is to recover "damages for a breach of contract when the damages are not certain or liquidated," or when "the action sounds in damages merely," only a judge of the circuit court, probate judge, or chancellor has authority to issue the attachment. Code, §§ 2929, 2931. The term "moneyed demand" ordinarily is of comprehensive meaning, and may arise out of contract or breach of duty. Whether its collection be enforced by actions *ex contractu* or *ex delicto* does not alter its character as a moneyed demand for which an attachment will lie. The statute limits the authority of the clerk to issue attachments for a moneyed demand to cases in "which the amount can be certainly ascertained." The term "moneyed demand," as used in section 2789 of the Code,—which provides that, "if suit be brought on any moneyed demand for a less amount than that of which the court has jurisdiction, the suit must be dismissed," etc.,—was construed by this court many years ago in King v. Parmer, 34 Ala. 416, to apply only to actions *ex contractu*. In construing that section, the court stated the context controlled the meaning of the phrase, and in the opinion confined the definition given to the term to the section as there "employed." In the same case Chief Justice A. J. WALKER, *arguendo*, held that "moneyed demand," as used in section 2503, Code 1852, which is the same as section 2929 of the present Code, included trover, an action in tort. This decision was reaffirmed in Mills v. Long, 58 Ala. 458, and as there construed the act has been readopted into the present Code. Section 2934 of the Code provides that before an attachment shall issue to enforce the collection of a demand "for a breach of contract, when the damages are not certain or liquidated," or "when the action sounds in damages merely," an additional "affidavit in writing must be made of the special facts and circumstances," so as to enable the officer "to determine the amount for which a levy must be made," etc. In such cases the clerk has no authority to issue an attachment. Attachment may be issued in trover by the clerk, the recovery in such cases being clearly ascertainable from the value of material things. So in actions on the case, if in the particular action the character of the demand is such that the recoverable damages are fixed by a legal standard, such as are ascertainable from the value of material things, the clerk may issue the attachment. This is clearly the meaning of the statute, for it is provided in the third and fourth subdivisions of section 2929 "that, when the damages are not certain or liquidated," or when the "action sounds in damages merely," the clerk cannot issue the attachment, while it is expressly provided that to enforce legal moneyed demands, in all other cases, whether *ex contractu* or *ex delicto*, he may issue the attachment. The inquiry arises, does the law fix a legal standard for the admeasurement of damages "certainly ascertainable," when the action is in case to recover damages for the destruction of a landlord's lien upon property for rent and advances, which in the present case was four bales of cotton? The lien does not confer on the landlord a right of property or the right of possession, but simply a right to charge it with the payment of rent and advances. As was said in Westmoreland v. Foster, 60 Ala. 455, "it is simply a right to have so much money carried out of the proceeds. Trespass, detinue, or trover cannot be maintained on such a right." Hussey v. Peebles, 53 Ala. 435. The payment of the landlord's debt and interest extinguished both debt and lien. The property upon which the lien is given is a material thing, and its value ascertainable with legal certainty. No damages are recoverable over and above the value of the property upon which the lien existed, and this is limited by the amount of the debt for which the lien is given. The recovery, though the action is in case, is the same as where *assumpsit* is brought for money had and received, against one who has converted the crop into money with knowledge of the lien. Thompson v. Merriman, 15 Ala. 166; Westmoreland v. Foster, supra; Coffey v. Hunt, 75 Ala. 240. We are of opinion that the court ruled properly in sustaining the demurrer to the plea in abatement.

The facts show that defendants were nonresidents, merchants doing business at West Point, Ga., just across the state line, and only two or three miles from the land upon which the cotton grew. It is not controverted that Frank Washington, from whom the cotton was purchased, was indebted to plaintiff for rent and advances for the year 1890. It further appears that to obtain additional advances, on the 18th of February, 1890, Frank Washington executed a mortgage to defendants on his crop of cotton to be grown that year on lands in Chambers county, Ala. The evidence sufficiently shows that the defendants knew when they took the mortgage and made the advances to Frank Washington that he was a tenant of James, and that the crops mortgaged were to be grown on lands rented from James. In the fall of the year Frank Washington carried four bales of cotton, raised on the rented land, to West Point, in Georgia, and sold the

same to defendants, the proceeds to be applied to the payment, and which were so applied, of the mortgage debt. It appears that the cotton was carried off and sold without the knowledge or consent of the landlord. Defendants admit that they knew that Frank Washington was a tenant of James, but deny that they had any notice or knowledge of the fact that Frank Washington had obtained advances from or was indebted to his landlord for advances. They claim to be innocent purchasers of the cotton after it was removed into the state of Georgia, for a valuable consideration, and without notice of the landlord's lien for advances.

A short and simple denial of notice of plaintiff's lien for rent and advances may be a mere conclusion, and, when the proven and admitted facts exclude the conclusion, the denial amounts to nothing as evidence. The only real question presented by the record is whether a person who, when he purchases a crop from one known to be a tenant, and knows that the crop was grown on rented land, is charged with constructive notice that the tenant owes his landlord for rent or advances or both, which is secured by the statutory lien, if in fact such an indebtedness exist. The statute of this state, as now framed, declares and defines the landlord's lien for rent and advances, and, as interpreted by the decision of this court, clearly establishes that a purchaser of a crop grown on rented land under such circumstances would be chargeable, at least, with constructive notice. It is true that some of the decisions referred to were made with reference to the lien for rent only, and before the statute had created the liens, as now framed, for advances. The statute now declares, (Code, § 3056:) "A landlord has a lien which is paramount to, and has preference over, all other liens on the crop grown on rented lands for rent for the current year, and for advances made in money, or other thing of value, * * * for the sustenance or well-being of the tenant or his family," etc. Whatever right a landlord may assert against one who deprives him of his lien for rent may be asserted and enforced against one who in the same manner interferes with his lien for advances. The common-law methods of distress for rent have been abolished in this state by statute, and the landlord may enforce his lien upon the property whenever found, although removed off the premises, except as against innocent purchasers. These conclusions are supported by the following authorities and others therein cited: Manasses v. Dent, 8 South. Rep. 108, 89 Ala. 565; Lomax v. Le Grand, 60 Ala. 537; Wilkinson v. Ketler, 69 Ala. 441, 442; Hussey v. Peebles, 53 Ala. 436; Boggs v. Price, 64 Ala. 519; Ex parte Barnes, 84 Ala. 540, 4 South. Rep. 769. The fact that the cotton was delivered to defendants in Georgia can avail them nothing. Having knowledge that the cotton was grown on rented land, they are charged with knowledge,—constructive notice of plaintiff's lien for rent and advances at the time of their purchase from his tenant. The price was credited upon a mortgage purporting to have been made in Alabama. It was recorded in Alabama, and the cotton was delivered and received according to the provisions of the mortgage contract. It would be a strange principle of law which would hold these defendants liable if the cotton had been purchased by them in Alabama, and removed by them into Georgia, and yet exempt them from liability by virtue of an arrangement made with the tenant by which the tenant delivered the cotton across the border of the state. We are not called upon to adjudicate what the rights of the parties would be if the present suit had been instituted in the state of Georgia. Plaintiff's rights are secured to him by a statute of Alabama. The property attached lies in Alabama, and the court had jurisdiction both of the person and property of the defendants. In such cases the rights and remedy are amply furnished by the law and courts of this state.

Affirmed.

(96 Ala. 227)

WADSWORTH v. GOREE.

(*Supreme Court of Alabama.* April 12, 1892.)

APPEAL—TIME OF TAKING—INJUNCTION—TITLE TO LAND—EQUITY JURISDICTION.

1. Under Code, §§ 3611, 3612, 3619, declaring that an appeal may be taken from an order overruling a demurrer to a bill at any time within 30 days, and that if not taken error may be assigned on such ruling on an appeal within a year from the rendition of the final decree, a party who does not appeal within the 30 days, but who does appeal within the year after the final decree, is entitled to assign error not only on such decree, but on the order overruling the demurrer.

2. A bill which alleges that complainant, the owner of a sawmill, had acquired the legal title to land which was heavily timbered, and in the vicinity of the said mill, for the purpose of obtaining logs for his mill; that he had brought ejectment against defendant, who was cutting and removing the timber, but that, owing to the crowded state of the docket, the case would not be tried until the next term, and that by that time, if the defendant was not restrained, all the timber suitable for sawmill purposes would be taken,—makes a case for an injunction, since, although complainant might recover in an action at law for cutting and removing the timber, he could not recover for the loss to him of the use of the mill, or for the loss of the profit to be derived from converting the timber into lumber.

3. Where an action at law to recover land is brought by a person claiming the legal title against another also claiming the legal title, and before the case comes to trial a suit in equity is instituted to restrain waste, the title can be tried only in the action at law.

Appeal from chancery court, Elmore county; S. K. MCSPADDEN, Chancellor.

Bill by James L. Goree against W. W. Wadsworth to enjoin the defendant from cutting timber on lands alleged to be the property of the complainant. From a decree granting the relief asked, defendant appeals. Reversed.

Watts & Son, for appellant. *Tompkins & Troy* and *W. P. Goddis*, for appellee.

STONE, C. J. In Wadsworth's answer is embodied a demurrer to the bill for want of equity. That demurrer was set down for hearing, and a decretal order

was rendered September 11, 1889, overruling the demurrer, and declaring the bill contained equity. No appeal was taken from that interlocutory order. On September 10, 1890, the chancellor rendered a final decree, granting relief to complainant, Goree, and perpetuating the injunction against Wadsworth. Wadsworth took the present appeal to this court December 8, 1890, more than 12 months after the decretal order was rendered overruling the demurrer to the bill. Appellant assigns as error, not only the decree granting relief to Goree, but the interlocutory decree overruling the demurrer to the bill. The appellee submits a motion to strike out the assignments which question the ruling on demurrer, "because it appears from the record that said decree upon which the same are based was rendered more than twelve months before the appeal was taken." It is very true that from the decretal order overruling defendant's demurrer to complainant's bill an appeal might have been prosecuted to this court at any time within 30 days after it was rendered. It is equally true that, if such appeal is not taken, then errors may be assigned on such ruling, if appeal be taken to this court at any time within one year from the rendition of the final decree. Code 1886, §§ 3611, 3612, 3619. There was no appeal taken from the decretal order overruling the demurrer to the bill, and it follows that movant can take nothing by his motion.

The bill charges that Goree is the owner, by legal title, of a tract of land, which it described; that the land is heavily timbered, the timbers being suitable for sawing into lumber, and that, with the exception of the timber, the land is of but little value; that he (complainant) is the owner of a sawmill in the vicinity of the land, and that he purchased the land for the purpose of obtaining such timber, to be used by him in the operation of said sawmill, the timber being necessary to complainant in the operation of his mill; and that, if he is deprived of the same, he will suffer great loss and damage, not only in the value of said timber, but in the great expense and trouble to which he will be put in order to obtain the necessary timber to operate his said sawmill. The bill further charges that Wadsworth, though notified of complainant's claim and right, and warned not to cut or remove the timber, is in possession of the land, persists in cutting and removing large quantities of timber therefrom, and, unless restrained, will soon cut and remove therefrom all timber suitable for sawmill purposes, to the irreparable injury of complainant. The bill then charges that complainant, Goree, has brought an action of ejectment against Wadsworth for the recovery of the land, but, owing to the crowded state of the docket, the case cannot be tried before the next term of the court; "and, if the said Wadsworth persists in cutting said timber, and removing the same from said lands, all that is suitable for sawmill purposes will be taken therefrom before orator will be able to obtain a trial of said ejectment cause." We have now stated briefly the substance of the averments on which the prayer for injunction was rested. It is not charged that Wadsworth was insolvent, or unable to respond in damages for any injury he might inflict. An injunction was granted, and one object of the demurrer, we presume, was to get rid of the injunction. It will be noted that this case is not rested on the right of a reversioner or remainderman to have the freehold preserved against waste or spoliation for his ultimate enjoyment. The complainant avers that the legal title is in him, and states a case which, if true, shows a present right in him to maintain ejectment or trespass for the redress of the wrong it is alleged he was being made to suffer. The ground of demurrer was and is that, complainant's alleged title being purely legal, and the wrong charged in the bill against defendant being a naked trespass, remediable by action at law, no reason is shown why the extraordinary process of injunction should be invoked and granted in this case. If the wrong charged be only a naked trespass, containing no elements of damage which cannot be redressed in an action at law, then this bill is without equity, and the demurrer should have been sustained. High, Inj. §§ 699, 713, 728; Thomas v. James, 32 Ala. 723; Brooks v. Diaz, 35 Ala. 599; Burnett v. Craig, 30 Ala. 135; Attaquin v. Fish, 5 Metc. (Mass.) 140. To justify injunction in such case, there must be something special in the case made, which a court of law cannot adequately redress. 3 Pom. Eq. Jur. § 1347; High, Inj. §§ 673, 699, 713; Lyon v. Hunt, 11 Ala. 295, 306. The case made by the bill, as we have seen, is that complainant is a mill owner; that the lands are in the vicinity of his mill; that there is an abundance of timber on the lands, suitable for saw logs; and that the chief value of the land consists in its abundance of timber that may be sawn into lumber. The inference from the averments of the bill is irresistible that, in acquiring said timber land, complainant's controlling motive and purpose were to obtain the timber, that he might convert it into lumber. This charge necessarily implies the loss to him of the use and enjoyment of his mill and its machinery, and all the profit to be derived from converting the timber into lumber. Can he obtain compensation for this loss in an action at law? In an action at law for cutting and removing the timber, complainant, if he have the legal title to the land, can sue and recover. What would be the measure of his recovery? True, in an action of trespass, he might, in the discretion of the jury, recover smart money, but the only actual damage he could claim would be the actual value of the timber as timber. We speak not of the statutory action provided for by sections 3296, 3297, of the Code. The injury suffered in being deprived of the profit to be derived from the conversion of the timber into lumber, or any other prospective enhancement of its value, would be classed as speculative, and not recoverable in an action at law. Pollock v. Gantt, 69 Ala. 373; Bank v. Jeffries, 73 Ala. 183; 3 Brick. Dig. p. 293,

§ 8. We think the bill makes a case for an injunction against cutting and removing the timber, pending the suit for the recovery of the land. Kane v. Vandenburgh, 1 Johns. Ch. 11, and note 1 N. Y. Ch. R. 10; Jerome v. Ross, 7 Johns. Ch. 315; 10 Amer. & Eng. Enc. Law, 884, and note; Shreve v. Black, 4 N. J. Eq. 177; Chambers v. Iron Co., 67 Ala. 355; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. Rep. 565, and other authorities on brief of appellee. The chancellor did not err in overruling the demurrer to complainant's bill.

In the case we have in hand the bill avers that Goree, the complainant, had instituted an action of ejectment against Wadsworth for the recovery of the lands, which was still pending and undetermined. The record nowhere informs us that any trial has been had of that suit at law, and we must infer from its silence that when the final decree was rendered in this case that action of ejectment had not been tried. It is shown in the record before us that each of the parties, Goree and Wadsworth, claims title to the land, and that whatever title either of them asserts is, in form, a legal title. The bill does not seek to have the question of title determined in the chancery court, and, if it did, it would probably, to that extent, be without equity. When opposing disputants each claims title which is legal in form, the general rule is that such issue can only be tried in a court of law; and to justify its trial and decision in a chancery court special circumstances must be shown, or the question of title must arise as an incident to some other controversy of equitable cognizance. No such case is shown in the present record. In fact the bill contains neither averments nor prayer to have the title passed on in the chancery court. Its whole scope and aim are to have Wadsworth restrained from wasting and destroying the timber, until the question of title is determined in the ejectment suit. A bill filed for such purpose is ancillary to the common-law action, and accomplishes the whole of its legitimate object when it prevents waste or spoliation pending the action at law. The chancellor erred in making the injunction perpetual; at least at that stage of the case. Jerome v. Ross, 7 Johns. Ch. 315, 2 N. Y. Ch. R. 313; 10 Amer. & Eng. Enc. Law, 820, 821; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. Rep. 565; Cornelius v. Post, 9 N. J. Eq. 196; Tainter v. Mayor, 19 N. J. Eq. 46; Ashurst v. McKenzie, 92 Ala. 484, 9 South. Rep. 262. The decree of the chancellor, making the injunction perpetual, is reversed. Let the injunction as first granted stand until the final disposition of the ejectment suit, and let the appellee pay the costs of the appeal.

Reversed and rendered.

(44 La. Ann. 427)

Succession of COMSTOCK. (No. 11,005.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

EXECUTION AGAINST SUCCESSION REPRESENTATIVE —PRESUMPTIONS.

1. Execution can issue against a succession representative, who fails to pay a judgment creditor, only when he has funds in hand wherewith to discharge the debt, and does not do so, after due demand, and when proceedings have been previously instituted against him, culminating into a personal judgment against him, on which the writ can issue.

2. Courts of justice will not supply wanting proceedings, and assume the existence of facts which have no being.

ON REHEARING.

1. A judgment sustaining an opposition to an administrator's account, by which the opponent is decreed entitled to recover a sum of money due by the deceased, does not affect the personal liability of the administrator, who was in no way responsible for the debt; who was not asked to be, and was not, condemned to pay the amount.

2. The registry of such judgment in the mortgage records does not create a judicial mortgage against the administrator, whom it did not affect individually; and the judgment creditor is not entitled to any preference, by virtue of such pretended mortgage, out of the proceeds of the real estate of such administrator.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Feliciana; F. D. BRAME, Judge.

A. E. Comstock, as executrix of her husband, filed an account, which was opposed by H. B. Vaughn, who asked to be placed thereon for $4,097. His opposition was sustained. The executrix died, and her succession was opened by Vaughn, who was appointed to administer it. He rendered an account showing a balance of $2,199, which he proposed to apply to the payment of his judgment. D'Armond opposed. From a judgment sustaining this opposition, and rejecting Vaughn's claim, he appeals. Affirmed.

D. J. Wedge and *Merrick & Merrick*, for appellant. *W. F. Kernan*, for appellee.

BERMUDEZ, C. J. The question presented in this controversy involves the right claimed by the administrator of this succession to a judicial mortgage in his favor, in his individual name, on the real estate left by the deceased, and its proceeds. It appears that Mrs. Comstock, while acting as executrix of her husband, George C. Comstock, filed an account, which was opposed by H. B. Vaughn, who asked to be placed thereon for $4,097. His opposition was sustained for that sum, with interest on fractions of the same, from different dates, on June 30, 1885. This judgment was recorded in the mortgage records on the 3d of July following. Mrs. Comstock having died, her succession was opened by Vaughn, who was appointed to administer it. He subsequently rendered an account showing a a balance of $2,199, which he proposed to apply to the payment of his judgment; claiming that its registry gave him a judicial mortgage on her property and its proceeds. This pretension was opposed by one D'Armond, who claimed for himself a judicial mortgage, and denied any in favor of Vaughn. After hearing, the court sustained the opposition, and rejected Vaughn's pretension. Hence this appeal.

An inspection of the judgment in favor of Vaughn, from the registry of which he contends that a judicial mortgage was created in his favor against Mrs. Comstock and her real estate, shows that it is merely one in favor of Vaughn against

the succession of Mrs. Comstock, and in no way one against Mrs. Comstock individually. The opposition does not charge her with any personal liability for the amount claimed. There was no contention on the subject, and therefore no judgment against her. There is no doubt that administrators may be held personally for omissions or commissions, in certain cases, but there must be charges in such instances; issues must be formed, and a personal responsibility fixed; none of which exists in the present litigation.

Judgment affirmed.

ON REHEARING.

Notwithstanding the protestations and assurances of the counsel for Vaughn, the court persists in affirming that the judgment, from the recording of which a judicial mortgage is claimed to have sprung, is not a personal judgment against Mrs. Comstock, but is a judgment on his opposition to an account in the succession of Mr. Comstock against his estate, ordering the opponent to be placed upon it and paid accordingly. It will not do to argue that execution could have issued against Mrs. Comstock on that judgment, and that no execution could thus have issued, unless the judgment was a personal judgment. This is an assumption altogether unauthorized; a *petitio principii* and a fallacy which create a confusion of ideas on the subject. Under the articles of the Code of Practice treating of this matter, and the several authorities cited in the opinion, the creditor might have taken that judgment as a basis for a personal judgment against Mrs. Comstock if, having funds to pay, she had refused or failed to do so, the same to be obtained on subsequent contradictory proceedings, culminating into such personal judgments; but it is not until then that execution could issue. Code Prac. arts. 993, 1057, et seq.; Carriere v. Meyer, 16 La. 126; Wells v. Roach, 10 La. Ann. 543; Stevens v. Stevens, 13 La. Ann. 416; Succession of Philbrick, 18 La. Ann. 220. No such proceedings were taken, and no personal judgment, therefore, was subsequently rendered against Mrs. Comstock, on which execution could have issued.

Vaughn complains that D'Armond, whose claim was recognized with a judicial mortgage, is not entitled to that security, because, Mrs. Comstock having died in October, 1889, and D'Armond's judgment having been recorded in December following, the registry did not create a judicial mortgage in his favor, because it was made after her death. Succession of Gayle, 27 La. Ann. 552; Succession of Myrick, 43 La. Ann. 885, 9 South. Rep. 498; Succession of Gagneux, 40 La. Ann. 703, 4 South. Rep. 869. We did not consider this objection in the opinion, for the reason that we thought that, as Vaughn was no creditor at all of Mrs. Comstock, he had no interest to attack D'Armond, and that the district judge had nevertheless recognized the claim and the mortgage. The record shows that D'Armond is a creditor, as the transferee of a judgment against Mrs. Comstock for $715, but does not establish the date of the death of Mrs. Comstock. D'Armond surely had the right, as a judgment creditor, to oppose the absorption by Vaughn of the residue of $2,199 in favor of his judgment against the succession of Mrs. Comstock; and the district court was right in so holding. If it be true that, at the time he was recognized as such creditor, Mrs. Comstock had ample funds in hand to discharge his claim, and that, on due demand, she failed to do so, Vaughn could have taken the steps pointed out by law to hold her personally responsible; and, after obtaining a judgment against her individually, he could have issued execution against her, and, having recorded the judgment before her death, could have claimed a judicial mortgage on her real estate, and enforced it after her death against her succession and heirs. It may be that he suffers, but his lot is of his own making, and he cannot complain now that his derelictions have defeated his claim, which otherwise, perhaps, might have been satisfied. Courts of justice cannot supply wanting proceedings, and assume the existence of judgments which never existed.

(44 La. Ann. 543)

Succession of GIRARDEY. (No. 10,836.)

Appeal of CITY OF NEW ORLEANS. (No. 10,836.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

PRACTICE—PROBATE COURTS—PRESERVATION OF EVIDENCE—HOMOLOGATION OF ACCOUNTS.

1. The provisions of Code Pr. art. 1042, which require that "the testimony of witnesses in cases before the court of probate shall be taken in writing, and annexed to the record," has for their object to preserve the evidence of claims which are placed upon a succession account for the benefit of minors and absentees, so that their right of appeal shall not be abridged.

2. In case an account be homologated without due proof reduced to writing or otherwise, except as to a single creditor who has opposed, the judgment cannot be maintained, except as to the claim of that opponent.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Succession of C. E. Girardey. The city of New Orleans filed an opposition to the provisional account. From the judgment opponent appeals. Affirmed.

W. B. Sommerville, Asst. City Atty., and *Carleton Hunt*, City Atty., for appellant. *B. R. Forman*, for appellee.

WATKINS, J. Originally there were several different oppositions to the account, all of which are dealt with and determined, respectively, in the judgment homologating same, on the 12th of March, 1891; that of the city of New Orleans having been dismissed on an exception and plea of prescription. On the 16th of December, 1890, there was a judgment homologating the account, "so far as not opposed." The city appears as intervener *quoad* the last-mentioned decree, and as such she appeals; and from the first-mentioned judgment she has appealed, in her capacity of opponent and defendant, other opponents not making any further contest. Hence the question for decision is the distribution of the

funds of the succession, and the right of the city to participate therein. In this court counsel for the city has filed an assignment of errors, in aid of her appeals, in which are formulated and circumstantially stated the grounds of her appeals, and which are substantially that (1) the said judgments of homologation were rendered without any proof having been introduced as to the correctness of the items of the account opposed; (2) that the record contains no note in writing of any such evidence having been introduced to serve as a proper foundation of said judgments; (3) that the record contains no evidence of the correctness of the items of said account, and the judgments homologating such accounts were rendered without any sufficient evidence. The record shows that the city's petition of opposition simply alleges that she is a creditor of the succession for a large amount of taxes, due for the years 1877 to 1890, inclusive, the whole aggregating, in capital alone, $3,177.64; and her prayer is "that the account herein filed be amended by placing [her] thereon as a first privilege creditor" for the amounts due for the various years enumerated, with interest, and that same enjoy preference in payment from the proceeds of the sale in the hands of the administratrix. During the progress of the proceedings counsel for the administratrix tendered, as an estoppel against the right of the city to participate in the distribution, her resistance to a rule the administratrix had theretofore taken to compel the cancellation of certain tax inscriptions against the property, subsequent to its sale; and she also urged the prescription of two, three, five, and ten years as a bar to the city's claim for taxes, as well as against the privilege claimed as securing their payment. On this statement of the issues raised, in respect to the opposition of the city, there seems to be no question for determination, other than that of privilege *vel non*, and that rests alone upon the plea of prescription urged by the administratrix.

It is true that counsel objected to the city tax bills being introduced in evidence, on the ground that the comptroller's certificate, or certified copies of the tax rolls, constitute the best evidence. We are of opinion that the judge of the lower court correctly overruled the objection, because the tax bills appear to be official exhibits, or exemplifications from tax-rolls signed by the city treasurer, giving full and complete *data* of the assessment. If there be any objection, it goes to the sufficiency, and not to the admissibility, of the evidence. Mullan v. His Creditors, 39 La. Ann. 398, 2 South. Rep. 45.

Considering the question of the prescription of the tax privileges of the various years in question, we find that those of the years 1882, 1883, 1884, and 1885 are governed by the terms of section 34, Act 96 of 1882, p. 130, which fixes the prescriptible period at five years; and those since 1886 are governed by the provisions of section 34 of Act 98 of 1886, p. 145, (since re-enacted as Act 85 of 1888,) which fixes the prescriptible period at three years. Opposition of the city having been filed on the 21st of December, 1891, all tax liens and privileges securing the taxes of 1885 and antecedent years were prescribed by five years. Succession of Stewart, 41 La. Ann. 127, 6 South. Rep. 587. And those securing the taxes of the years 1886, 1887, and 1888 were extinguished by the prescription of three years. By the operation of these two periods of prescription all of the tax privileges have become inoperative against the claims and demands of succession creditors, except, possibly, the insignificant sum of $27.59, for the taxes of 1889 and 1890, of which the city appears to have made no specific complaint. This is manifestly an insolvent succession, the total proceeds marshaled for distribution only aggregating $18,712.50, and the privileged debts enumerated on the tableau amounting to $17,570.46, in capital alone; nothing remaining to be applied to the payment of ordinary debts of about $3,000, and only a small amount of property remaining unsold. Under this statement of facts, the demands of the city, as an ordinary creditor of the succession, would be completely overshadowed and defeated by the demands of other creditors, whose claims are secured by mortgage and privilege. Succession of Mercier, 42 La. Ann. 1135, 8 South. Rep. 732. As a reason why the demands of such creditors—and notably of the widow of the deceased, who figures as a creditor of his succession for a large sum—should be disallowed and rejected, counsel for the city points to the provisions of article 1042 of the Code of Practice as mandatory and controlling, and his insistence is that the failure of the counsel to observe its provisions results fatally to all the claims that are covered by the judgments rendered. That article is found in that chapter of the Code which treats "of the proceedings in violation to all actions brought in the parish court as a court of probate," and it declares that "the testimony of witnesses in cases before the courts of probate shall be taken in writing, and annexed to the record," etc. Respecting the provisions of that article as mandatory, we cannot perceive the interest of the city to urge them. She is a person in law, and *sui juris*. In her answer and opposition she affirms the existence of a lien and privilege for the security of her taxes, but she does not object to or disaffirm the validity or binding force of the privileges and mortgages asserted by other creditors. If the evidence, the absence of which she complains, were in the record, it is very doubtful whether or not she could avail herself of it, to impeach or diminish the demands of which she has made no complaint. *Res inter alios acta*. In Succession of Reeves, 3 La. Ann. 554, a case cited in city's brief, the court, in commenting on that article, says: "The interests of minors and absentees in probate proceedings have induced our predecessors, on all occasions, to require a compliance with this regulation on the part of those courts," etc. In quite a number of cases this article has been examined and construed, the purport of decision being that its object is to preserve the evidence of claims placed upon succession accounts, for the benefit of minors and absentees, so

that the right of appeal shall not be embarrassed or abridged. Thompkins v. Benjamin, 16 La. 200; Graham v. Graham, Id. 203; Desormes v. Desormes, 17 La. 115; Pargood v. Breard, 4 La. Ann. 517; Succession of Ross, 21 La. Ann. 511; Succession of Dorville, 27 La. Ann. 131; Succession of Cloney, 29 La. Ann. 328; But in Succession of Bellocq, 28 La. Ann. 154, a case is stated wherein an account had been "homologated in so far as not opposed," and the record disclosed but one opposition to the account; and, considering the provisions of the cited article, the court said: "As the account was homologated without any proof reduced to writing or otherwise, *except as to the creditor who opposed it*, the judgment, *except as to said opponent*, cannot be maintained." (Italics ours.) In Succession of Commagere, 38 La. Ann. 834, we had occasion to examine and collate the authorities *pro et con* bearing on the question of what effect is to be attributed to a judgment homologating an account, so far as not opposed, and we held, substantially, that one opponent could take advantage of the opposition of another opponent, which suspended decision of the court, in respect to any and all items thereon opposed, so as to enable the former to supplement his opposition by including such items as the latter had opposed. But in the instant case all oppositions, other than that of the city, have been abandoned, or the judgment of homologation acquiesced in; and the city has no effective opposition on which to rest her claim for relief as an ordinary creditor. In our opinion, the judgment appealed from is correct, and it is affirmed.

(44 La. Ann. 856)

McCLELLAN, Tax Collector, v. PETTIGREW.

(No. 10,980.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

LICENSE—AGENT OF FOREIGN MANUFACTURER—SALES BY ORDER—INTERSTATE COMMERCE—COLLECTION.

1. The agent of the manufacturer of clocks in another state, who takes orders for them in Louisiana, is not subject to the payment of a license tax.

2. The agent would be liable to the tax imposed by section 23, Act No. 150 of 1890, if the clocks had been shipped to Louisiana, and, after they had been located in Louisiana, the agent, by peddling them, disposed of them.

3. Whether the tax can be imposed, either directly on the goods introduced into the state, or by license on the party who is intrusted with their sale, depends upon the fact whether the goods have been incorporated into the general mass of property subject to taxation.

4. If the manufacturer in another state sends an agent to Louisiana to find a purchaser for his manufactured goods still at the factory, and he takes orders, and the goods are shipped directly to the agent, to be delivered to the purchaser, he is not liable to said license tax imposed by said act. It is immaterial whether the sale is perfected by delivery. The clause of the constitution of the United States which declares that congress shall have the power to regulate commerce among the several states extends to negotiations for the sale of manufactured articles solicited in another state. Therefore any license tax imposed upon an agent or solicitor for soliciting orders for said goods by sample is in violation of said clause of the constitution of the United States.

5. A tax collector has the same remedy to enforce the payment of parish as state taxes and licenses.

6. A tax on peddlers is sufficiently graduated when a specific sum is imposed upon them.

(*Syllabus by the Court.*)

Appeal from district court, parish of Madison; FIELD F. MONTGOMERY, Judge.

Proceeding by J. T. McClellan, tax collector, against L. R. Pettigrew, as agent of the Seth Thomas Clock Company, to enforce the collection of a certain license tax. From a judgment for plaintiff, defendant appeals. Reversed, and judgment entered for defendant.

Bell & Randolph, for appellant. *A. L. Slack*, for appellee.

McENERY, J. The plaintiff tax collector proceeded by rule against the defendant, as agent of the Seth Thomas Clock Company, a corporation domiciled in the state of New York, to enforce the collection of state and parish licenses against said company as clock vendors, imposed by section 13 of the revenue act of 1890. An exception was filed by defendant, denying the right of the plaintiff to sue for the license due the parish of Madison. The tax collector needs no special authority to collect the tax. The amount of the tax, and the delivery to him of blank licenses and the tax rolls, is a sufficient basis for his authority to enforce the collection of the tax or license. But we think the authority for him to collect by legal process is contained in Act 106 of 1890 and Act 85 of 1888. The exception was overruled, and the defendant answered, denying liability, because the license was not graduated, and that the license imposed was a tax upon interstate commerce. The license tax was a specific sum for the business conducted by defendant. It was the only practical method of imposing the license tax, as there was no means of graduating the license among different peddlers of the same kind of goods. State v. Liverpool, L. & G. Ins. Co., 40 La. Ann. 463, 4 South. Rep. 504; State v. Chapman, 35 La. Ann. 76.

On the second objection, the facts agreed upon to determine the liability of the defendant are as follows: "That the agent, Pettigrew, is temporarily in the parish of Madison as the solicitor of the Seth Thomas Clock Company, a corporation domiciled in the state and city of New York, a manufacturer of clocks; and that the said Pettigrew is engaged in said parish in soliciting orders from purchasers, with a view of introducing said clock into the state; that he obtains orders, forwards same by mail to the said clock company, then ships the clock to points convenient to the purchaser, and they are delivered by the company at its own expense in this parish. There have been two wagons employed to deliver said clocks to the purchasers. This delivery is generally made under the direction of defendant. The said defendant has no interest in or title to said clocks. The sales are generally made on a credit as per attached blank note, which is signed

by the purchaser at time of purchase, and forwarded to said Seth Thomas Clock Company. In traveling and soliciting said orders as above, said defendant carries along a sample clock, to show its style and operation, and makes his sales by said sample. For his services he is paid a salary by said clock company. It is admitted that on orders so received said company has delivered clocks in this parish to purchasers. It is admitted parish license is same as state, as provided by section 13 of the revenue act." The note attached to the agreement, and a part of it, is as follows: "$36.00 ——— P. O. State of ———. 189—. On or before the first day of ———, after date, I promise to pay to Seth Thomas Clock Company or order the thirty-six dollars, value received, without discount or offset, waiving all rights to exemption allowed us by law as to the debt, with interest at the rate of eight per cent. from date if not paid when due and presented. This note is given for one Fashion calendar clock, which I have this day purchased from said Seth Thomas Clock Company, to be delivered at ——— premises, within ——— days from this date. This note is to be void only upon the condition that said Seth Thomas Clock Company refuse to deliver the said Fashion clock, as above specified, and for no other cause whatever. There are no outside contracts or conditions affecting the sale of this note except what is herein specified." There was judgment rendered in favor of the plaintiff, the tax collector, from which the defendant appealed.

The reasons assigned for the judgment were that when the clocks reached Louisiana they were still the property of the defendants, and remained their property until delivered to the purchasers; that the agent was not a drummer, but a vendor of clocks, as the sale was not completed until the clock was delivered to the purchaser. If the clocks had been shipped to Louisiana, the place of their destination, and were to remain there until a purchaser could be found, there can be no doubt that they would then have been incorporated into the general mass of the property of the state, subject to taxation. This is clearly enunciated in the cases of Machine Co. v. Gage, 100 U. S. 676; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592; Hardware Co. v. McGuire, 39 La. Ann. 849, 2 South. Rep. 592. In the Robbins Case, 120 U. S. 489, 7 Sup. Ct. Rep. 592, the court said: "In a word, it may be said that, in the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restrictions upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or merchant of one state to sell his goods in another state without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them?" The prohibition to levy a license for the sale of goods situated in another state does not depend upon the actual sale of the goods. It extends to the negotiation for the sale of the goods, to their introduction into the state, and the opening of a market for them. If the goods are situated in the state, having been shipped there for sale, and the negotiations are then made in relation to their final disposition, they are subject to taxation, as they have been incorporated into the general mass of property subject to taxation. It does not, then, make any difference where they were manufactured. Had the defendants shipped their clocks to the state, and then endeavored to find purchasers for them, by peddling them through the parish of Madison, they would have made themselves liable to the license imposed by the revenue act of 1890. 100 U. S. 676. The admissions show that the defendant employed a solicitor, who exhibited a sample clock in order to procure orders. The clocks were in New York, at the manufactory, when the orders were solicited. When an order for a clock was obtained, it was shipped to the defendant solicitor for delivery. He delivered them by a wagon,—having two of these vehicles in his service. The clocks were shipped to convenient points for delivery to the purchaser by defendant's agent. After the orders were obtained, the clocks in fact were shipped directly to the purchaser. The fact that their agent received and delivered them cannot so locate them in the state as to make them a part of the general mass of the property subject to taxation. They became so when delivered to the purchaser. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that there be judgment in favor of defendant, and plaintiff's demand be rejected and dismissed.

(44 La. Ann. 309)

LONG v. KEE. (No. 10,967.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

PARTNERSHIP—SETTLEMENT—SEQUESTRATION—EQUITABLE ESTOPPEL.

1. When, in the course of a *quasi* partnership settlement, a sequestration is obtained of property mutually claimed by each one of the parties, the strictness of the rule applicable to an equitable estoppel by conduct may be somewhat relaxed.

2. If, in such case, the defendant sets up a reconventional demand for property alleged to have been taken by the sheriff, and not reported in his return, allegations should describe it with some degree of precision, in order that proof be admissible.

3. When *quasi* trust relations exist between such parties, the burden of proof rests upon that party to whose care and fidelity the affairs of such *quasi* partnership was intrusted to make a fair and clear showing as the basis of settlement. (*Syllabus by the Court.*)

Appeal from district court, parish of Lafayette; ORTHER C. MOUTON, Judge.

Action by Denis Long against John E. Kee. From a judgment for defendant, plaintiff appeals. On motion to dismiss the appeal. Motion was denied, and judgment on the merits modified.

Gus A. Breaux and *C. De Baillon*, for appellant. *Jos. A. Chargois, Chas. D. Caffery* and *Julian Mouton*, for appellee.

ON MOTION TO DISMISS APPEAL.

WATKINS, J. Defendant and appellee seeks to dismiss the plaintiff's appeal on account of certain alleged imperfections in the appeal bond. To the motion appellant's answer is that it comes too late, having been filed more than three days after the filing of the transcript, and after the return day. This answer is good, and disposes of the motion, as the transcript was filed on January 20, 1892, subsequent to the return day, the 18th thereof; the motion to dismiss having been filed on the 25th of said month. Webb v. Keller, 39 La. Ann. 55, 1 South. Rep. 423; St. Romes v. Cotton Press Co., 31 La. Ann. 224; Holbrook v. Holbrook, 32 La. Ann. 13; Succession of Charmbury, 34 La. Ann. 21; O'Reilly v. McLeod, 2 La. Ann. 138; Hall v. Nevill, 3 La. Ann. 326; Mitchell v. Lay, 4 La. Ann. 514; Boykin v. O'Hara, 6 La. Ann. 115; Temple v. Marshall, 11 La. Ann. 613; Creevy v. Breedlove, 12 La. Ann. 745; Murrison v. Seiler, 22 La. Ann. 327; Kohn v. Davidson, 23 La. Ann. 467; Dumonchel v. Lemerick, 21 La. Ann. 30. The motion is therefore denied.

ON THE MERITS.

When the case was under consideration last, the pleadings were analyzed, the respective positions of the parties stated, and many of the issues decided. 42 La. Ann. 599, 8 South. Rep. 610. From our opinion it appears that the plaintiff and defendant entered into a contract on the 26th of February, 1886, in which, among other things, it was stipulated that the former furnished his plantation with all its ameliorations and equipments, and some live stock,—of which a description is given, as passing, with the place, into the joint adventure, and other cattle which did not. Thereunder the defendant entered into possession, stipulating that he was to give his time and undivided attention to the supervision and management thereof, and to the care and protection of all the live stock; and as a consideration for his services he was to have the profit arising from the cultivation of the annual crops and one half the increase of the live stock. Claiming the right to terminate the contract, on account of defendant's mismanagement, and retake possession of his property, the defendant resisting, plaintiff caused certain specified property to be sequestered judicially, and, in default of defendant exercising that right, gave bond therefor, and took it into possession. On the trial, in the district court, plaintiff's sequestration was dissolved, and defendant restored to possession of the plantation and property that was sequestered. On appeal to this court, the judgment rendered was reversed; many issues therein were decided, as above stated; the contract was held to have been legally terminated on the 31st of December, 1889, and plaintiff's right to possession recognized, and the cause remanded for the trial of three issues, viz.: (1) Damages inflicted upon personal property; (2) defendant's right of ownership of personal property claimed; (3) the adjustment of his claim to a share in the increase of the live stock,—all of which are circumstantially set out in an extended answer and reconventional demand. With defendant's demands thus reformed and restated, the case went back to the district court, and was again tried,—the defendant apparently abandoning his claim for damages, and only insisting on his other demands; that is to say, his demand for restitution of personal property, and an interest in the live stock, (a minutely detailed list of which is appended to his answer,) the aggregate value of the former of which he places at $6,275.85, and of the latter at $2,550, the two aggregating $8,625.85. There was judgment commanding the plaintiff to make restitution to the defendant, within 30 days after the finality of the decree, of the following items and articles of property, or, in the alternative, to pay the various sums set opposite said items, as the respective values thereof, viz.:

5 horses and 3 mules	$ 710 00
Blacksmith shop and tools	68 80
Old buggies, etc	79 50
Poultry, pigs, etc	159 50
Vegetables, etc	30 00
Farming implements, etc	363 75
One rice-thrasher	250 00
Aggregating in value	$1,661 55

It further commands plaintiff to make restitution to defendant of one half of the increase of horned cattle, the whole number of which is fixed at 161 head, thus entitling defendant to 80½ head; and decreeing that, in default of making restitution, the plaintiff shall pay him therefor at the rate of $10 per head, or $800 for the whole number. From this judgment, which condemns the plaintiff to surrender property, or to pay an alternate value of $2,461.55, he prosecutes the present appeal. It is of importance to mention that, after disposing of the foregoing property, the judgment decrees that "all other property herein claimed by the parties to this suit * * * belong to Denis Long."

1. The first question to be disposed of is the claim of the defendant to an interest in the increase of the horned cattle, which is stated, in his answer and reconventional demand, to be $2,550 in value, but which the judgment fixes at $800, and which must be accepted as the limit of his demand, inasmuch as he has not, in this court, requested an increased allowance. As a basis of the judgment, we quote the following therefrom, viz.: "It is ordered, adjudged, and decreed that the amount of stock of horned cattle, at the time of sequestration, be, and the same is hereby,

recognized at 430 head; and that the interest of J. E. Kee, defendant, in the increase thereof, be, and the same is, fixed as follows, viz.:

First deduct cows	156	
Three years old	85	
Two years old	27	
One year old	28	
Calves	19	
Oxen	4	
Aggregating	269	430"
Leaving an increase	161	

In the preceding part of the judgment it is stated that there was ascertained from the evidence to have been on hand, at the date contract was entered into, 269 head of horned cattle, and it is on this basis that the calculation is made. In our former opinion it is stated, viz.: "Now, in this case, the testimony of the defendant is that, at the time of making the contract of 1886, he did not count the cattle, and could not state the number. He took all the cattle on the place, and was to have an interest in the increase. Of the calves that were branded in 1886, 1887, and 1888, he was unable to say how many survive. It is quite unnecessary for us to examine or discuss any additional testimony on this branch of the case, as it is manifest that, under this admission, no settlement can be made at this time," etc. 42 La. Ann. 907, 908, 8 South. Rep. 613.

We had before us then, as we have now, the original agreement, which is authentic in form, which specifically declares that, with the plantation and its appurtenances and farm implements, the plaintiff furnished to the defendant "three mules for which [he] paid $375.—Fly, Dolly, and Queen;" and also that he "further furnished live stock, cattle, sheep, etc., at a cost of $4,165" in addition to seventeen head of Kentucky thoroughbred cattle not covered by the agreement. We had before us then, as we have now, the admission in defendant's answer that it was he who proposed to go into the stock business with the plaintiff, on "the condition that [the latter] would furnish the money to buy the cattle, and he [defendant] was to be half owner thereof, and pay back to plaintiff one half the money, with interest;" and that this proposition was accepted by the plaintiff, who "then advanced $4,000, which was expended by defendant in the purchase of cattle." That the agreement was subsequently modified by the agreement of February, 1886," whereby plaintiff became entire and sole owner of the cattle and sheep," etc.; and that "he had said live stock on the place at the time of the execution of the agreement of 1886, and same were kept there afterwards, as well as such as have been placed there since." This admission in the defendant's answer is confirmatory of the truthfulness of the recital of the agreement as to the value of the live stock invested under the contract; and, as the judgment found there were on hand, at date of sequestration, 430 head of cattle, which, valued, as other cattle were, at $10 per head, would have aggregated $4,300 in value, there would seem to be practically no increase for division,—the difference between the cattle purchased and on hand in 1886 and those on hand in 1890 being only 14, and this difference is nearly offset by the 13 head of cattle the defendant confesses to have disposed of in violation of a stipulation of the agreement to the contrary, and the value of which he places at $123. The memorandum list appended to the plaintiff's petition calls for 600 head of cattle, as on hand at date of contract, which is readily explained by taking as the initial point of the calculation a smaller price per head, say $7, which would produce the value of $4,200, or a fraction above the value stated in the contract, viz., $4,165, and is possibly a more accurate estimate. But this would show a loss of 200 head of cattle, or, at $7 a head, an aggregate diminution of $1,400 on the stock which was invested in the enterprise originally. The judgment fixes the same number and value of the stock on hand as that stated in the sheriff's return on the writ of sequestration, and the list appended to the defendant's answer only shows the net increase to which he alleges himself entitled, *i. e.*, 250 head of cattle. An examination of the reasons which the judge assigns as the foundation of his decree in this respect simply discloses this statement, viz.: "As to the number of cattle furnished by Long, under contract of 1886, I conclude that, at the time of the contract, there were 238 head; bought from Sterne, 7; from Torrence, 14; and from Hawkins, 10,—making a total of 269." Then follows, immediately after this quoted paragraph, the tabulated statement and conclusion related above. The judge does not make any reference to the evidence of witnesses on which this conclusion is based, and a patient examination of the record has failed to disclose any. And, if there was any such evidence, its reliability would be, evidently, problematical. The defendant was, on the last trial, as he was on the former trial, fully examined and cross interrogated, without, in any material respect, bettering his case; and, as plaintiff in reconvention, he evidently carries the burden of proof. It is our deliberate opinion that the judgment is in error in this respect, and the defendant's demand, *pro tanto*, should be rejected.

2. With regard to the defendant's claim for personal property, or its value, the difficulties of solution appear to be greater than those in reference to the increase of stock. They arise from the fact that this is a *quasi* partnership settlement of ordinary planting partners and stock-raisers, of which the defendant had the exclusive use, control, and management, the plaintiff residing in the state of Kentucky, and possessing no information other than such as it pleased the defendant to disclose. In our former opinion we held that the agreement between the parties, "although styled a 'partnership,' is a contract of hire of labor;" that "the plaintiff had just grounds for his sequestration," and had the legal right to put an end to the agreement as he did. In that opinion defendant was treated as, in some sort, an unfaithful agent, who had abused the confidence and trust his lessor or principal had reposed in him, and, upon the principles of equity,

he must be held to a strict accountability, and required to make clear proof of his demands. This fact appears prominently, at the opening of the discussion, viz., that upon no theory has plaintiff been benefited by the transactions of many years, notwithstanding he was the owner of all the property, primarily, and furnished large sums of money to the defendant. It is quite true that evidence of such advances of money was rejected by the district judge, on the ground that such proof did not correspond with any averments in the petition; but we are of opinion that his ruling was erroneous, and that plaintiff, occupying the position of defendant in reconvention, had the right to introduce such evidence in rebuttal of the defendant's claim, without making any plea, replications not being permissible. This view is supported on the hypothesis of plaintiff's counsel that these moneys were invested in stock and personal property of the kind mentioned in defendant's reconventional demand, and should be carried into the calculation of the value for which he insists plaintiff is responsible; and it seems so manifestly just and reasonable that, to our minds, there is no escape from this conclusion.

This much having been premised, we will dispose of the contentions of the plaintiff which are set up as a bar to the prosecution of the defendant's claim in reconvention, viz.: (1) That, the latter having pointed out to the sheriff the property for sequestration, he is equitably estopped by conduct from subsequently asserting his ownership of same; (2) that said defendant having, during the period of the contract, had the personal property assessed as that of the plaintiff, and upon his own affidavit, he is likewise estopped from making claim to it. While, under ordinary circumstances, such considerations would have great weight, yet, under the exceptional circumstances of this case, they cannot be deemed controlling: (1) Because the sheriff was furnished with a detailed list of the property intended for sequestration, and a seizure of which was demanded, and it is likely enough that the defendant merely indicated where such property could be found, without intending to waive or abandon his right; (2) because of the fact that the defendant admitted the ownership of the plaintiff in the real estate, and of some of the stock and personal property, of which he was also part owner, he may have thought an assessment, solely in the name of the plaintiff, would suffice, and inflict no injury upon the state. Such an assessment cannot have any real, substantial bearing upon the rights of the parties, and we must decline to consider it as such in this case. Plaintiff's further contention is that no claim of property can be entertained and decided, under a proper construction of the issues raised in defendant's answer, other than such as appertains to the property that was sequestered, and made mention of in the sheriff's return; and we think there is great force in this contention. The plaintiff's counsel was careful to make out a list of property which he desired seized, and handed it to the sheriff; and that is the property he sequestered in part, though he sequestered some additional property. In the answer there is a declaration to the effect that the sheriff did seize and actually take into his possession other property belonging to him, of which no account is taken in the inventory and return, and for which he makes claim; because his contention is that, when plaintiff gave bond and released the property from seizure, he took possession thereof, and placed it in the hands of his agent, where it now is. But there is no list or description of the particular property referred to whereby it can be identified with any degree of certainty, and to hold an absentee landlord to a rigid accountability for large values, predicated upon such an averment, would be manifestly unjust. The kind and character of the property is given in the judgment, and referred to in a previous paragraph of this opinion. We think it better to limit this decision to the property sequestered, reserving the rights of the defendant to make claim to any other property of which the plaintiff may be illegally possessed.

Confining ourselves to an examination and comparison of the items and amounts stated in the judgment with those enumerated in the sheriff's return, we find the following to be a just and proper settlement between the parties, to-wit: That the following items of property listed in the judgment be reduced in value by the following amounts, viz.:

The mule Mary by	$ 75 00
The mule Rock by	35 00
The mule Jane by	50 00
The mare Katy by	25 00
The mare Bella by	20 00
The mare Queen by	50 00
The horse Rondeau by	75 00
The horse Kee by	10 00
Two horse carts by	20 00
Two buggies by	10 00
One lot of chickens by	6 70
One lot of geese by	3 80
Aggregate reduction of	$380 50

That the following items of property be, and the same are to be, stricken from said list, viz.:

One duck, at	$ 25
One saddle, at	7 00
5 sows with pig	45 00
1 boar	15 00
26 head of hogs	78 00
7 sugar coolers	28 00
Aggregating in value	$173 25

These diminutions and reductions will operate a change of the alternate values of the articles specified by the total sum of $380.50, and deduction from the list of property which the judgment decrees to belong to the defendant of the articles last enumerated, having an aggregate valuation of $173.25; and, as thus altered and amended, the judgment should be affirmed. It is therefore ordered and decreed that the judgment appealed from be amended in the following particulars, viz.: (*a*) By eliminating altogether the claim and demand of the defendant for a share of the increase of the horned cattle, and in the judgment, estimated to be worth $800; (*b*) by reducing the value of the various items

of property listed above by the amount of $380.50; (c) by rejecting and disallowing the defendant's claim to the ownership of other articles enumerated above, valued at $173.25. And it is further ordered and decreed that, as amended, said judgment be affirmed at appellee's cost; the right of defendant being reserved to claim any other property than such as was sequestered, and the right of plaintiff is also reserved to claim of defendant an account and settlement of moneys had and received.

(44 La. Ann. 263)

In re SCARBOROUGH *et al.* (No. 10,901.)

SAMPLE v. SCARBOROUGH. (No. 10,901.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

RES JUDICATA—HOW PLEADED—TUTOR AS ADMINISTRATOR—DEBTS OF SUCCESSION.

1. There is no form required for presenting the plea of *res judicata*.
2. It is only necessary that it be specially and specifically pleaded.
3. The plaintiff may plead it to defendant's answer by way of exception.
4. It is immaterial in what form presented.
5. Where a tutor administers a succession which has debts against it, with the consent of the creditors, he can hold the property as tutor only after he has fully administered the succession.
6. If the tutor conduct the mercantile and planting business left by the deceased, and borrows money to pay off succession debts, and then, to pay off this debt so created, uses money made in the business, and then borrows money to pay off the indebtedness of the business created since the opening of the succession, this last debt is a debt against the succession, and not against the tutorship.

(*Syllabus by the Court.*)

Appeal from district court, parish of De Soto; W. PIKE HALL, Judge.

The succession of Henry F. Fullilove, deceased. O. H. P. Sample, claiming to be a creditor of deceased, proceeded by rule against R. N. Scarborough, natural tutor of Henry F. and Thomas F. Scarborough, who were sole heirs of deceased, to compel payment of the debt. From a judgment for the tutor, Sample appeals. Reversed.

E. W. Sutherlin, for appellant. *J. F. Pierson*, for appellee.

McENERY, J. This case was before this court in March, 1891, and the pleadings are stated in the opinion in 43 La. Ann. 316, 8 South. Rep. 940. The suit was remanded for further proceedings to ascertain whether the succession was under administration when the debt upon which the plaintiff in rule proceeded to enforce its payment was created. The law applicable to the administration of successions by tutors in the interest of both creditors and minors was fully discussed in the opinion remanding the case. It is not necessary to refer to this question, which is referred to in the brief of counsel.

When the case was reinstated in the lower court, in addition to objections to the form of proceedings, the defendant put at issue the validity of the claim sued on. To defendant's answer the plaintiff, by exception, filed the plea of *res judicata*. The defendant objected to the filing of the plea on the ground that it was a "replication" or "rejoinder" to defendant's answer, which is prohibited by article 320, Code Prac. The objections were overruled, to which the defendant excepted and reserved his bill. The plea may be presented by petition, exception, or rule, or by intervention, or in any form of proceeding; and whenever the same questions recur between the same parties, even under a different form of procedure, the exception of *res judicata* estops. There is no particular form required for pleading it. It may be pleaded either by way of exception or in the answer; the only requirement being that it be specially and specifically pleaded. There is no way in which the plaintiff can plead it, unless by exception or special plea. The form is immaterial.

Plaintiff's claim was presented for approval to the court by the defendant as tutor. All parties—the plaintiff, creditors, the under tutor, and the defendant as tutor—were represented in the judgment homologating the account. There was no opposition to the account, and it became final and definitive as to all parties, and the judgment thereon operated as an effectual estoppel to all parties thus represented. While presented as the account of the tutor, it was in fact an account of his administration of the succession, which he, with the consent of the creditors, was administering by virtue of his office as tutor.

The facts disclosed by the record and before the court are as follows: Henry F. Fullilove died in February, 1885. He left an estate consisting of plantations, a storehouse, and stock of goods. He was a merchant and planter, and was engaged in the usual line of business conducted in a country store. Henry F. and Thomas F. Scarborough, grandchildren, were his heirs. R. N. Scarborough, the father of the children, and surviving husband, qualified as natural tutor of his minor children. As tutor, he took possession of the effects in the succession of Fullilove. On March 24, 1885, a family meeting was convened on the petition of Scarborough, tutor. He represented that said succession owed about $4,000, and that there were no funds on hand to pay this amount; and he also recommended that the mercantile and planting business conducted by the deceased should be continued. The family meeting which convened advised as the tutor had recommended, and also advised that he be authorized to contract debts to the amount of $5,000 in the interest of said business. The succession really owed $3,703.02, and its assets were large; the indebtedness only being about 10 per cent. of the value of the succession effects. A profit was made by the business for the year 1886. Another family meeting was convened, and the tutor authorized to borrow $5,000 and to continue the business. At the end of the year 1887, he procured another family meeting, which authorized him to borrow $3,000 and to continue the business to March 28, 1888. On 23d February, 1887, the debts of the succession had been paid by money obtained from Perrin & Zeigler, of Shreveport. All the old debts of the deceased, Fullilove, were paid

through this firm. It took all of the money in the hands of the tutor to pay this debt. In the mean time, there were other debts, which had been created since the opening of the succession, and only a short period before the account was filed by the tutor. These were debts created by the tutor in carrying on the business authorized by the family meeting.

The defendant contends that, when the debts of the succession were paid by Perrin & Zeigler, this put an end to the succession, and the tutor held the property of the succession for the minors, and that they, through the tutor, the moment the succession ceased to exist, by the payment of the succession debts, went into possession of their inheritance from their grandfather; that all debts created after this were debts of the tutorship. The distinction makes a material difference in the means employed to secure the payment of the debt, as well as in the effect of the homologation of the final account. To pay the outstanding indebtedness created since the payment of the debts of the succession by Perrin & Zeigler, the tutor, Scarborough, borrowed the money from the plaintiff. This is the amount now in controversy. From the abbreviated statement of the facts in the case, it will be observed that the efforts of the tutor in the administration of the succession were to pay its debts, which were small in amount, not exceeding $4,000. The mercantile and planting operations were conducted for this purpose. In his acts of administration, he found it necessary to borrow money to pay off the indebtedness of the deceased, and to continue the business to pay off the amounts that he borrowed. If he paid the debts from money obtained from one source, others were created, equal in amount, in an endeavor to pay that which was borrowed. The acts of the tutor in administering for the heirs and for the creditors cannot be distinguished. His administration was an entirety,—one effort of administration to make money to liquidate the indebtedness. The minors only had a residuary interest in the succession after the payment of the debts of the succession. The old debts against the succession, it is true, were paid, but it was in the course of the administration of the succession in conducting the business left by the deceased. The debts were paid either by money borrowed for the purpose, or from the profits of the business. It is immaterial from what source the debts were paid. The succession had never been freed from its debts, for, as rapidly as the old debts were paid, new ones were created, from the necessity of paying the old ones. These were but substitutes for the debts left by the deceased, and all the acts of the tutor were done in the line of administering a succession to pay its debts. In remanding the case, we said that "it does not appear from the pleadings and account that the minors Scarborough have entered into possession of their grandfather's estate as an inheritance, yet upon issue joined, and trial had, the fact may be made to appear. Until this fact is made to appear affirmatively, we must hold that a tutor acting as administrator of an open succession does not possess apparently for the heirs, and that the property will not pass to him as tutor until his administration as such is terminated." The account filed by the tutor was an exhibit of his administration of the succession. It showed debts still existing against the succession. It was a provisional account. Until the tutor's administration of the succession is terminated, the property will not pass to him as tutor. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that the rule granted herein be made absolute, and the prayer of the plaintiff in rule be granted.

WATKINS, J., (*concurring.*) The following is an extract from the brief of defendant's counsel at page 28, viz.: "We most respectfully submit that the court was drawn into error as to the true meaning of the opinion in the case of Lemmon v. Clark, 36 La. Ann. 744. Upon a critical analysis of that case, we come to the conclusion that the doctrine there announced is the reverse of the conclusion drawn from it by the court in the opinion in this case. We do not find that the court there admits the doctrine that an appointment and qualification of one as tutor authorizes him, under such appointment and qualification, to act also in the different capacity of administrator of a succession falling to his wards without another appointment and qualification in such other capacity, also." Reference to our opinion will show that the paragraph immediately preceding the one selected and quoted by counsel does not state that the case of Lemmon v. Clark recognized the right of a tutor, *ex virtute officii*, to administer a succession. Indeed, it did not present that question for the decision of the court at all, nor does our previous opinion say that it did. It was a case of heirs in possession, as Soye v. Price, 30 La. Ann. 93, was. But in deciding that case the court, for the purpose of illustration, merely, announced the existence of the rule stated by us, saying: "The cases quoted by counsel for plaintiff are all cases in which the tutor held in a dual capacity, of tutor and administrator," etc. That was all the use our previous opinion in this case meant to make of the quotation from Lemmon v. Clark. The sequence of counsel's argument is that the tutor, having been appointed and qualified as such, and never having been appointed and qualified as administrator of the succession of the deceased, cannot represent the succession or its creditors, and that, acting as tutor alone, plaintiff's account was necessarily one of tutorship *per se*, the homologation of which was only *prima facie* proof as against his wards; and therefore, as a creditor whose claim had been acknowledged and placed thereon, plaintiff had no right to proceed by rule, under article 990 of Code of Practice, as he has done, for a sale of property to pay same. But I think our opinion is correct in announcing, as a proposition well sustained in our jurisprudence, that a duly qualified, bonded,

and acting tutor may, *ex virtute officii*, administer the succession coming to his wards without any appointment as administrator thereof, and in so doing perform the dual functions of tutor and administrator. True it is, as stated by counsel in his brief, that the contrary was held to be the rule of jurisprudence in many early cases, some of which he cites, viz.: Jacobs v. Tricou, 17 La. 109; Tildon v. Dees, 1 Rob. (La.) 409; Atchison v. Parks, 9 Rob. (La.) 141; Self v. Morris, 7 Rob. (La.) 24; Beal v. Walden, 11 Rob. 75; Arthur v. Cochran, 12 Rob. (La.) 43. But it has not been maintained in opinions of more recent date, and he cites none to that effect. In Martin v. Dupre, 1 La. Ann. 239, it was held that a tutrix "had power to administer the estate as such." In that case the validity of a sale at public auction by the tutrix was maintained against the demand of a subsequently appointed administrator for its nullity. In Bryan v. Atchison, 2 La. Ann. 463, the question was whether a tutor, as such, might administer a succession, and as to his capacity to stand in judgment, in a suit for the sale of property, so as to make the decree of sale binding upon the heirs and creditors. The court say: "It is not pretended that any creditor in this case ever required the appointment of an administrator, and the judge was not bound to appoint one. So that, if the tutrix does not represent the succession, creditors could not enforce their rights." And, commenting on that proposition, they say: "There can be no doubt that the succession was properly represented." This declaration was made in answer to the complaint of a subsequently appointed administrator of that succession. In Monget v. Penny, 7 La. Ann. 134, the court held, upon the principle announced in Bryan v. Atchison, that "the defendant, as tutor to his minor children, was the representative of the succession, and as such the proper party defendant in plaintiff's suit." In Hoover v. Sellers, 5 La. Ann. 180, it was held that "it is a well-settled doctrine that a succession inherited by minors may be administered by their tutors." In Hair v. McDade, 10 La. Ann. 534, it was held that "as tutrix [plaintiff] had the right to administer upon the estate belonging to the minor children without taking out letters of administration, unless required to do so by creditors." In State v. Leckie, 14 La. Ann. 641, the foregoing opinions were cited and approved; the court holding this course of procedure to be "an exception to the general rule to be applied if creditors do not require the appointment of an administrator." This is now the established rule of our jurisprudence, and it has been sustained by this court in many subsequent cases; and I had no thought of its being disputed. *Vide* Succession of Weber, 16 La. Ann. 420; Ducote v. Bordelon, 24 La. Ann. 145; Succession of De Lerno, 34 La. Ann. 38. All of the foregoing cases, with the exception of the last three, were cited in the former opinion of this court in this case; and I respectfully submit that they furnish ample foundation for the opinion expressed, as counsel would have learned, had he taken the precaution to review them before writing his brief. I concur in the present opinion of the court, fully.

(44 La. Ann. 257)

SAMPLE v. SCARBOROUGH. (No. 10,902.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

VERBAL SALE OF IMMOVABLES—VALIDITY AS TO THIRD PERSONS—RECORDATION—MORTGAGES—OWNERSHIP OF MORTGAGOR—TUTOR AND WARD.

1. The authority of the thing adjudged must be tested by the requisites of article 2286 of the Civil Code. The decree is not final unless it falls within the terms of that article.
2. Verbal sales of immovables are null as to third persons.
3. The promise to sell must be established with the same formalities as sales.
4. All sales affecting immovable property, not recorded, are null and void, except between the parties thereto.
5. Property can be specifically hypothecated only by the owner, or some one authorized to act for him.
6. The mortgage given by one not the owner will not become valid unless he acquires the ownership.
7. Joining the owner, who has promised to sell to the mortgagor in the sale of the property, is not an acquisition of the property, and does not give validity to the mortgage.
8. A tutor has no right to pledge the note due his wards as a security for his debts.
9. One of the notes, at one time unlawfully pledged, having been returned, and the other having been collected in the name and for account of the tutor, who applied the amount to the payment of his debt, he has no right of action to recover the amount paid in satisfaction of his individual debt.

(*Syllabus by the Court.*)

Appeal from district court, parish of De Soto; W. PIKE HALL, Judge.

Suit by O. H. P. Sample against R. N. Scarborough to foreclose a certain lien. From a judgment for plaintiff, defendant appeals. Affirmed.

J. F. Pierson, for appellant. *E. W. Sutherlin* and *C. W. Elam*, for appellee.

BREAUX, J. Plaintiff sues to foreclose, *via ordinaria*, a vendor's privilege and mortgage against the defendant, amounting to $1,237.40, and for interest and fee of attorney, on a tract of land known as the "Fortson Place," in the parish of De Soto. The defendant makes no defense, personally. As the tutor of his minor children, he intervened, and in his petition of intervention avers that this property was on the 15th day of December, 1886, mortgaged to him, as tutor, to secure two amounts, aggregating $3,577.21 and interest. There was another amount $2,500, claimed, which was subsequently abandoned, and is therefore no longer at issue. The mortgagor was F. N. Coleman, who did not have a deed to the property mortgaged. The intervener alleges that at the time the mortgage was given the mortgagor had paid the purchase price, except about $1,000. He assumed that the sale would be made to him, and mortgaged this property, which he did not own, with other property he owned at the time. The intervener avers that in April, 1888, F. M. Fortson, who had promised to sell to Coleman, sold the property to the defendant, Scarborough. In this sale Coleman joined, and the de-

fendant contends that in thus joining the mortgage before mentioned became valid. The intervener also avers that he acted without authority in placing with plaintiff the notes of his minor children, secured by said mortgages, as collateral security for a debt of $3,468.66. This said amount is claimed by plaintiff in another suit pending before this court. Scarborough, tutor, defends on different grounds. He, as tutor, alleges that he has the right to recover back the mortgage notes, and all amounts collected on them, as the claim belonged to the minors; that the mortgage of the minors is superior in rank to that of the plaintiff. To the demand of the intervener the plaintiff pleaded *res adjudicata*, and in its support alleged that the tutor, who is the intervener, presented an account of tutorship, in which was carried this claim of $3,468.66 as due to plaintiff. This account was homologated in 1889.

This judgment was the subject-matter of a suit before this court at its last session. 43 La. Ann. 316, 8 South. Rep. 940. This court held that the judgment did not have the appearance of one enforceable against the minors, as it was not proven that they had been placed in possession, and the succession closed; that if, on the trial of the merits, it should be conclusively shown that the tutor administered the succession *ex virtute officii*, a rule under Code Prac. art. 990, was the proper remedy to enforce payment. That case was remanded for further proceedings. It was tried. Judgment was rendered in favor of R. N. Scarborough, tutor, which was reversed by this court. 44 La. Ann. —, 10 South. Rep. 858. The issues are different in the pending case. The action is to recover on a note secured by mortgage. The intervener claims a superior mortgage; and certain notes and obligations, he alleges, are illegally held by the plaintiff. The parties are not the same. In one case the defendant debtor is sought to be held; in the other, the contention arises about the indebtedness of a succession, and the mode of enforcing collection. The plea of *lis pendens* was also filed against the intervention. The cause of action is not the same. A final judgment in the case pleaded as *lis pendens* will not settle the issues in this case. To sustain the plea, not only the subject, but the parties, must be the same, or privies to the parties in the pending suit. The subject-matter involved in the present case is different from that in the case of the tutorship of the minors Henry F. and Thomas Scarborough, (Sample v. Scarborough, 10 South. Rep. 858.) The relief asked for is different. In the matter of the sale, in said case, it is contended that the judgment is not binding on the minors, and that the property cannot be sold on rule to sell as against an administrator in this case. They seek to recover notes pledged as collateral, and the amount collected by the creditor on the collateral, and to prevent a mortgage from being enforced as first in rank. Plaintiff also urges an exception that the intervention is in its nature independent of the main action brought by plaintiff, and not connected with or incidental to the same. The intervener alleges an interest, and claims that he has a prior mortgage, and alleges that plaintiff's mortgage is invalid. The interventional demand is clearly connected with the main action. It was properly used to protect a right in the property plaintiff asks to have sold for the payment of his alleged mortgage. These pleas were properly overruled.

ON THE MERITS.

The priority in rank, *vel non*, of plaintiff's mortgage, presents the first question for our determination. It is conceded that at the time the mortgage to Scarborough, tutor, was signed, the mortgagor was not the owner. The intervener does not contend that the mortgage by one not the owner gives him a right. He claims that the promise to sell has been complied with, and that the mortgage had thereby become valid, and relies upon article 3304 of the Civil Code: "This mortgage shall be valid if he [the mortgagor] should ever after acquire the ownership of the property, by whatever right." In support of his contention, he invokes the fact that the notes secured by this mortgage (Coleman to Scarborough, tutor,) were pledged to the plaintiff, and that, in the written receipt of these notes, it is stated that they are secured by this mortgage, and that he is therefore estopped. He also relies upon a sale made in 1888. With reference to the sale, it appears that the party who had verbally promised to sell was unable to return the amount he had received on account of the price, and the party (the said mortgagor) who was to buy was unable to pay the remainder to consummate the sale; whereupon, Fortson, who had promised to sell to Coleman, offered the land to Scarborough, who purchased. The latter applied to plaintiff to borrow the money to pay for it. Plaintiff consented to loan the amount provided notes secured by mortgage and vendor's privilege were executed by the buyer, which would be transferred to him, (plaintiff.) The deed was signed, and the note transferred, in compliance with the agreement made. The property was not sold to the mortgagor at all. Although never owned by the mortgagor, the intervener pleads the act of mortgage to defeat plaintiff's claim, and contends that it precedes that of his creditor. There was a verbal promise to sell. The conditional promise to sell does not give the right to mortgage property, and no right will arise under the mortgage unless the promise is followed by compliance. The receipt invoked does not create a mortgage, as none exists. The plaintiff testifies that he did not know of any such mortgage. The declaration in the receipt does not give validity and binding effect to the alleged mortgage. The condition laid down in the article of the Code is that the mortgage shall be valid if the mortgagor becomes the owner. The receipt did not make the mortgagor the owner, and therefore the alleged mortgage was ineffective. An estoppel is limited to questions concerning the receipt, and

does not apply to incidental descriptions. A receipt may be contradicted or explained. "Even in a deed, the recital, to operate an estoppel, must appear as intended not to be questioned, or that injustice would follow if the court were to allow it to be contradicted." Bigelow, Estop. p. 311. The property having been sold by the owner, no one can lay claim to any right under the mortgage not executed by the owner. In the deed of mortgage of December, 1886, by Coleman (not the owner) to Scarborough, tutor, it is declared that the mortgagor expects to receive a title. The owner, who had promised to sell, as a witness states that it was agreed that no sale would be passed before payment of the price. The price was not paid, and the property was sold to another. The sale to the mortgagor never was made.

The intervener claims one of the notes identified with the alleged mortgage, amounting to $2,075, and the amount collected in payment of another, also identified with the act. These notes were pledged to secure the payment of certain amounts due by the intervener. The issues do not establish a pecuniary responsibility on the part of plaintiff, for he has returned the notes, and only received an amount in payment of a sum due him. The intervener in this case, some time since, in another suit, intervened, and alleged that he had possession of the note he now seeks to recover. Since that intervention was filed, it is not shown that plaintiff has had it in his possession. The record discloses that it has not been in possession of the plaintiff since 1888.

With reference to the amount collected on the second note. It appears of record that the mortgagor, Coleman, sold certain property to James F. Greer on 9th February, 1888. The notes were at the time in the possession of Sample, the plaintiff, pledged as before mentioned. One of these pledged notes was paid. The other was returned to the intervener. The question does not arise on these notes as being in the hands of the pledgee claiming a right, but arises after one of the pledged notes has been paid, and the other is in the possession of the pledgor. The intervener seeks to make the at one time pledgee return an amount received, and return a note of which he already has possession. The mortgagor had the absolute right to pay his debt secured by mortgage, and the possibility that the tutor will squander the amount will not affect the receipt. Riddell v. Vizard, 35 La. Ann. 310. The notes were collected for account of the tutor, who applied the amount to the discharge of his debt. It is a *fait accompli*, and cannot be revoked at the instance of the tutor, who personally made the payment.

With reference to the claim of $3,468.66. We are relieved from giving it consideration in this case, as it has received the court's attention, and was the subject-matter of another suit, decided to-day, (10 South. Rep. 858) in which it is held that the amount is due.

Judgment affirmed, at appellant's costs.

H. B. CLAFLIN CO. v. FEIBLEMAN *et al.*, (SWEETZER, PEMBROKE & Co. *et al.*, Interveners.) (No. 11,004.)

(*Supreme Court of Louisiana.* March 7, 1892. 44 La. Ann.)

PEREMPTORY EXCEPTION — WAIVER — NOTE — LIABILITY OF INDORSER — ATTACHMENT — INTERVENTION.

1. A peremptory exception going to the cause of action is not waived by being referred to the merits, and tried and submitted with them.

2. The indorser of a promissory note only becomes the debtor of the holder after complying with the conditions of presentment at maturity, failure of maker to pay, and due notice given.

3. A demand against an indorser, brought before maturity, is properly rejected on exception to cause of action, or even under the general issue.

4. Creditors who have attached the same property may intervene in a prior attachment proceeding by another creditor, and oppose the maintenance thereof; and the *prima facie* proof of debt, which the law sanctions as sufficient to authorize their attachments, is also sufficient to maintain their interventions, without requiring them to anticipate the issues involved in their suits against their debtor, and to make such proof as would sustain a final judgment.

5. The attachment must stand or fall, according to state of facts at date of issuance, and the demand in this case is not of a nature to authorize an attachment.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Baton Rouge; GEORGE W. BUCKNER, Judge.

Attachment by the H. B. Claflin Company against B. Feibleman & Co. Sweetzer, Pembroke & Co. and others intervened. From a judgment rejecting its claim as to three notes, and also sustaining the interveners', plaintiff appeals. Affirmed. Rehearing refused.

Gus A. Breaux and *Farrar, Jonas & Kruttschnitt*, for appellant. *Henry L. Lazarus* and *C. C. Bird*, for defendants and appellees. *Read & Goodale*, for interveners, appellees.

FENNER, J. The H. B. Claflin Company instituted this attachment suit against the commercial firm of B. Feibleman & Co., claiming an indebtedness as due them by the defendant of $30,970.70, of which, however, the sum of $22,500 was claimed by them as holders of three promissory notes, of $7,500 each, which were made by the firm of Cohn & Feibleman, and indorsed by the defendant, and not due at the date of suit. The defendant firm promptly interposed an exception to the cause of action, on the ground "that the action is premature, and the debt not due." Subsequently, Sweetzer, Pembroke & Co. and sundry other alleged creditors of B. Feibleman & Co., who had levied attachments on the same property attached by the Claflin Company, intervened in this suit, and setting up that, as to the said claim for $22,500, it could not authorize or sustain an attachment, they prayed that, to this extent, the plaintiff's attachment be not sustained or recognized as inferior to their attachments. This intervention was put at issue by answer, and the defendants also appeared, and filed an answer to the principal suit, in which,

first "reserving the benefit of the exception herein filed," they pleaded the general denial. On January 18th, on motion of defendants' counsel, without objection, the exception was referred to the merits. The cause was then assigned for trial *instanter*, and, after introduction of evidence and argument of counsel, was submitted to the court. Judgment was rendered in favor of the Claflin Company to the extent of the debt due, with recognition of their attachment privilege, but rejecting their demand on the three notes of $7,500 each, above referred to, and also sustaining the intervention of Sweetzer, Pembroke & Co. et al. From this judgment the Claflin Company appeals. The appellant claims that, by referring their exception to the merits, and by going to trial on the merits without requiring the court to pass upon the exception, defendant must be held to have waived the exception. It relies on the following authorities: Mix v. Creditors, 39 La. Ann. 624, 2 South. Rep. 391; Boone v. Carroll, 35 La. Ann. 284; Chaffe v. Ludeling, 34 La. Ann. 966; Francis v. Lavine, 26 La. Ann. 312. Reference to them will show that they apply only to dilatory or declinatory exceptions, the effect of which is only to retard, or change the forum of, the action. The exception here is not of that character. It is, by its terms, an exception to the "cause of action," based on the elementary proposition that the indorser of a promissory note incurs no other obligation except to pay in case the maker, on due demand at maturity, shall fail to pay, and in case due and legal notice thereof shall be given to him. Hence, before maturity, the indorser is not the debtor of the holder, who has no cause of action against him. Such a defense would be conclusive under the general issue, or even on application to confirm a default. It was never waived by defendants, was entirely susceptible of being referred to and tried with the merits as part of them, and, in point of fact, the judgment, though it does not mention the exception, is obviously based upon it.

We think, moreover, the interveners properly established their right to intervene. They were attaching creditors of the same property, and made their attachment proceedings parts of their petition. These exhibited the *prima facie* proof of debt which the law sanctions as sufficient to authorize the attachment, and, if they were authorized to attach, they were authorized to intervene, and to protect their attachment from being nullified by the allowance of a preference in favor of a prior illegal attachment. They were not bound to anticipate the issues involved in their suit against the debtor by proof of their claims, such as would sustain a final judgment against him. Their interest is too palpable to admit of dispute, since the maintenance of plaintiff's attachment would render their own futile. The case is fully within the authority of Bank v. Moss, 41 La. Ann. 227, 6 South. Rep. 25, where we held that an attachment must stand or fall according to the state of facts existing at date of issuance; that, in order to sustain it, the debt must be unconditional; and hence that the holder of a bill of exchange, not yet due, cannot attach against the drawer of the bill, because his liability does not arise until after compliance with the conditions of presentment at maturity, failure of the drawee to pay, and due notice. We can discover no error in the judgment appealed from.

Judgment affirmed.

ON REHEARING.

(April 18, 1892.)

WATKINS, J. The importance of the questions involved, and the earnestness with which the application has been presented, have induced us to re-examine the case. Counsel do not, however, seem to be in agreement as to the character of the questioned contract of the defendants, —one presenting the theory that, notwithstanding averment is made in the petition that their contract is one of indorsement, yet they are entitled to take judgment against them as principal debtors, on the proof in the record, admitted without objection; while that presented by other counsel is that, in truth, they are either securities *in solido*, or solidary obligors, and bound primarily. In addition to the foregoing, the point is made and insisted upon that the interveners are merely ordinary litigants, tendering issues of fact for trial, which they are bound to establish, and, failing to do so, are not entitled to recover. The case before us is a controversy between the plaintiff, as first attaching creditor of B. Feibleman & Co., defendants, and the interveners as second attaching creditors of the same property; the latter claiming the right to prime the former in the distribution of the proceeds thereof, after the defendants' absolute indebtedness has been satisfied therefrom. It is error to insist that interveners seek to obtain a judgment in this suit against the defendants. They are only seeking to reduce and restrict the amount of plaintiff's judgment against them, so as to enable them to realize something out of the property attached. Manifestly, the defendants' exception and answer cannot affect their right. All that is necessary in order to entitle a party to intervene in a pending suit between other parties is that his petition shall disclose an interest in the success of either party, or an interest opposed to both parties. Code Pr. § 390. The proposition on which the interveners mainly depend is that the plaintiff's demand, to the extent of $22,500, is based upon indorsements of B. Feibleman & Co. upon the notes of Cohn & Feibleman, drawn to their own order, and by them indorsed, and made payable at a future date, and not due at date of suit; and that on such indorsements no attachment will lie, because the obligation of an indorser is conditional only, and cannot become absolute until the maker is in default for nonpayment, and due presentment, protest, and notice have been made. In the assertion and maintenance of such a proposition interveners certainly had an interest, and, in support of such plea, it was only necessary that they should allege and prove the existence of their attachments,

and the character of the defendants' contract. The assertion of their interest does not depend at all upon the validity of interveners' claims against the defendants, for that is not an issue in this case. Defendants objected to the introduction of evidence tending to establish them. The real object of their demand is to diminish the plaintiff's claim against the defendants, so that the extent of their privilege on the property attached might be correspondingly reduced. In order that this object be accomplished, it became necessary that the claims of the interveners should be presented "to the court by whose mandate the property was first seized," so that it should "proceed to class the privileges * * * according to their rank, * * * in a summary manner," etc. Rev. St. § 2903. From the record it appears that the three notes in controversy are each for the sum of $7,500, drawn by Cohn & Feibleman as makers, payable to their own order at the Importers' & Traders' National Bank of New York, and by them indorsed in blank. They matured, respectively, on the 27th of November and December 12, 1890, and 10th of January, 1891, and suit was filed and service on the 1st of December, 1890, the very date on which the first note went to maturity. Upon each of those notes the name of B. Feibleman & Co. is indorsed in blank, immediately underneath that of Cohn & Feibleman, without any accompanying explanatory statement. On the same date, and contemporaneously with the service of citation, a protest of said note was made, and due notice given to both makers and indorsers, the evident purpose thereof being to fix the liability of the defendants.

Viewing defendants' contract as one of indorsement, pure and simple, this protest, made, as it was, in the city of New Orleans, was altogether unavailing, because the note was payable at a bank in New York, and could not be presented for payment elsewhere. It is a familiar principle that the indorser's "undertaking is not general, but conditional upon due diligence being used against the principal debtor, and such diligence requires presentment at the place specified, where it is presumed that funds have been provided to meet the bill at maturity." 1 Daniel, Neg. Inst. § 644, (3d Ed.) Inasmuch as this protest was insufficient to place liability upon defendants, the three notes occupy very much the same position in this case, the defendants having become exonerated from the payment of the first, and their liability on the other two not having become absolute at date of suit.

The controversy is thus narrowed to the single question, whether B. Feibleman & Co. were really, as matter of law, sureties of the makers, notwithstanding plaintiff's averment that they are indorsers. This court has frequently held the law to be well settled that one not a party to a bill or note, who puts his name upon it, is presumed to have done so as surety; and that, in such case, his obligation will not be that of an indorser, under the principles of the commercial law. Cooley v. Lawrence, 4 Mart. (La.) 639; Guidrey v. Vives, 3 Mart. (N. S.) 659; Smith v. Gorton, 10 La. 374; Lawrence v. Oakey, 14 La. 386; Gilbert v. Cooper, 4 Rob. (La.) 161; McGuire v. Bostworth, 1 La. Ann. 248; Drew v. Robertson, 2 La. Ann. 592; McCausland v. Lyons, 4 La. Ann. 273; Chorn v. Merrill, 9 La. Ann. 533; Richard v. Butman, 14 La. Ann. 144; Weaver v. Marvel, 12 La. Ann. 517; Collins v. Trist, 20 La. Ann. 348; Field v. Newspaper Co., 21 La. Ann. 25; Adams v. Gordon, 22 La. Ann. 41; Rogers v. Gibbs, 24 La. Ann. 468. This rule is well recognized by text writers. Story, Prom. Notes, passim; Chit. Bills, p. 435; 1 Pars. Notes & B. 521 et seq. But it is just as well settled that the foregoing rule is exclusively applicable to bills or notes payable to order, and which are subsequently indorsed by one not originally party thereto; the real purpose and object of an indorsement being to transfer the property in a bill or note, and to effect a legal delivery thereof to the indorsee. From this settled principle it follows that it has no application to such notes as those in controversy, same being payable to bearer, and not to order; for Mr. Daniels has justly observed of the proposition under consideration, to wit: "If the note be payable to bearer, either in terms, or becomes so in effect, by being made payable to the maker's order, and then being indorsed by him, in either case the party who places his name on the back of it will be deemed an indorser only." 1 Daniel, Neg. Inst. p. 635, § 707*a*, (3d Ed.) The author cites in support of this proposition the very clear and pertinent opinion of the Massachusetts court, as expressed in Bigelow v. Colton, 13 Gray, 309, to the effect that, in case the note is payable to and indorsed by the maker, "it does not fall within that anomalous class where a third person, neither maker nor payee, puts his name on the back of a note, before its indorsement by the payee, but is the ordinary case of an indorsement of a note payable to bearer, the effect of which cannot be varied or controlled by parol proof." We have no hesitation in accepting this interpretation of the principles of the law merchant, and they are especially applicable to this case.

Applying them to the contract in question, there is not a doubt in our minds that it was one of indorsement, pure and simple, and not of suretyship or unconditional obligation. Nor, in our opinion, does it matter materially that certain parol proof was introduced in reference to the disposition that was made of the proceeds of the discounted paper, and without objection on the part of interveners. The evidence referred to is as follows, viz.: "Question. Is the firm of B. Feibleman & Co. and Cohn & Feibleman practically one concern? Answer. Yes, sir; except with different partners. I had most of the money in both of them. Q. What was done with the proceeds of these notes? A. It was first handed to Cohn & Feibleman, and then paid to me. I paid B. Feibleman's accounts with it, and continued our business. Q. The three notes of $7,500, you mean? A. Yes, sir. Q. The proceeds of these notes were used, then, for the payment of debts created for

the benefit of B. Feibleman & Co.? A. Yes, sir." It shows that Cohn & Feibleman really discounted the paper, it may be for the benefit of the defendants; but that can make no possible difference, as, presumably, every indorser receives a consideration for his signature. It shows, further, that, if Cohn & Feibleman did discount their own paper, it was apparently indorsed by the defendants at the time, and the money was expended for their benefit. Evidently, when interpreted in the light of this evidence, the undertaking of the defendants was conditional, and not absolute. A careful investigation of the law and evidence, and a comparison of our opinion made therewith, have served to confirm us in the correctness of our opinion, and therefore a rehearing is refused.

(44 La. Ann. 194)

BRELET v. MULLEN. (No. 10,922.)

(*Supreme Court of Louisiana.* March 21, 1892. 44 La. Ann.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—BONA FIDES OF PROSECUTOR.

1. It is universally held that a criminal proceeding, having been brought or prosecuted maliciously and without probable cause, affords, when terminated, the basis of an action in damages for malicious prosecution against the one bringing or prosecuting such proceeding.

2. In order that a plaintiff may maintain such an action three things must concur: (1) The motive must have been malicious; (2) the suit must have been instituted without any probable cause; (3) the suit must have terminated, after trial of its merits, in favor of the accused.

3. It is malice, composed of bad feeling and knowledge of the want of probable cause, which creates liability.

4. Public interest and a proper administration of justice require that such actions should not be maintained except in clear cases.

5. Courts will not inflict damages on a party resorting in good faith to law for the protection of his rights, rather than taking the chance of a recourse to arms, or tamely submitting to a usurper.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Action by Alexander Brelet against James Mullen for damages for a malicious arrest and prosecution. From a judgment for plaintiff, defendant appeals. Reversed, and a new judgment entered.

W. R. Richardson and *James Timony*, for appellant. *Buck, Dinkelspiel & Hart*, for appellee.

BERMUDEZ, C. J. This is a suit in damages for a malicious arrest and prosecution, for $5,000. The petition contains the usual charge of malicious arrest and prosecution without probable cause, discharge after trial, and injury sustained; and the answer is a denegation of the averments. From a judgment for $250 by the judge the defendant appeals, and the plaintiff, on appeal, asks an increase to the amount originally claimed. It appears that in 1883 a city ordinance was passed, in pursuance of which the side of the revetment levee, at West End, not covered by grants to the New Orleans City Railroad Company, was divided into lots, and leases were made to various parties. One Carroll, who obtained one of the leases or permits to occupy, placed some improvements on his spot, subsequently selling his right thereto to one Minnie Wilson, who afterwards, on the 10th of March, 1890, by public act sold or transferred hers to Mary Boylan, the wife of defendant, including "buildings and improvements," for $600, acknowledged to have been paid. Under the impression that a certain structure existing between the revetment levee and the shore proper, and used as a "necessary," or place of convenience for ladies and children, had been erected upon the spot, the permit to occupy which had been purchased by his wife, Mullen, the defendant, thought he had a right to take possession of it for her. Finding it locked, and informed that it was in the possession or under the control of the railroad company, he went to the mayor's office to ascertain how the matter stood. The title to the spot was exhibited to the mayor, who, after hearing Mullen's complaint, compared it with the plan or map of West End, and found that it referred to lot No. 9 upon it. He then told Mullen the piece was his, (meaning his wife's, no doubt,) and to go and take possession of it. Thereupon Mullen, finding the building closed, entered it, and took possession of it, placing obstructions within, to prevent all entering into it. Subsequently a woman, who had the key of the building or structure, finding that the door had been barred, complained of her inability to enter to the plaintiff, Brelet, who is a police officer, commissioned by the mayor, but paid by the railroad company at West End, and put on duty at that place. This authority broke into the structure, removed the obstacles, and placed the woman in possession. Subsequently Mullen remonstrated with the person who held the key, who directed him to complain to the company, if he had any cause for grievance. Mullen did not follow the advice, but went again to the mayor, stating what occurred. The result of the interview was that the officer was sent for by the mayor, who stated the complaint against him, and advised him on the subject, favorably to Mrs. Mullen's pretentions. The officer denies that the mayor told him not to break into the premises; but he states that had he done so, and, had the railroad company directed him otherwise, to the reverse, he would have rather obeyed the latter. Be this as it may, the fact is that, after Mullen had placed other obstructions, Brelet broke into and entered the premises, putting the woman in possession again of it, thus championing, at his peril, the presumed right of others. Thereupon Mullen reported the fact once more to the mayor, who told him to take possession again, and to make a charge against whomever would interfere with the place. Then it was that Mullen went before the recorder, made a charge against Brelet for breaking and entering, upon which the latter was nominally arrested, taken to the recorder, who released him without bail. The matter came up before the magistrate, who dismissed the charge. Heard as a witness,

he said that he did so because the case involved a title to property, which he declined to go into. It appears that some publicity was given of the arrest of Brelet, and that his discharge was also announced. Under those circumstances, $5,000 damages are claimed.

"It is universally held that a criminal proceeding, having been brought or prosecuted maliciously and without probable cause, affords, when terminated, the basis of an action of malicious prosecution against the one so bringing or prosecuting such proceeding." 14 Amer. & Eng. Enc. Law, "Malicious Prosecution," p. 25. "In order that the plaintiff may maintain this action, three things must concur: (1) The motive of the party instituting or prosecuting the suit or proceeding must have been malicious; (2) the suit or proceeding complained of must have been instituted without any probable cause therefor; (3) the suit must be terminated." Id. p. 17. A thoughtful consideration of the facts of this cause does not impress the mind with the conclusion that Mullen acted with malice, and without probable cause. The balance of probabilities rather preponderates the other way. His whole course indicates that, as a faithful husband, anxious of protecting the interest of his wife, he did all in good faith which ordinary prudence and discretion could suggest. He really thought that the structure in question had been put up on the lot, the right of occupancy of which his wife had purchased from one who indirectly held it from the city, which was a sort of warrantor. Before using violence or even taking any legal step against the party who had broken into it and placed another person in possession of it, Mullen thought it prudent to go to the city hall, and ascertain from the officer representing the city as to his wife's right to the occupancy of the structure. After comparing the act of sale with the map of West End, the mayor told him the building was on the spot, and to take possession of it. He did so, but, after the structure had been again broken into, he returned to the mayor, and, on his suggestion, made the charge against Brelet, the dismissal of which caused the bringing of the present suit. There is nothing to show any actual or constructive malice in any of Mullen's acts and doings in the premises. Under the circumstances, he had probable cause. If it be true that the structure is on the spot, and that Mrs. Mullen acquired the right of occupying and enjoying the same, it is clear that she had a good cause to have any one arrested who interfered with it; the more so, as the mayor, who is the authority who has the control of the police force of the city, thus said, and advised the bringing of the charge. The inquiry of the mayor, and his suggestions, are perhaps better than legal advice from counsel learned in the law, in a case of this description.

It may be asked further whether the prosecution has terminated, so as to justify a suit for malicious arrest by one who had no authority to intermeddle as he did. The merits of the charge were not inquired into, and the dismissal of the proceeding does not amount to an acquittal. The recorder said that he would not go into the question of ownership, and discharged the accused. Another accusation could be brought against him, were it in time, and did the facts warrant another prosecution. In a kindred recent case, in which the owners of two contiguous lots quarreled as to the spot on which a division fence should be placed, surveyors disagreeing, and the one caused the arrest and trial of the other, who was subsequently discharged, a suit in damages was brought for malicious prosecution, this court had occasion to review somewhat extensively the law applicable to cases of this character, and it declined to allow damages. It held that it is not always that malice and want of probable cause can be inferred from the dismissal of a charge against an accused before a committing magistrate, and that, if the discharge be *prima facie* evidence, the presumption may be rebutted. It also held that, in the absence of facts showing malice and want of probable cause, which are essential ingredients, no recovery can be had. It is the malice, composed of bad feeling and the knowledge of the want of a probable and just cause, which creates liability. Public interest and a proper administration of justice require that actions for malicious prosecutions should not be maintained without clear proof of malice and want of probable cause. Courts cannot inflict damages on a party for resorting in good faith to law for the protection of his rights, rather than taking the chance of a recourse to arms, or tamely abandoning the field to a usurper. Girot v. Graham, 41 La. Ann. 511, 6 South. Rep. 815. See, also, Maloney v. Doane, 15 La. 278; McCormick v. Conway, 12 La. Ann. 53; Lisk v. Mathis, 11 La. Ann. 419; Godfrey v. Soniat, 33 La. Ann. 915; Coleman v. Insurance Co., 36 La. Ann. 92; Dearmond v. St. Amant, 40 La. Ann. 374, 4 South. Rep. 72; Macias v. Lorio, 41 La. Ann. 301, 6 South. Rep. 538; Ivers v. Ryan, 42 La. Ann. 32, 7 South. Rep. 61. The circumstances of this case do not show malice in the defendant and a want of probable cause, and do not warrant the infliction of damages on him. It is therefore ordered and decreed that the judgment appealed from be avoided and reversed, and that there now be judgment rejecting plaintiff's demand, and relieving defendant from the claim; plaintiff to pay costs in both courts.

(44 La. Ann. 564)

STATE *ex rel.* BLOCK *et al.* v. RIGHTOR, Judge. (No. 11,026.)

(*Supreme Court of Louisiana.* March 21, 1892. 44 La. Ann.)

ATTACHMENT—INTERVENTION—SUSPENSIVE APPEAL—AMOUNT OF BOND—MANDAMUS.

The ruling in 22 La. Ann. 115, (State v. Judge,) has no bearing. The case is not analogous, as there was no fund in court for distribution.

ON REHEARING.

1. The law fixes no standard for the amount of the bond to be given by a party who wishes to take a suspensive appeal from a judgment refusing him a participation in funds in the hands

of the court. A bond for costs is sufficient. The appellant can be condemned to pay nothing else.

2. A bond for more would be oppressive, and an idle ceremony.

(*Syllabus by the Court.*)

Application of Elias Block & Sons for a writ of *mandamus* to compel N. H. Rightor, judge, to grant the relators a suspensive appeal on a certain bond for costs. Writ allowed. Rehearing refused.

W. S. Benedict, for relators. *Henry L. Lazarus* and *Hunter C. Leake*, for respondent.

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the district judge to grant the relators a suspensive appeal on a bond for costs. The averments are that C. Lazard & Co., having brought suit against Henry Block & Co. for $31,000 and more, coupled with an attachment, under which property was seized and money realized to a large amount, ($10,000 or more,) which are in the sheriff's hands, Elias Block & Sons intervened, claiming to be creditors of the defendants, levying their attachment on the same property, and traversing the claim of the original plaintiffs; that, after trial, the court rendered judgment in favor of plaintiffs, rejecting the intervention of Elias Block & Sons; that thereupon the latter applied for a suspensive appeal from the judgment so rendered, tendering a bond for $2,000, but that the judge declined to accept said bond, and required one to be furnished, according to law, less the amount in the sheriff's hands, meaning a bond for one half over and above the difference between the amount of the judgment and that in the sheriff's hands. The district judge substantially answers that the bond required by him is that prescribed by law, for the reason that a third party is no more allowed to suspend a money judgment on a bond for costs than the defendant in the case could, and therefore that such party is bound to furnish a bond for the same amount that the defendant would have to give should he apply for a suspensive appeal. The only effect of the appeal taken within the 10 days following the signature of the judgment would be to prevent a distribution, as far as the interveners are concerned, of the moneys in the sheriff's hands. The law fixes no standard for the amount of the bond to be given by a party who wishes to take a suspensive appeal from a judgment refusing him a participation with others in a fund in the hands of the court. A bond for costs is sufficient. Blanchin v. The Fashion, 10 La. Ann. 345. See, also, State v. Judge, 20 La. Ann. 108; State v. Judge, 22 La. Ann. 178; State v. Judges, 27 La. Ann. 685; State v. Judge, 30 La. Ann. 314; Succession of Gohs, 37 La. Ann. 428. The bond could only be for the satisfaction by the surety of the judgment to be rendered on appeal, should the principal fail to pay it. In no event could the relators be condemned, on appeal, to pay more than the costs. Requiring a bond for more would be oppressive, and an idle formality. It is therefore ordered and decreed that the *mandamus* prayed for be made peremptory, and that the suspensive appeal asked be allowed on the bond of $2,000 offered, which appears to be ample.

ON REHEARING.

(April 4, 1892.)

Article 579, Code of Practice, distinctly provides that the appeal bond must set forth in substance that it is given as surety that the appellant shall satisfy whatever judgment may be rendered against him on appeal. It is palpable that on appeal he could not be condemned to pay a judgment rendered against some one else, and that the only one which could be pronounced against him, as a dismissed plaintiff, appealing, would be for costs. Reference to the case of State v. Judge, 22 La. Ann. 115, affords relator no relief. It is not an analogous case, as there was no fund in court. The question whether the appeal by the relators would suspend the further execution of the judgment against the defendants and the garnishees does not arise here, and is not decided, although it may well be that it does not, so as to realize money for distribution, without making any repartition. The funds are arrested only to an amount sufficient to meet the claim of relators.

(44 La. Ann. 508)

BERTHELOT v. FITCH *et al.* (No. 10,917.)

(*Supreme Court of Louisiana.* March 21, 1892, 44 La. Ann.)

DESCENT AND DISTRIBUTION—COLLATION—LIABILITY OF DONEE FOR RENTS—TAXES AND INSURANCE—LANDS IN FOREIGN STATE—PARTITION—APPEAL.

1. Collation is founded on the equality which should prevail among children, and the purpose is to restore the property or its value to the succession, so that the heir will receive his portion as if no donation had been made.

2. If, as to immovables, the donee elect to collate in kind, the property belongs to the succession as of the date of the donor's death.

3. He will be charged rent for the property from the time of the opening of the succession.

4. He is entitled during that time to the taxes paid by him, and the insurance.

5. He also has the right to repairs, made at his expense, covered by the provisions of articles 1256 and 1257 of the Revised Civil Code.

6. The donee of movables must collate by taking less. Article 1283, Rev. Civil Code.

7. The waiver of all rights by the usufructuary in favor of one of the heirs, in so far as concerns her portion, does not give valid cause to object to a partition. The usufructuary has the right to waive the entire right.

8. She can therefore waive a part on property falling to one of heirs.

9. The defendant who has not appealed cannot avail himself of the appeal of his codefendant.

10. A judgment cannot be amended as between coappellees.

11. Immovable property in another state, belonging to heirs, must be administered under its laws.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit by Emma Berthelot against Mrs. J. E. Fitch, Mrs. W. D. Maginnis, and Catherine Henderson. From a judgment for defendants, plaintiff appeals. Affirmed. Rehearing refused.

H. P. Dart, for appellant. *Farrar, Jonas & Kruttschnitt*, for appellee Mrs. Fitch. *W. S. Benedict*, for appellee Mrs. W. D. Maginnis. *Gilmore & Baldwin*, for appellee Mrs. Catherine Henderson.

BREAUX, J. Plaintiff petitions for a partition as one of the heirs of her late father, John Henderson, and to have returned to the mass of the succession, either in kind or by taking less, the property which two of the heirs have received in advance of their shares, in order that the property may be divided, together with the other effects of the succession. One of the heirs filed an exception to the suit on the ground that prior it was necessary to know the amount of assets and liabilities of the succession, in order that the judgment might settle the rights of the parties. The court overruled this exception. This heir denies, in her answer, that she is indebted to the succession. She also denies that any collation is due by her. She alleges that her brothers and sisters have received from their father an amount equal to that which she has received. Another heir admits that she received real estate from her father, and adds that only half is subject to collation, because her mother is living, and the property donated belonged to the community. The remaining heirs also pleaded the general issue, and express their consent to a partition, subject to the right of usufruct of their mother. The latter is also a party to the suit. In her answer she admits that she has waived the usufruct allowed her by law on the share of plaintiff in the estate of her father. The judge of the district court ordered a partition to be made, and the judgment decrees that the heirs shall collate the property donated, and the taxes, insurance on the property, and that necessary repairs be deducted from the time mentioned in the judgment. From this judgment plaintiff appeals.

The order overruling the said exception gives no ground for defense, for the purpose of the suit is to ascertain the assets and liabilities of the succession. Proof of these cannot be required as a condition precedent to maintain the suit. The judge orders the partition, and regulates the manner in which it shall be made, as well as the collations. They are among the first acts to establish the assets and the liabilities of the succession.

ON THE MERITS.

Collation is founded on the absolute equality which should prevail in dividing property of the father and mother among children or other lawful descendants. The donations made did not stipulate that they constituted an extra portion. At the time of the donor's death they were in excess of the disposable portion of his estate. The court, in the judgment appealed from, fixed the value of the immovable property at the time the succession was opened, and at which the collation should be made, in the event that the donees elect to collate by taking less, as required by article 1269, Rev. Civil Code. The appreciation of the testimony in this respect by the district judge impressed us as being just and eminently correct,—that donated to Mrs. Maginnis at $14,000; that donated to Mrs. Fitch, $3,100. The latter is properly ordered to collate one half the property donated to her by her father as head and master of the community.

With reference to the expenses on the immovable property in case the donor elects to collate in kind. The court *aqua* ordered that the donees be charged with the rental of the property from the opening of the succession, and fixed the amount due by Mrs. Maginnis at $80 per month on the immovable property donated to her. This was proven as being a fair amount, and was properly allowed. We do not discover any error in ordering that the necessary repairs, taxes, and insurance paid during the time the rent is charged on the property be deducted. They were useful and unavoidable expense during the time that rent was being paid. Expenses on immovable property, in case of collation, are distinguishable by three kinds,—necessary, useful, and those for mere pleasure. The first are chargeable when they were necessary to preserve the thing. The second should be deducted when the value of the real estate has been enhanced thereby. The third should not be charged at all. The donor has the right to take them away, if he can, without injuring the estate, and leave things in the situation they were at the time of the donation. With reference to necessary repairs, it is said that the donee has the right to reimbursement when he has acted as a prudent administrator should, and has had the work done as cheaply as possible, and has acted for the best in every respect. "The *de cujus* would have been obliged to make the expense had he been the owner. He could not have had the repairs made for less. It is therefore just that the succession should indemnify the donees." 2 Baudry Lacantinerie, p. 186. This commentator illustrates what are necessary repairs by reference to the reconstruction of a wall threatening to fall; the elevation of an embankment to prevent loss. The useful repairs are such as a prudent owner would make. They must be substantial, and improve the value of the property. The reasons for judgment and the judgment establish that necessary repairs and useful repairs improving the value of the property are to be deducted, such as the cost of Barber asphalt pavement, $602, and the amount paid F. Jehnke also for paving, $270, to which the donee has a right. The donee has no claim for expense in substituting one iron fence for another, it being proven that the first was not out of repair. The other items which are not covered by the definition of "repairs improving the value of the property or necessary," must be rejected. The same principle applies in all respects to the Fitch immovable property of the other defendant. The plaintiff alone appeals. All the appellees except one have filed an answer to the appeal alleged to have been taken by Mrs. Anna Lee Maginnis. She is not an appellant. As between the appellees the several demands were passed upon by the judgment below. There can be heard on appeal only those who are actually appellants. Lawrence v. Burris, 12 La. Ann.

846. Therefore the question of repairs is reduced to the issue presented by the appeal against those called upon to collate.

Usufruct. One of the defendants files an objection on the ground that the survivor in community has no right to renounce her usufruct in favor of one of the heirs. The waiver was made in favor of plaintiff, who is one of the owners. If, after the partition, or even before, the usufructuary waives her right as to an heir, this gives no valid objection to the partition of the property. She has the right to waive the whole; she therefore can waive a part. *Totum in toto et totum in qualibet parte.*

The movable property must be collated by taking less at its appraised value at the time of the donation. Rev. Civil Code, art. 1283. The value was correctly fixed, we think. The wear and decay since they were purchased and presented to the donees should not be taken into account in establishing the rights of the parties, for the donee of movables is bound to collate their value at the time of donation. We agree with the learned judge of the district court that plaintiff has received no property from her father, and owes no debts for which she is bound to collate. The claims made, if proven, come within the exemption stated in article 1244 of the Revised Civil Code.

One of the defendants claim that certain real estate in Mississippi should be brought into the settlement of the succession. The question was not passed upon by the court *a qua*. Neither in the reason for judgment nor in the judgment is there anything stated about real estate, in which the succession has interest, in another state. In the absence of any decision as to this property, by the court below, this court will not decide any issue affecting it.

In the second place, the claim is made by one of the appellees against her coappellees. The judgment cannot be amended as between them. We see no reason, however, not to add that immovable property in another state, belonging to heirs, must be administered under its laws. Abercrombie v. Caffray, 3 Mart. (N. S.) 1; Cole's Widow v. His Executors, 7 Mart. (N. S.) 44; Succession of Packwood, 12 Rob. (La.) 366; Packwood v. Packwood, 9 Rob. (La.) 438; Dunbar v. Dunbar, 5 La. Ann. 158; King v. Neely, 14 La. Ann. 165. We will not alter the judgment. The decree does substantial justice. Judgment affirmed, at appellants' costs.

ON REHEARING.

(April 4, 1892.)

Our attention on rehearing is directed to an error committed by the draughtsman of the judgment in the district court. It was evidently an oversight on his part. It escaped our attention. The district judge, in his reasons for judgment, says: "In this case, if Mrs. Maginnis collates in kind, she owes rent, which the evidence proves to be $80 a month, from the date of the opening of the succession, from which must be deducted all necessary repairs." In our opinion a paragraph is headed with "reference to the expenses on the immovable property in the case the donor elects to collate in kind," and we ordered that the donees be charged with the rental of the property from the opening of the succession, and fixed the amount due by Mrs. Maginnis for rent at $80 a month on immovable property donated to her; and that the necessary repairs, taxes, and insurance paid during the time rent is charged on the property be deducted, should the donors elect to collate in kind. It happens by the said inadvertence that the decree reads: "If the parties elect to collate said immovable by taking less, the rent of the Magazine street property is hereby fixed at eighty dollars," etc. This inadvertence we now correct by substituting for said words the following, viz.: "Should said defendant elect to collate said immovables in kind, the rent of the Jackson street property, donated to the defendant Mrs. Maginnis, is fixed at eighty dollars a month." The judgment having been amended and made to comply with the records for judgment in the district court and with the decision of this court, as amended it is affirmed, without granting a rehearing, all parties in interest having been heard; the appellees to pay costs of appeal.

Rehearing refused.

(44 La. Ann. 514)

BONIEL v. BLOCK. (No. 10,864.)[1]

(*Supreme Court of Louisiana.* March 21, 1892. 44 La. Ann.)

LANDLORD AND TENANT—ILLEGAL EJECTION OF TENANT—DAMAGES.

1. A house owner, who has served the notice provided by Act 96 of 1888, and has followed it by ejectment proceedings provided therein, acknowledges that the party so proceeded against and occupying his house is a tenant, and is estopped from subsequently denying it.

2. Where a landlord, instead of resorting to the means provided by law, takes upon himself, without authority, to remove the property of his tenant, and to turn him out, he will be liable in damages, though the ejectment was effected without personal violence, in the tenant's absence.

3. It is no defense that the business conducted by the tenant was illegal, or that the latter was claimed to be in default in payment of his rent. The law provides remedies for such wrongs, and does not sanction private redress.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Action by Moses A. Boniel against Henry Block to recover certain damages. From a judgment on a verdict for plaintiff, defendant appeals. Modified. Rehearing refused.

Moise & Titche, for appellant. *Lionel Adams, Gus A. Breaux*, and *Henry L. Lazarus*, for appellee.

FENNER, J. The allegations which constitute the cause of action may be briefly stated as follows: (1) That plaintiff had rented a house from the defendant, and occupied the same as a tenant, and was conducting a grocery business therein, with a

[1] Rehearing refused April 18, 1892.

stock of groceries. (2) That one Edwards, acting under the authority and direction of the defendant, forcibly entered the house in his absence, removed his goods, and took possession of the premises. (3) That said acts were illegal, and occasioned him damage, for which the defendant is responsible. The defense is a general denial. The case was tried before a jury, and resulted in a verdict and judgment for $1,500, from which the defendant appeals.

It cannot be denied that the petition sets forth a good cause of action, if the allegations are proved.

1. The defendant is conclusively estopped from denying that plaintiff occupied the house under a contract of lease from him by the following notice, signed by himself and served on plaintiff: "New Orleans, April 12th, 1889. Mr. Boniel: You are hereby notified to vacate the property now occupied by you at the corner of Munroe and Newton streets for failing to comply with the verbal lease entered into by you. This notice is in conformity with Act 96 of 1888." This notice was followed by a suit brought under the act referred to, which was a judicial admission of the relation of landlord and tenant, under the very terms of the act.

2. It is proved to our entire satisfaction that Edwards, claiming to act by defendant's authority, had gone to Boniel, and demanded the key and possession of the property, which Boniel refused; that Edwards then told him that he intended to take possession, and that Boniel warned him that, if he did, he and Mr. Block would be held responsible; that Edwards then went to a locksmith, and had a key so filed as to fit the lock of the house; that subsequently, in plaintiff's absence, leaving the house locked up, Edwards returned, unlocked the door with a false key, entered, removed the plaintiff's counter and goods, and took possession. When plaintiff returned, and found what had been done, he caused Edwards to be arrested for trespass. When plaintiff resumed possession of the premises, he was called upon by one Levy, an employe of the defendant, who was sent by the latter again to demand the keys, and the interview resulted in an altercation, in which plaintiff was knocked down and severely beaten. After this he concluded to abandon the premises, and rented and moved into another house. It is not pretended that defendant is responsible for this assault, and it is unnecessary to determine who was in fault. It was only admitted, and is referred to, to explain plaintiff's final abandonment.

3. The evidence is, to our minds, equally clear that, in all that he did, Edwards acted under the authority and direction of defendant. Edwards' statements, in connection with his acts themselves, though properly admitted as part of the *res gestæ*, to prove *rem ipsam*, would not operate as proof of authority when made out of defendant's presence; but there is other testimony of statements by Edwards in the presence of defendant, and of defendant's own statements, to sustain the authority, particularly in view of the significant fact that the defendant, though testifying as a witness, does not even intimate a denial of Edwards' authority.

The foregoing findings are sufficient to sustain the action of plaintiff. It is no defense to say that the business conducted by plaintiff was illegal, being the kind of business described in State v. Boneil, 42 La. Ann. 1110, 8 South. Rep. 298. Defendant was not charged with any function as an officer of the law, and if, as a citizen, he desired to vindicate the law, the course pointed out was entirely different from that here pursued. Neither is the charge that Boniel had not complied with the terms of his lease of any avail. There was a dispute as to whether Boniel was bound, under his lease, to pay his rent in advance. Even if he were so bound, and had failed to comply, defendant's remedy was at law, and not by such proceedings as those here taken. Counsel for defendant has quoted some common-law authorities which are no doubt of great weight in the cases to which they apply; but, so far as this case is concerned, we prefer to rest it upon the memorable case of Thayer v. Littlejohn, (decided by this court,) 1 Rob. (La.) 140, in which the doctrine, ever since followed by this court, was laid down, that, "where a landlord, instead of resorting to the means provided by law for obtaining payment of his rent and possession of his premises, takes upon himself, without authority, to remove the property and turn out the family of his tenant, he will be liable in damages; and it will be no excuse that such removal was effected without violence or injury." See, also, Van Wren v. Flynn, 34 La. Ann. 1158.

We have observed the stress laid by counsel upon his numerous bills of exception to the admission and rejecting of evidence, and have considered them all carefully. We need not review them. Several of them are disposed of by our ruling that defendant was estopped from denying the fact of a lease. Others are eliminated by other views above expressed. The only one sufficiently important to require special notice is that excluding the evidence of Edwards, taken by defendant's counsel at his office, and out of the presence of opposite counsel, but in alleged compliance with Act 84 of 1868. Mere reference to that act will show that the testimony was not taken in compliance with the requirements of that act, and that it would be inadmissible, unless compliance with those requirements had been waived by consent of counsel. There was no agreement in writing, and the counsel disagree in their statement of the facts. Plaintiff's counsel states that, when he received a verbal notice from defendant's counsel that he wanted to take Edwards' testimony, he sent back the message that "he did not desire to be present at the taking of the testimony, that he reserved all legal objections, and reserved the right to cross-examine the witness." This was certainly not a waiver of any requirements of the statute. Defendant's counsel gives a different statement. This court declines to decide such delicate differences, and requires that "all agreements of counsel on which the court is to act must be in writing." Rule 9, § 3. The testimony, there-

fore, stands as not taken according to the statute and without any waiver. Although the particular objection on which the court acted may not have been sound, the testimony was objected to, and was not legally admissible. The testimony was not brought up with the bill, and we know nothing of its nature or importance. We cannot remand the case on this ground.

The damages allowed by the jury are excessive. In the case of Thayer v. Littlejohn, above referred to, the damages allowed, in absence of proof of direct pecuniary injury, were $300. We think that $200 additional will cover the actual pecuniary loss of this plaintiff. It is therefore adjudged and decreed that the verdict and judgment appealed from be amended by reducing the amount thereof to $500, and that as thus amended the same be now affirmed; appellee to pay costs of appeal.

(44 La. Ann. 394)

CARONDELET CANAL NAV. CO. v. CITY OF NEW ORLEANS. (No. 10,884.)

(*Supreme Court of Louisiana.* Jan. 18, 1892. 44 La. Ann.)

FINAL JUDGMENT—FAILURE TO SIGN—DEFECTIVE RECORD—TAXATION—EXEMPTIONS—CONSIDERATION—PUBLIC BENEFITS.

1. A judgment which makes an injunction perpetual, and passes on the points at issue, after trial on the merits, is a final judgment.
2. A final judgment is incomplete until signed.
3. The court will notice *ex officio* that the judgment is not signed.

ON REHEARING.

Our former decree, dismissing this appeal because it appeared from the record that the judgment appealed from was unsigned, was correct; but under the showing now made, that the judgment had been duly signed, and that the omission from the record of the signed judgment was an error of the clerk, which had escaped the notice of the city's counsel, the public interests represented by the city justify us, under precedents of this court, in extending a more liberal relief than could be claimed by merely private litigants.

ON THE MERITS.

1. The Carondelet Canal Navigation Company was exempted from taxation by an amendment to its charter approved March 10, 1858.
2. The immunity was not repealed by article 207 of the constitution of 1879.
3. The public benefit anticipated from the corporation is sufficient consideration for the exemption. None other need be shown.
4. The plaintiff admits ownership on the part of the state.
5. The property, being a constituent part of the canal, incident thereto, and serving the purpose of the company by maintaining its navigation, is exempt from taxation.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Suit by the Carondelet Canal Navigation Company against the city of New Orleans, to enjoin the collection of certain taxes. From a judgment for plaintiff, defendant appeals. Affirmed.

W. B. Sommerville, Asst. City Atty., and *Carleton Hunt*, City Atty., for appellant. *Charles Louque*, for appellee.

BREAUX, J. Plaintiff sued out an injunction, claiming exemption from taxation on the property described in the petition. The defendant presented the plea of general denial. The case was tried. The judgment appealed from, making the injunction perpetual and decreeing the exemption of the property, is not signed, nor is there any evidence that it has been actually signed. It was intended to be definitive, and to decide all the points in controversy. A judgment is incomplete until signed. That it may be appealed from, it must be signed. Saloy v. Collins, 30 La. Ann. 63; Jacob v. Preston, 31 La. Ann. 514. The court will notice, *ex officio*, that the judgment is not signed. Chartier v. Police Jury, 9 La. Ann. 42. Appeal is dismissed, at defendant's costs.

ON REHEARING.

(March 7, 1892.)

FENNER, J. Finding, on the face of the record, that the judgment appealed from had not been signed, we only followed the settled precedents of this court in dismissing the appeal; and no one can question the correctness of our action. Now, however, the city of New Orleans shows, under *certiorari*, that the judgment was regularly rendered and signed in the lower court; that the clerk, in making up the transcript, had erroneously copied only the judgment entered on the minutes, instead of the signed judgment, and that the counsel of the city, misled by the complete certificate of the clerk, had, through inadvertence, omitted to notice the defect. Were ordinary litigants and private interests alone concerned, it would doubtless be too late to obtain relief; but we cannot permit the public interests represented by the city of New Orleans to suffer injury by such an inadvertence of counsel. Precedents justify us in extending such protection to municipal corporations with a more liberal allowance than in the case of private litigants. Millaudon v. First Municipality, 1 La. Ann. 215; Delabigarre v. Second Municipality, 3 La. Ann. 280; Police Jury v. McDonogh, 4 La. Ann. 352; Hassard v. Municipality No. Two, 7 La. Ann. 495. It is therefore ordered that a rehearing be granted, and, acting thereon, that our former decree herein be set aside, and that the case be reinstated, under submission for decision, in due course, on the merits.

ON THE MERITS.

(March 21, 1892.)

BREAUX, J. Certain property fronting on Bayou St. John, near its mouth, was assessed for the year 1888 as the property of the plaintiff company. It is described as a lot of ground near the mouth of Bayou St. John, on its east bank, measuring 188 feet front on the bayou by 540 feet in depth. The collection of the taxes was being enforced by seizure and sale, when an injunction was sued out on the grounds that plaintiff is the lessee of the said property, and is entitled to the franchises of its predecessor, the Orleans Navigation Company, and that the property, being owned by the state, will revert to the state at the expiration of its charter,

and that by section 9 of Act 74 of 1858 the canal is exempt from taxation. The court maintained plaintiff's injunction. From the judgment the defendant appeals.

The history of the plaintiff company has been so often made the subject of comments in different suits that we deem it proper only to refer briefly to the fact that the Bayou St. John was a natural stream, and that Canal Carondelet is known as the work of the Spanish governor whose name it bears. As public property, it became a part of the public domain at the cession of Louisiana. In 1805 the territorial legislature incorporated the Orleans Navigation Company, and made it the duty and gave the authority to that company to improve the canal and bayou. The company was authorized to buy and hold other property. The company, having violated its charter by not complying with its conditions, was dissolved. State v. Navigation Co., 7 La. Ann. 680. The New Orleans Canal & Navigation Company, its successor, having failed to comply with its obligations, the present company, the Carondelet Canal & Navigation Company, was incorporated, (Act No. 160 of 1857;) and the New Orleans Canal & Navigation Company transferred to it all their interests. This includes the lot of ground seized in this case. The said act limited the duration of the charter to 25 years, and provided that the state might at the expiration of that term become the owner on paying the corporation for its improvements and other property of which the plaintiff company has the enjoyment. In the event of an extension of 25 years the state reserved the right, without compensation, of becoming the absolute owner of the said property. Another act was passed in 1858. The corporate succession was extended 50 years from that time, and the property is to revert to the state on due compensation. Certain privileges and immunities were granted to the company,—among them, exemption from taxation until the expiration of the charter. The canal is under the control of the state. City of New Orleans v. Carondelet Canal & Nav. Co., 36 La. Ann. 396. The land on which taxes are claimed, plaintiff admits in its petition and in its brief, belongs to the state. It was donated by congress on April 18, 1814. The act exempting the plaintiff has not been repealed.

The case falls within the doctrine laid down in Home of the Friendless v. Rouse, 8 Wall. 430, and Asylum v. New Orleans, 105 U. S. 362. Act 74 of 1858 amends and is a component part of Act 160 of 1857. The act of exemption establishes a consideration. In several decisions the benefits to accrue to the community are specially set forth. State v. New Orleans Nav Co., 11 Mart. (La.) 309. In one of the decisions, it is even found that an additional harbor has been created. Navigation Co. v. Parker, 29 La. Ann. 434. Benefits anticipated from the corporation is sufficient consideration for the exemption. None other need be shown. Cooley, Tax'n, p. 54.

It is contended that the property cannot be regarded as within the intent of the exemption; that the legislature intended to exempt only the property used for the improvement of the bayou as a navigable water way, and no other. The admission for the trial states that the property is situate on "the right-hand side of the Carondelet canal, and that the same is improved; that the improvements consist of a house rented for a restaurant to third persons, and the other improvements are used by the canal for the storage of their utensils."

In the case heretofore decided, with reference to exempting this company, the court says: "The legislative intent was clearly to exonerate the property of the company, represented by its stock and the machinery used for the contemplated improvement of the canal and bayou." 36 La. Ann. 396. The machinery being exempt, the place on the bank of the stream selected to store it and other materials, to protect them from loss and decay, is also exempt. That buildings of some sort are required, cannot be doubted. It is a constituent part of the canal, necessarily incident thereto. In Schuylkill Nav. Co. v. Commissioners of Berks Co., 11 Pa. St. 202, it was admitted that a canal was exempt from taxation. It was decided by the court: "Where a canal is exempt from taxation, the tollhouse is not taxable," being necessarily appurtenant to the canal. In addition in the pending case the state reserved the right to become the owner at the expiration of the charter, and declared the canal exempt. This property is appurtenant to the canal. The exemption was maintained on similar grounds in Railroad Co. v. Reid, 13 Wall. 267. That one of the buildings is occupied as a restaurant does not defeat the exemption. Burroughs, Tax'n, p. 140, § 74, "Corporations." The question relates to exemption on this lot, *vel non*. The immunity, having been granted many years prior to the adoption of the constitution of 1879, is not defeated by an admission that one of the buildings yields a revenue as rental, without proof of its amount. It is not shown how little or how much is collected for rent. The exemption and the right to resume possession being expressed in one act of the legislature, we conclude that the legislative intent was to exempt the canal and the property appurtenant to it, and serving the purpose of the company in maintaining its navigation. The sovereign authority having the right of becoming the owner of this property on the forfeiture or at the expiration of the term of the charter, we construe the exception with reference to that right.

Judgment affirmed, at appellant's cost.

(44 La. Ann. 433)

Succession of SALOY. (No. 10,906.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

VACATING APPOINTMENT OF ADMINISTRATOR — ILLEGITIMACY OF HEIRS — PROCEEDING BY PUBLIC ADMINISTRATOR — EVIDENCE — CHILDREN BORN DURING COVERTURE.

1. The public administrator has no standing in court to ask the nullity of the appointment of administrators, made after observance of all the forms of law, and seek his own appointment instead, because the deceased was an adulterous bastard, who left no issue, no surviving hus-

band, and no will, and the parties claiming the estate are adulterous collaterals, who cannot inherit.

2. The state has a right to institute judicial proceedings to revendicate the succession of a person who dies without heir. The action arises under express provisions of law.

3. The state would have such right, in the case of a succession of an adulterous bastard, leaving no legitimate or natural issue, no surviving husband, and no will, which is claimed by adulterous collaterals, upon legal proof of the adulterous relationship of the parties.

4. The only evidence which the law allows to be introduced in such a case is a valid judgment, upon proper proceedings, obtained by the husband, or, in his default, his heirs, under the circumstances and within the period prescribed by law.

5. The right to institute an action *en desaveu*, to repudiate children born during the marriage, is exclusively personal to the husband, who is the sole judge of his honor, and of the propriety of bringing it.

6. Where the husband or his heirs fail to institute such suit, the door for the contestation is forever closed; the *status* is irrevocably recognized and fixed, so that it can be thereafter questioned by no one.

7. The state, whatever her governmental prerogatives or police powers be, has no right, in the absence of a formal expression of the legislative will declaratory of the same, to any action to vindicate laws enacted for the preservation of public order or of good morals.

8. The state has not been declared by the legislature to be vested with the right of bringing the "public action." Such right cannot be exercised unless formally recognized and announced by law, and then only for the purpose designated and in the cases specified. In the mean time it is a dormant attribute.

9. In an action brought by the state to exclude adulterous bastards from a succession, where the persons represented to be such were born during marriage, it is essential to allege and prove that their adulterous character (*adulterinite*) has been judicially pronounced by a competent court, and that the judgment has acquired the force of sovereignty.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Bertrand Saloy having died intestate, two administrators were appointed. After they had taken possession of her estate, the public administrator sued to have the appointments vacated and himself appointed, to which the succession excepted. From a judgment denying his petition, the public administrator appeals. Appeal dismissed.

Chretien & Suthon, for public administrator, appellant. *W. H. Rogers*, Atty. Gen., (*Girault Farrar* and *Wynne Rogers*, special counsel,) for the State. *Thomas J. Semmes, Drolla & Augustin*, and *Buck, Dinkelspiel & Hart*, for succession, appellee. *Benjamin C. Elliott*, for absent heirs, appellees.

BERMUDEZ, C. J. The transcript contains several judgments which are brought up for review.

1. The widow of Saloy having died intestate, a contest arose for the administration of her succession, and two administrators were appointed, who took the oath and furnished the bond required by law. After these administrators had taken possession of the estate, and entered upon the discharge of their functions, the public administrator brought suit to have the appointments vacated, and himself appointed administrator of the succession. The grounds upon which he relied are that Widow Saloy died intestate, leaving no legal heirs; that the parties who claim to have inherited her estate are adulterous collaterals, who are disqualified by law; that the appointments were obtained in fraud of the law After hearing on an exception of no cause of action, the petition of the public administrator was denied. From the judgment thus rendered, he appeals.

In Succession of Winn, 26 La. Ann. 162, the then court held that the public administrator has no right to interfere in a succession not vacant, in which the executrix had qualified, and had not been removed, and no creditor had asked for her destitution. In Succession of Burnside, 34 La. Ann. 728, (732,) the right of the public administrator to ask the removal of an executor for the reasons charged was considered, and the court held that he had no authority to provoke the removal of the executor, who was discharging his duties. It said: "His power to act arises only in cases provided by the law which created his office. The utility of his office arises according to law, and his services are required only when a succession is not being administered at all. His office was intended to fill a vacancy, but he had no power to provoke a vacancy. * * * This right can be exercised only by heirs, legatees, or creditors." Code Prac. art. 1018. The ruling in Succession of Winn, 26 La. Ann. 162, is referred to with approval. It does, moreover, appear that, even if the public administrator could have raised lawful aspirations to the administration of a succession like the present one, he should have made them known, asserted them, after the publication of the first application had been made, and engaged with the others in the contest for the administration. It was surely too late after the appointments had been conferred and the appointees qualified. The lower court ruled correctly.

2. It appears that certain parties claiming to be the nearest collateral relatives and the only heirs of Widow Saloy were recognized as such by the court, and ordered to be put in possession of the property left by her. The state of Louisiana then instituted proceedings to have the judgment annulled, on the ground that it had been fraudulently obtained; that the deceased left no legal heirs; and that, in the absence of such, her succession accrues to the fisc. The grave charge is propounded that Widow Saloy was an adulterous bastard, and that the parties in question are adulterous relations, incapable of inheriting. The specific allegation is made that the mother of Mrs. Saloy, Dolores Morales, was the legitimate wife of Juan Gestal, of Cuba, whence she eloped with one Antonio Carcagno, settling in New Orleans, where they had three children,—Marie Madeleine, Carmelite, and Antonio,—who were conceived and born during the existence of said Gestal, who died only in 1842.

Several decrees and judgments rendered in the succession proceedings are com-

plained of, and their annulment is prayed for. The parties appointed administrators, and those recognized as the sole heirs of Mrs. Saloy, whose *status* and right of inheritance are assailed, as well as the attorney of absent heirs, are asked to be cited. The petition concludes with the prayer that the judgment attacked, recognizing the alleged heirs, be annulled, and that the state of Louisiana be declared to be the sole legal heir of Carmelite Carcagno, widow of Bertrand Saloy, and, as such, entitled to the residue of her estate, after payment of debts and charges. To this petition the defendants filed an exception of no cause of action. After hearing, that defense was sustained, and the claim of the state was rejected, with judgment in favor of the defendants. The state appeals.

The exception of no cause of action was considered as putting at issue the right of action of the state to institute the suit, and it was dealt with accordingly. There can be no doubt that, under express textual provisions of the law, the state has the right, in certain cases, to claim the succession of parties who die without heirs, or whose estates are not claimed by those having a right to them. Article 485, Rev. Civil Code, is formal on the subject. It reads: "The succession of persons who die without heirs, or which are not claimed by those having a right to them, belong to the state." In the same sense is article 917, which reads: "When the deceased has left neither lawful descendants nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the state." To same effect is a following article,—No. 929: "In defect of lawful relations, or of a surviving husband or wife, or acknowledged natural children, the succession belongs to the state." It may not be out of place to observe that under the provisions of article 923 it has been held that when the father and mother of a natural child have died before him, the estate passes to the natural brothers and sisters, or to their descendants. Laclotte's Heirs v. Labarre, 11 La. 181; Layre v. Pasco, 5 Rob. (La.) 9. Being made an heir in certain contingencies, it is clear that the state has a right to demand a judicial enforcement of the law in her favor. This right has been admitted in more than one instance, but notably in the well-known case of Succession of Fletcher, 11 La. Ann. 59, in which the state successfully opposed the claim of a daughter of the deceased, on the ground that she was his adulterous child, and could not inherit from him. *Vide*, also, Succession of Mager, 12 Rob. (La.) 584; Berens v. Dupre, 6 La. Ann. 494. This right is so well recognized that the state, in a proper case, may be allowed to institute even the action in disavowal, (*action en desaveu.*) Toullier, vol. 2, No. 127. It is enough that the state has a pecuniary interest to revendicate, to authorize the institution of the suit. Had that interest no existence, the state would have no standing in court, in the absence of declaratory legislation, to assert a governmental privilege or police power for the prevention or suppression of the violation of civil laws enacted for the preservation of public order and good morals. The right thus to interfere must have previously been expressly announced and formulated. No doubt the state inherently possesses the prerogative, as a dormant attribute of sovereignty; but her official representatives have no authority to assert and enforce it when there exists no solemn expression of the legislative will directing or sanctioning its exercise. It is not self-operative, and needs legislation to be put in motion. The French authorities referred to in support of the proposition have no application here, where the power has not been announced by the legislative will; but they are of significance in France, where the right to institute as *censor morum* the "action publique" is formally thus recognized. *Vide* Pandectes Francaises, *verbo*, "Action Publique." Also, Repertoire J. P., Suppl. Comp. Id. There is to be found in France, however, no case that we know of, in which the state has sought to exclude adulterous relations from a succession, and was permitted to prove their *status* as such, otherwise than by a judgment obtained by the proper party, and seasonably declaratory of the fact.

The dominant question nevertheless arises whether the state can assert the bastardy of the pretended heirs and claim the succession of the adulterous deceased bastard without alleging that she possesses such evidence, for that is the case presented here, as, under the exception, the facts averred in the petition are taken for true, and that fact is not therein set forth. Adulterous bastards are considered as having no relatives. *Nec genus, nec gentem habent.* Domat says, (Loix Civiles, pt. 2, preface No. 12:) "The successions of bastards who die without legitimate children, and without having disposed of their estates, must be placed in the rank of those which accrue to the prince, for, under our usage, no one succeeds them *ab intestato*, except their children, if they are legitimate, and they themselves succeed to others by testament only." Dealing with the subject, Laurent (volume 9, p. 181, No. 153) says: "The Code does not speak of the succession of adulterous or incestuous children. The question must be decided according to general principles. The adulterous or incestuous child cannot be acknowledged, and has therefore no natural relative,—no father, no mother, no brother, no sister. * * * He can have, as his legitimate relatives, the children born of his marriage, for, however maculated be his own birth, it cannot affect the condition of children born of a legitimate union. From this it is very easy to determine the order in which the estate left by an adulterous or incestuous bastard descends. It passes at first to his legitimate issue. * * * If there are only natural children, they take the inheritance, under article 758, Code Nap. In default of posterity, there are neither natural nor legitimate relatives. It was proposed to defer the succession to the father and mother; but it was not remembered that the unfortunate are legally without father or mother, as

they have no filiation. * * * For the same reason they have neither natural brothers nor sisters, and there is no reversion or succession for their benefit. Remains the surviving spouse, and, in his or her default, the state." See Zacharie, (Aubry & Rau Ed.,) vol. 4 p. 266, No. 10; Demolombe, vol. 14, p. 211, Nos. 136-138. It is therefore apparent that the estate of an adulterous child who dies leaving no issue, legitimate or natural, and without having disposed of it by will, accrues to the state. But is it enough that the crude fact exist to entitle the sovereign to take? Is he not bound to prove it by legal evidence, establishing it beyond all peradventure? If so, what should that evidence be? The exception of no cause of action does not say how and why the petition discloses no valid claim. The state did not demand any specification, and it was tried on the face of the papers. Exceptions of that description tend to the rejection of a petition, not only because the facts alleged, if true, would not warrant the judgment sought, but because the averments are insufficient. From the manner in which the case was presented and argued it is manifest that the purpose of this exception was not so much to deny the right of the state to obtain the judgment sought as it was to deny that for want of allegations which were not and could not be made the state could not adduce legal evidence to substantiate them. Had not the exception been filed, the defendants, after joining issue by answer, could, on the trial, have successfully objected to the introduction of any evidence in support of the averments which would not have been strictly warranted by law. The defendants, by their exception, may be viewed as having told the state: "You say that the three children were born from the adulterous connection of Dolores Morales with Antonio Carcagno while her marriage with Juan Gestal was in existence; that, one of them—Carmelite—having died without issue, and *ab intestato*, the other, Marie Madeleine, who is Mrs. Pons, and the representatives of Antonio, being adulterous collaterals, cannot inherit, and that you therefore are called to her succession, which belongs to you. You do not allege that those three children have, in an action brought by Juan Gestal, under proper averments and seasonably instituted, been judicially declared to be adulterous bastards. Not having made that allegation, because the fact does not exist, you cannot force us to a trial on the merits of the suit. You cannot prove your averment of adulterinity; and, failing in that, you cannot recover the judgment of heirship which you seek." To this the state answers: "It was unnecessary to make the allegation, because this is an action in contestation of legitimacy, on a charge of adulterous bastardy, which can be proved otherwise than by a judgment bastardizing the children at the instance of the husband of their mother or of his heirs. The deceased was an adulterous bastard, and you are her adulterous collaterals. She has died leaving no issue, no surviving husband, no will. You cannot and do not inherit her estate, which therefore accrues and belongs to me, and I ask that it be so adjudged."

It would be cumbersome, and subserve no useful purpose, to enter into any elaborate inquisition to establish clearly what are actions in disavowal, actions in contestation of legitimacy, actions in reclamation, and actions in contestation of *status*, and to enumerate the cases in which they may successfully be brought. The commentators and the courts which have hazarded a disquisition on the subject have ventured on a perilous enterprise, and engaged in a labyrinth, from which it has been difficult sometimes for them to extricate themselves. Insatiable aspirants, after exhaustion of legal knowledge on those thorny subjects, may be assisted in collecting notes to serve as landmarks by referring to the authorities alluded to by the able counsel engaged in this controversy in their elaborate briefs, and to those on which the ravenous commentators themselves, more or less, rely. It will suffice to say that every action brought to contest the *status* of a person is an action *en contestation d'etat*, which is of three kinds: (1) That by which one maintains that the presumption, "*is pater est quem nuptiæ demonstrant*," invoked for a child born or conceived during the marriage, is, as to him, contrary to truth. (2) That by which one maintains that the child is not legitimate, because his birth and his conception did not take place during the marriage of his mother, or because his mother was not married. (3) That by which one contests either the delivery of the mother or the identity of the child. The action *en desaveu* belongs only to certain persons exactly determined; that is, the husband and his heirs. It belongs neither to the mother nor to her heirs. This action is limited to a fatal delay, and very short, after which it is extinguished by the renunciation, express or tacit, which is made by the husband or his heirs. While the action *en contestation de legitimite* accrues to all persons interested, and consequently to the heirs of the mother and to the child himself, this action lasts always. It subsists notwithstanding any contrary renunciation. Mourlon, vol. 1, p. 438, No. 867 et seq. It is unnecessary to enter into any discussion as to whether the suit brought by the state is an action *en desaveu*, or one *en contestation de legitimite*, because it has the complexion of neither, and the state expressly disclaims that it is either, contending merely that it is one *en contestation d'etat*. Whatever its character be, it is clearly an action which has for its object to have it judicially declared that the deceased was an adulterous bastard, and that the defendants, her sister, nephews, and nieces, are adulterous bastards; that the deceased having left no issue, no husband and no will, the defendants do not inherit, and her succession belongs to the state.

The only question presented, after all, is one which relates to the nature of the proof or evidence of which the case is susceptible. Can the state be permitted to resort to any evidence save the judgment in a case of disavowal? That is the ques-

tion. We have been referred to no authority showing that evidence of such a character was ever allowed in order to bastardize children born during marriage, and we know of none. In Succession of Fletcher, 11 La. Ann. 59, in which the state had charged the adulterinity of the daughter claiming the estate, the court allowed the state to introduce usual evidence other than a judgment; but this was done because the daughter was the child of the deceased, a married man, by an unmarried woman and a slave. So there is no parity between the two cases.

The state takes the further position that parties who pretend to be the sole heirs of the deceased, being plaintiffs, must make out their claim, as was required in the Fletcher Case, and that, as they have shown themselves to be Carcagnos, and not Gestals, they have established their *status* as adulterous connections, and therefore debarred themselves from inheritance. This is a fallacy. Those parties are not plaintiffs, as was Marie Louise, in the Fletcher Case. The court there was particular in premising that she was not a defendant, but a plaintiff, on whom the burden of proof rested. In the present instance the parties are not asking or claiming anything, and have nothing to prove. Whatever their *status* be, the state by the suit has forced them into the attitude of defendants, as she attacks them. They are in possession of a judgment, which is their property, emanating from a competent court, which recognizes them as the sole heirs of the deceased. The *onus* is on the state to show by strictly legal proof that they have procured it by fraudulent representations and practices, and the question reduces itself as to whether the state has at her command the evidence exclusively permitted in such cases, in which children born during marriage are gravely charged with being adulterous bastards, incapable of inheriting under the law. The two cases—that of Fletcher and the instant one—are, therefore, in this further respect, entirely dissimilar. There is no doubt that a husband, although he be presumed by law to be the father of the children born from his wife during the existence of their marriage, has the indisputable right to repudiate them, when they have not been begotten by him, and are the spurious fruits of the adulterous intercourse of his wife with another man; but the cases in which he is permitted to go into the scandalous doings of his depraved consort, reeking with the odor of adultery, are specified with precision, and his action, and, in his default, that of his heirs, are to be asserted within a limited delay. Rev. Civil Code, arts. 184–192, inclusive. The proceedings must be conducted contradictorily with the wife and with the child or children whose character and *status* are involved. The law has made him the sole judge of the propriety of engaging in such a course, with a reserve of a right to his heirs of doing so in the event of his death within the delay. He is the only one who, perhaps, can know that he is not the father. Where, aware of the circumstances under which he might have exercised the right of repudiation, the husband, who is the sovereign arbiter of his honor, fails to do so, the door is forever closed, and no one can afterwards assert a right strictly personal to him. Permitting such thing would be to strike a heavy blow at the sacredness of family ties, keep the honor of the wife and of the children in a condition of constant trepidation, and allow the foundation of society to be at all times exposed to tottering and upturning. *Status hominum in perpetua incertitudine fluctuaret.* The sanctity with which the law surrounds marital relations and the reputation and good fame of the spouse and of the children born during their marriage is of such inviolability that the mother and the children can never brand themselves with declarations of adultery, illegitimacy, and bastardy, and their character is not permitted lightly to be thus aspersed, however true in themselves the stern and odious facts may unfortunately be. This doctrine has long ago been recognised in this state. In the two cases of Eloi v. Mader, 1 Rob. (La.) 583, and of Dejol, 12 La. Ann. 854, the then supreme courts expressly recognized and applied it, holding that, where the husband has failed to institute the action *en desaveu*, under the circumstances and within the period specified, the right to assail the legitimacy of the children born during marriage having become extinct and lapsed, it could be subsequently exercised by no one, and those asserting it were debarred from all action. See, also, Tate v. Penne, 7 Mart. (N. S.) 553; Vernon v. Vernon's Heirs, 6 La. Ann. 242. But the converse of the proposition is true, that, if the husband or his heirs have brought proceedings to bastardize children born during marriage, and have established the facts of the adulterinity propounded, and a judgment has accordingly been rendered, and has become final and executory, sovereign and absolute, to all ends and purposes, any one having an interest to promote, growing out of the fact judicially established and proclaimed, may use the proceeding and the judgment successfully for the purpose of establishing the adulterinity. Had, therefore, such judgment been procured in this instance, the state could have used it, and by its operation would have silenced the voice of the blood which the defendants have raised to possess themselves of property left by a collateral, whose forehead has not been branded with infamy. From the fact that such judgment has not been alleged, that its existence is not even whispered, the unavoidable conclusion is that it has no being, and therefore that the state is unprovided with the only legal evidence by which her case was susceptible of proof, and that she must fail in her action. It is therefore ordered and decreed that the judgment appealed from, rejecting the application of the public administrator and the demand of the state, be affirmed, with costs; and, considering that the state has no interest in contesting the validity of the other judgments from which she has appealed, it is ordered that said appeals be dismissed.

(44 La. Ann. 591)

Succession of GLIDDEN. (No. 10,934.)

Appeal of AULD. (No. 10,934.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

SUBSTITUTION—VALIDITY.

A substitution prohibited by our law is the disposition of a donation *inter vivos* or *mortis causa*, which vests the property of the testator in a person named, during the lifetime of such person, who has not the power of alienation; and at his death the same property is to vest in another person named, but who takes title directly from the testator, but by a title which only springs into existence on the death of the first donee.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Suit by Benjamin F. Auld and Hugh Wilson Auld against the succession of Ann E. Auld, wife of George Glidden, to annul the will. From a judgment for plaintiffs, defendant appeals. Reversed.

Rice & Armstrong, for executor, appellant, and *F. S. Drolla*, special tutor, *in pro. per.* *Thos. J. Semmes*, for appellees.

WATKINS, J. Alleging themselves to be the brothers and sole heirs at law of the deceased testatrix, who died without ascendants or descendants, Benjamin F. Auld and Hugh Wilson Auld instituted this suit for the revocation and annulment of the last will of Ann E. Auld, who died in the city of New Orleans, state of Louisiana, on the 27th of January, 1891, possessed of property of the aggregate value of $50,267.52, which consisted, almost exclusively, of United States bonds and currency, state and city bonds, stocks of corporations, and rights and credits generally. Of this, George Glidden, surviving husband of the testatrix, laid claim to some $13,000 or $14,000, as his individual property. The last will of the testatrix is in olographic form, bearing date "New Orleans, July 1, 1884." It was duly proved and admitted to probate, and the surviving husband alone, of three persons named in the will as executors, qualified, and undertook the administration of the decedent's estate. The principal averment on which the charge of nullity is grounded, is that, "except the appointment of an executor," the provisions of the will "are null and void, and substitutions prohibited by law." The following is the full text of the will, viz.: "New Orleans, July 1st, 1884. I declare this to be my last will and testament. I wish my money to be invested in ground rents and real estate in the city of Baltimore, state of Maryland. Should I die possessed of *and* good stocks or securities *that* shall remain until called in, (that is, if they should be found to be United States securities;) other stocks, if doubtful, should be sold, and the proceeds invested as above mentioned. After my means are invested as above directed, I give to my dear husband, George Glidden, of New Orleans, state of Louisiana, one thousand dollars annually out of the income of my estate. The income to be used and divided equally between my nieces of the city of Baltimore and daughters of my brother Benjamin F. Auld, to be used for their benefit. At my husband's death, the property shall be held in trust by my nieces, and all the income, including that left by my husband, shall inure to their benefit during their lifetime, and at their death to be divided equally between their daughters. Should there be any opposition on the part of heirs to this instrument, my husband shall have the whole of the interest during his lifetime, and they to receive the interest only after his death, without the power of disposing of any part thereof. I appoint George Glidden, William A. Gault, and Peter M. Peterson my executors. ANN GLIDDEN."

For the purposes of precision and careful analysis, we will reproduce the article of the Code which prohibits substitutions, viz.: "Substitutions and *fidei commissa* are and remain prohibited. Every disposition by which the donee, the heir, or legatee is charged to preserve for or return to a third person is null, even with regard to the donee, the instituted heir, or the legatee," etc. Rev. Civil Code, art. 1520. In order that the nullity of the will, on the ground that its provisions are prohibited substitutions, be made plainly and clearly to appear, it is essential that language be pointed out which charges an heir or legatee to preserve an inheritance for, or to return an inheritance to, some third person named in the will. There must plainly and clearly appear to be named and designated in the testament two absolute takers of one and the same inheritance, to constitute any provision of the will a prohibited substitution, within the intent and meaning of the law. This view is fully substantiated by the succeeding article of the Code, which declares that a disposition, by which two persons are designated as takers of the same thing alternately, is not a prohibited substitution. For says the article: "The disposition by which a *third person* is called to take the gift, the inheritance, or the legacy, *in case the donee, the heir, or the legatee does not take it*, shall not be considered a substitution, and *shall be valid.*" (Our italics.) Rev. Civil Code, art. 1521. It is equally true that the reprobated disposition must be of property of the testator, and not of income or revenue to subsequently accrue from the use of property, after the testator's death, and the consequent devolution of property *in esse*, upon the beneficiaries under the will. This appears from the succeeding article of the Code, which declares that "the same [*i. e.*, the observation made in the preceding article in reference to the validity of alternative dispositions] shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one and the naked ownership to another." Rev. Civil Code, art. 1522.

From those three articles, taken and construed together, we have the three following propositions, distinctly announced, viz.: *First*, there must be named in the will two absolute takers of one and the same inheritance; *second*, a third person may be legally called to take an inheritance in case an heir or legatee does not; *third*, it is permissible for the tes-

tator to donate or bequeath the usufruct of the property to one, and the naked ownership to another.

Keeping these three propositions in view, we must determine whether the will of the decedent violates the first, or is compatible with the remaining two, because it cannot be compatible with all three of them. In order to ascertain the incompatibility *vel non* of the will with the first of the foregoing propositions, it may be paraphrased and restated as follows, viz.: In the first paragraph she declares that her wish is that her money shall be invested in ground rents and real estate in Baltimore, Md., and that any good securities of which she may die possessed should remain until called in, and that all doubtful securities should be sold, and the proceeds thereof likewise invested. The second paragraph declares that, after her means are invested, her husband was to receive $1,000 annually out of the income of her estate; and the remainder of the income was to be equally divided between her nieces of the city of Baltimore, and the daughters of her brother Benjamin F. Auld, to be used for their benefit. The third paragraph declares that, at her husband's death, the property shall be held in trust by her nieces, to whose benefit all the income shall inure during their lifetime, and, at their death, the property shall be divided equally between their daughters. The fourth paragraph declares that, if there shall be any opposition on the part of the heirs to the testament, her husband shall have the whole of the interest during his lifetime, they to receive the interest only after his death, without the power of disposing of any part thereof. It is conspicuously observable that no disposition whatever is made by the testatrix of her property, save and except what is contained in the third preceding paragraph; and, if that be differently construed, it is quite certain that the testatrix made no disposition of her property at all. Reiterating the foregoing, it is quite clear that the testatrix merely expressed a wish that her money, in possession at her death, should be invested in Baltimore, and doubtful securities should be sold, and likewise invested. She then directs in what manner the income of investments thus made shall be distributed between her husband and nieces. Having thus disposed of the income during her husband's lifetime, she declares it to be her desire that, after his death, her "property shall be held in trust by [her] nieces," and that "all the income shall inure to their benefit during their lifetime." And just here the solitary doubt arises, and that one is in reference to the phrase, "and at their death to be divided equally between their daughters." Argument is presented to the effect that the words "to be divided equally" refer to the income, and not to the property. If this be a correct interpretation, then the question arises as to the disposition of the property. The will declares, emphatically, that "the property shall be held in trust by [her] nieces." For whom were they directed to hold the property in trust if not for their daughters? No one else is mentioned. When was the trust to expire? At the death of the trustees, the testatrix's nieces.

If such be the true construction to be placed upon this paragraph of the will, then the conclusion is irresistible that the words "to be divided equally" refer to the property, and not to the income. They could not have reasonably referred to the income, for the plain reason that the immediately preceding declaration of the will is that "all the income, including that left by my husband, shall inure to their benefit [*i. e.*, the nieces' benefit] during their lifetime;" and, conceding it to have been the intention of the testatrix that "at their death" the property should "be divided equally between their daughters," it would have been supererogatory and vain for the testatrix to have made any different distribution of the income of the property, after it had become irrevocably vested in the donees. Plaintiffs' suit necessarily admits that the will of the testatrix disposed of the property, and that the disposition of the will was necessarily in favor of the daughters of the testatrix's nieces. Otherwise there could be no prohibited substitution in the will against which plaintiffs could inveigh. Conceding this to be true,—and it necessarily is,—then it seems to be perfectly clear that there are no two absolute takers of the property as an inheritance, made mention of in the will; because the nieces, by whom the property was to be held in trust, were only and exclusively entitled to its income "during their lifetime." Death only was to terminate their trust, and their right to the income as well. Upon the happening of that event, the property, in fee simple, is to devolve upon the daughters of the testatrix's nieces, in equal and determined portions.

It is equally clear to our minds that this will presents a case wherein the testatrix, unmistakably, bequeathed the usufruct of her property to her husband and her nieces, in determined proportions, and during their respective lifetimes, and, at their death, the naked ownership to the daughters of those nieces. In confirmation of what we regard as a necessary implication, to be drawn from the character of this action, we refer to the brief of plaintiff's counsel, (pages 3 and 4,) viz.: "In no part of the will does she pretend to dispose of the *corpus* of the property; it is always the income which is in her mind, and it is only the income which she bestows on any one. So prominent is this feature of the will, the court will notice she gives nothing until her money is invested. The language is: 'After my moneys are invested, as above directed, I give to my husband, George Glidden, $1,000 annually out of the income of my estate. The balance of the income to be used and equally divided between my nieces of the city of Baltimore and daughters of my brother Benjamin F. Auld, to be used for their benefit.' No one was to get a cent until the investments were made. Her mind was bent on tying up her money by its investment in lands and ground rents in Baltimore, to be held in trust so that the income, and the income

alone, could be expended. Will this court compel the executor of this estate to invest the moneys of the deceased in ground rents and real estate in Baltimore, in his own name as trustee, and to hold it as trustee so that it may devolve at his death on the nieces of the deceased, as trustees under her will?" It must be observed that counsel starts out with the statement that "in no part of the will does the testatrix pretend to dispose of the *corpus* of the property;" but that statement is answered and refuted by the concluding sentence, in which it is declared that the evident intention of the testatrix was that her means should be invested in real estate in Baltimore by the executor, "in his own name, as trustee, and to hold it as trustee, so that it may devolve, at his death, on the nieces of the deceased, as trustees under the will." Evidently the trust estate is the property. That the trust was created necessarily implies that there is some beneciiary. The will distinctly and exclusively deals with and disposes of the income of her property up to and inclusive of the date of her niece's death. It is only after their death that their daughters are to participate in the estate at all; and, upon the happening of that event, the daughters of those nieces, and no one else, is entitled to any participation in the estate. Antecedent to the death of the husband of the testatrix, no trust is created or apparently contemplated. While it is true the will announces the wish of the testatrix to be that her money shall be invested in Baltimore ground rents and real estate, the duty of making that investment is imposed upon no one. The duty was not imposed upon either of the executors named in the will. At present, we are dealing with the testament alone, and must determine its validity by an examination and comparison of all its parts; and our decision must depend upon its ascertained susceptibility of execution *in futuro*. If, then, the moneys of the testatrix shall be invested in Baltimore real estate, according to the terms of the testament, would there be any legal impediment to its further execution? Such investments being made as contemplated, could the income and property be disposed of, in pursuance of the provisions of the will, without violating the prohibition of the statute in regard to prohibited substitutions? Our investigation has led us to the conclusion that the income and property of the testatrix could be so disposed of validly and legally.

Counsel's argument proceeds upon the hypothesis that the testatrix gave nothing until after the money was invested, and that no one was to get a cent until the investments were made. Hence it is necessary that the court should compel the executor to make the contemplated investments, and by this means create a trust estate, of which the executor should be trustee, until the date of his (the executor's) death, in order that the property might devolve on the nieces of the testatrix. This argument is entirely without any foundation in point of fact, because (1) there is no provision in the will that the executor shall make the investments; (2) it contains no provision to the effect that any one shall continue to be executor so long as he shall live; (3) and no provision that the trust of the nieces shall begin upon the death or expiration of an executor's term of service. On the contrary, the commencement of the trust of the nieces is fixed at the date of the death of the husband of the testatrix, who, as it turned out, was the only one of three who qualified. The only trust mentioned in the will is that of the nieces. That is not a prohibited substitution, but a naked trust, which does not convey any present or eventual interest in the property to the trustees. It is fully shown that there were *in esse*, at the date of the death of the testatrix, both nieces, and the daughters of the said nieces, who are beneficiaries under said testament, and who aver and claim that all of the provisions thereof are valid and legal. On this discussion and statement of facts the questions of law raised are few and simple. We think it quite sufficient for us to cite Marshall v. Pearce, 34 La. Ann. 557, as the whole scope of prohibited substitution was gone into, and the fullest discussion of the authorities bearing on the question had. While it is true that the court was not unanimous in its opinion on the particular application of the law of prohibited substitution to the will there under consideration, yet we find the opinions of the judges *pro et con* in perfect agreement as to what is the vital and essential element of a prohibited substitution. For in the opinion of the court it is said: "The simplest test of the substitution prohibited by our law is that it vests the property in one person, * * * and at the death of such person vests the same property in another person, who takes the same directly from the testator, but by a title which only springs into existence on the death of the first donee. Such a disposition destroys the power of alienation of the property by the first donee, because he is bound to hold it until his death, in order that the person then called to take the title may take it. At the same time, no power of alienation exists in the second donee during the life of the first, because his title only comes into being at the death of the latter." Differing from the majority only with reference to what was a proper construction of the will of Joshua Pearce, but not with regard to what was the proper legal definition of a "prohibited substitution," the chief justice, dissenting, said "To my mind it is apparent that when he bequeathed to his wife his plantation and movable effects, 'to have and to hold during her natural life,' he merely intended to give her the usufruct of that property," etc. Both opinions proceed, necessarily, upon the idea that the *corpus* of the property was disposed of, and that in order that such a disposition should come under the nullifying ban of the prohibited substitution of the Code, there must be, at least, two absolute takers of the title of the property of the testator; that is to say, that a title vests in one person, who is to keep the property during his life, without possessing the power

of alienation, and, at his death, the same property is to vest in another person named. We are of opinion that the will under consideration, in terms, gave to the nieces of the testatrix named as trustees the income of the property or the usufruct, but not the title. This is a mere naked trust, uncoupled with any interest in the trustee, save that of a usufructuary, which is permitted under our law. Under this view, the will contains no prohibited substitution, and is valid. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the demand of the plaintiffs be rejected, at their cost in both courts.

(44 La. Ann. 584)

CALHOUN v. PIERSON. (No. 10,988.) SAME v. TEAL. (No. 10,988.) SAME v. THORPE. (No. 10,988.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

DESCENT AND DISTRIBUTION—ACCEPTANCE OF SUCCESSION—TITLE FROM ANOTHER SOURCE—ESTOPPEL.

1. An act of sale, executed, by the testator to his sister, of his undivided interest and share in the succession and property of his deceased mother, will operate as an estoppel against a claim made by his child to an interest in the estate and property of the grandmother, through the father and testator, as an heir.

2. The admissibility of a private writing of any kind must be tested and determined before it is admitted and filed in evidence; and until proof of its execution is first administered, if such proof be required by the adverse party, it cannot be introduced and filed in evidence, it matters not what may be the object that is expected to be accomplished thereby.

3. After a son has unconditionally accepted the succession of the father, and has accepted and used, as unconditional heir, certain 12-months bonds that had been executed by adjudicatees of his succession property, such son and heir is conclusively barred and estopped from setting up an antecedent title derived from another source, as against the adjudicatees of the property, and their assignees and transferees.

(*Syllabus by the Court.*)

Appeal from district court, parish of Grant; WILBER F. BLACKMAN, Judge.

Petitory action by Mrs. Cora E. P. Calhoun, executrix of William S. Calhoun, deceased, and tutrix of his minor child, against Charles E. Pierson, who claims ownership of the property by mesne conveyance from the succession of said William S. Calhoun's father, Meredith Calhoun, deceased. Same plaintiff against Charles H. Teal. Same plaintiff against Andrew Thorpe. The three cases were consolidated, and separate judgments rendered for defendants. Plaintiff appeals. Affirmed.

Hunter & Hunter, for appellant. *T. H. Thorpe* and *Andrew Thorpe*, for appellees.

WATKINS, J. These three consolidated causes are petitory actions instituted by the widow of William S. Calhoun, suing in the double capacity of executrix of his last will, and of tutrix of his minor child, against the several defendants, claiming ownership, severally, by mesne conveyances from the succession of said William S. Calhoun's father, Meredith Calhoun, deceased. The claim of title is further supported by the averment that the lands in controversy were illegally inventoried as property of the succession of Meredith Calhoun, and therefore illegally sold to the various adjudicatees thereof at probate sales made by Howard McKnight, administrator, in 1882 and 1883; and prayer is made for the nullity of said sales to be judicially decreed, and a cloud on the title removed. The lands claimed aggregate in quantity 1,160 acres, of which it is alleged that William S. Calhoun entered from the government, as will be shown by patent certificates, 720 acres, and that Mrs. Mary S. Calhoun entered the remaining 440 acres, likewise evidenced by patent certificates.

Properly refined, plaintiff's claim and pretension are (1) that the minor of William S. Calhoun, whom she personates as tutrix, inherited the entire property from her father at his death; and (2) that her father acquired 720 acres of the land by the purchases made in his own right from the government, and the remaining 440 acres by inheritance from his mother, Mary S. Calhoun, deceased. *Contra*, the claim made by the defendants is that at the aforesaid succession sales, made in 1882 and 1883, as the property of Meredith Calhoun, deceased, the property was adjudicated in subdivisions to various persons, upon terms of credit, who executed their several and respective 12-months bonds for the purchase prices thereof, with security of mortgage recognized upon same; that subsequently William S. Calhoun unconditionally accepted the succession of his father, Meredith Calhoun, and received said bonds as part of the assets thereof, and gave them in payment to his wife, the present plaintiff; that being a judgment creditor of the father, Meredith Calhoun, the defendant Pierson proceeded by attachment and garnishment against William S. Calhoun, the son and unconditional heir, as his personal debtor, and subjected said bonds to the payment of his judgment, and, on the execution thereof, he became the purchaser of the said lands, in part, and Teal, another defendant, became a purchaser of part, and subsequently he (Pierson) conveyed a portion of those he acquired to the defendant Thorpe, and he in turn conveyed same to Teal. Independently of mere averment, the mooted and principal question is whether the property really belonged to the succession of Meredith Calhoun at the dates of the sales made in 1882 and 1883, for on that the title of defendants depends. Therefore, they averred in their answer various matters of estoppel *in pais* and by deed, as well as by conduct, the effect of which are to preclude William S. Calhoun, as well as persons claiming under him, from ever disputing the title of Meredith Calhoun as their author. Without enumerating them, we will dispose of them *seriatim* as stated in plaintiff's brief.

1. The first estoppel is averred to exist in an act of sale executed by William S. Calhoun to his sister, Miss M. M. Ada Calhoun, on the 27th of May, 1873, conveying

to her all his interest in and to the property of the succession of their mother, Mary Smith Calhoun. If, in point of fact, such a sale was made, the interest of the plaintiff in that portion of the land which William S. Calhoun is alleged to have acquired from the succession of his mother, Mary Smith Calhoun, passed thereby to his sister, and therefore could not have been inherited by his child.

The record discloses the existence of an act of sale, notarial in form, that was executed, as stated in defendant's plea, by William Smith Calhoun, in favor of his sister, Miss Marie Marguerite Ada Calhoun, whereby he sold, conveyed, and delivered to her "all and singular his undivided one-half interest, and all his right, title, interest, claim, and demand, of every nature and kind whatsoever, in and to the succession and estate of his deceased mother, the late Mary Smith Taylor, deceased, widow of Meredith Calhoun, late of the parish of Rapides, deceased, without exception or reservation, * * * and also in and to all the real estate, property, rights, credits, and effects belonging to the estate or succession of his deceased mother, the said Mrs. Mary S. Calhoun, or in which it may appear that said succession or estate is or may be entitled or interested." The consideration for this sale is stated to be the sum of $35,000 in cash; and the act of sale appears to have been duly recorded in the book of conveyances in the parish of Grant, wherein the property is situated, on the 3d of June, 1873. To this deed the plaintiff offered, in explanation and contradiction, what her counsel terms a "counter letter," in rebuttal. The only signature which it purports to have is that of the sister, Miss M. M. Ada Calhoun, who is named as vendee in the deed under consideration. It does not bear the signature of the vendor, W. S. Calhoun. Among other things, it contains the following recital, viz.: "Whereas, on the 27th of May, 1873, by notarial act, William Smith Calhoun did sell, transfer, and assign all and singular his right, title, and interest in and to the succession of his mother, Mrs. Mary Smith Calhoun, * * * now, I, M. M. A. Calhoun, for and in consideration of the above, do by these presents promise and bind and obligate myself to pay and deliver over one half of the entire net proceeds of the succession of our mother, Mary Smith Calhoun, deceased, upon the final settlement thereof," etc. It then concludes with this pertinent and significant phrase, viz.: "Said William Smith Calhoun is to have and receive one hundred dollars during each and every month, on account, and in advance of his share in said succession." This document bears date July 5, 1873, only a few weeks subsequent to the execution and registry of the act of sale in question. On the trial no proof was offered of its execution, even by Miss Ada Calhoun, or of its authenticity; and it was only offered and filed in evidence in this case on October 3, 1891, after the party to be affected thereby, beneficially, had, evidently, been dead for many years, and long since the rights of the defendants had been acquired in the premises; and this document was admitted in evidence by the judge *a qua* without any evidence of its execution, and over the objection of defendants' counsel. On this subject, plaintiff's counsel makes this statement, viz.: "The plaintiff offered in rebuttal the counter letter of Mrs. Lane. To this offer, counsel for the defendants interposed the objection that it was a document under private signature, and no proof of the signature had been made. The court admitted the document, and a bill was reserved on the record. If the suit had been one to enforce the agreement contained in the counter letter, the objection would be good; but when the document was offered merely to show that there was a counter letter, and that the sale was not real, but fictitious, we do not deem that the proof was required. Or if the objection had come in the shape of an exception to plaintiff's right to sue, because W. S. Calhoun had parted with his interest in his mother's succession, it might have required proof of the signature. The answer pleads the sale as an estoppel, and a defense which might have been good if pleaded otherwise does not necessarily operate as an estoppel." We are clearly of opinion that counsel's argument is not sound, and that the judge's ruling was erroneous. The question raised was one of the admissibility of the document to be filed in evidence. Until proof of the execution of a private writing is first administered, if such proof be insisted upon by the adverse party, it cannot be introduced in evidence, it matters not what may be the object intended to be accomplished by its introduction. This is elementary. Code Pr. art. 483; Rev. Civil Code, art. 2245. We must decline to consider that paper, thus denuded of all proof of its verity or authenticity, as having any effect upon the act in question. Disregarding that paper, the estoppel of the act is full and complete.

The second and third estoppels which are urged may be considered as one. They are to the effect that subsequent to the unconditional acceptance of the succession of Meredith Calhoun by his son and heir, William S. Calhoun, in 1887, he received the 12-months bonds that the various adjudicatees had executed for lands purchased at the succession sales made in the estate of Meredith Calhoun in 1882 and 1883, and gave them to his wife, the present plaintiff, in part satisfaction of her claims against him, in the month of February, 1888. The estoppel predicated upon the aforesaid acts is that because W. S. Calhoun had, as heir of his father, received and used the proceeds and avails of the property which had been sold as that of the father's succession, he, and those claiming through him, are precluded from setting up an antecedent title as against the adjudicatees, and their transferees and assignees, of the property. Admitting the facts to have been substantially as stated, counsel makes the subjoined explanatory statement on pages 9 and 10 of his brief, viz.: "C. A. Pierson

had a judgment for $1,000 against the succession of M. Calhoun. W. S. Calhoun did take the bonds from Mrs. McKnight. Pierson garnished the parties who had given those bonds, and obtained judgment against him, and seized and sold out the lands for which they had given the bonds; some of them being the lands now sued for in these cases. The proceeds were credited on his judgment. This 1,160 acres, and a lot more of the lands not included in this suit, were sold under his judgment; and, after paying enormous costs, there was still a balance due on his judgment. W. S. Calhoun had meanwhile made a *dation en paiement* of the bonds to his wife, and that had been recorded, and is offered in evidence here by him, and forms the basis of his next plea of estoppel. Neither he nor the sheriff ever had possession of the bonds; and how he could have found any sanction in law for his extraordinary legal proceedings, or any court to give him judgments, under the circumstances, is a mystery we cannot fathom. Neither W. S. Calhoun nor Mrs. Calhoun ever derived any benefit from the bonds, except so far as they may have been benefited by the ruinous credits on his judgment. He is sued here for the return of 520 acres of land, which is admitted to be worth $10 an acre, or $5,200, which he bought at one of those sales under his judgment; and in his answer he asks that, if he is evicted, plaintiff be required to return him the purchase price, which he fixes at $540,—a little more than $1 per acre. And yet he comes into court, and has the hardihood to urge that because W. S. Calhoun took the bare pieces of paper called 'twelve-months bonds,' and transferred them to his wife, they are equitably estopped from recovering the lands of which he has despoiled them under the bare forms of law; and he himself offers in this record the evidence upon which the foregoing statements are made." Giving the plaintiff the full benefit of her counsel's statement, and it is quite impossible to give her any relief in this action against strangers, and, to all appearances, innocent third persons. That W. S. Calboun did receive the bonds is a fact confessed. That he had previously unconditionally accepted the succession of Meredith Calhoun, as heir, is also a fact admitted. And it is also admitted that he subsequently transferred said bonds to his wife. The hardship and injury complained of might be appropriately considered if the plaintiff were claiming any right under the succession of Meredith Calhoun; but claiming, as she does, under the succession of Mary Smith Calhoun, to which she avers the property belonged, and from which the deceased testator, William S. Calhoun, inherited it at her death, these questions are *res inter alios acta*, and impertinent to the issue of estoppel pleaded as destructive of William S. Calhoun's claim of title.

The judge *a qua* decided the consolidated causes in favor of defendants, and signed three several judgments. Being of opinion that he decided the causes correctly, they are respectively affirmed.

(44 La. Ann. 475)

Succession of SPARROW. (No. 10,997.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

SUCCESSION REPRESENTATIVE—ADVANCES TO MINOR HEIRS—REIMBURSEMENT—SUCCESSION SETTLEMENT—CHARGES.

1. In case a right has been reserved to a succession representative, to claim reimbursement for sums by him already advanced to minor heirs having an interest in the property under administration, such representative, making further advances to said minors, in order to supply them with necessaries for their support and education, which the tutor did not possess adequate means to supply them with, occupies towards such minors *quasi* contract relations, entitling him to reimbursement of such sums since furnished also.

2. Settlement thereof is clearly contemplated to take place in due course of the administration of the ancestor's estate from which the advances were made. To such case article 850 of the Revised Civil Code does not apply.

3. A final succession settlement having been postponed for a number of years, on account of numerous complications and unavoidable causes, for which the administrator is not responsible, and in the mean time the mules and working cattle attached to the succession plantations having been annually leased therewith, the losses sustained by the death of any of said animals are rather to be attributed to natural causes, such as work, overage, and ordinary use will bring about, than to dereliction of duty on the part of the administrator, in failing to obtain a decree for their sale, or to damage resulting from his misconduct.

4. Charges against a succession, of whatever character they may be, such as funeral charges, law charges, lawyer's fees for settling the succession, and generally all claims against the succession, originating after the death of the person whose succession is under administration, are to be paid before the debts contracted by the deceased.

5. Among such succession charges may be included claims of the administrator against minors for moneys to their tutor advanced for their support and education, and before the shares of said minors have been segregated from the mass of the succession, and reduced to dominion and control by their tutor.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Carroll; FIELD F. MONTGOMERY, Judge.

Application by the administrator of Minerva Sparrow, deceased, to homologate his final account, and to be permitted to sell enough of the succession property to pay its established debts, and enough of the property of the interests of the heirs to pay their indebtedness to the administrator. The account was opposed, and the sale was enjoined. A judgment was rendered homologating the account, perpetuating the injunction, and holding the administrator liable to the minor heirs for one third the value of certain personal property lost. All parties appealed, but the claims of the major heirs were discontinued. Judgment modified and affirmed.

Joseph E. Ransdell, for appellant. *Charles S. Wyly* and *Felix P. Poche*, for minor heirs, appellees.

WATKINS, J. This record presents the fourth appeal to this court in this succession. In obedience to a previous decree of this court, in April, 1890, as reported in 42 La. Ann. 500, 7 South. Rep. 611, the ad-

ministrator prepared and caused to be filed a final account of his gestion of the succession of Minerva Sparrow, and attempted to sell a sufficiency of succession property to pay its established debts, and a sufficiency of the property of the respective interests of the heirs to pay their respective indebtedness to the administrator. The account was opposed, and the sale was enjoined by all of the heirs, on sundry grounds, the principal one being that the administrator had neglected to make sale of the perishable property of the estate, and had allowed it to deteriorate and perish while in his hands, under administration, and for the value of which property he became responsible. The opposition on the part of the two minors, representing one third of the estate, makes the additional point that, by a decree of this court made in this succession, they had been put in possession of their inheritance, and that no claim could be enforced against it as succession property, nor otherwise than by proceedings had contradictorily with their tutor; and that no claim against them for moneys advanced to their tutor for their account can be ingrafted on proceedings had in their grandmother's *mortuaria*. 40 La. Ann. 497, 4 South. Rep. 513. The opposition to the account and the injunction were consolidated and tried together, resulting in a judgment which homologated the account, including the sum of $3,287.50 claimed from the minors for moneys advanced to their tutor for their account; perpetuating the injunction against the probate sale; and holding the administrator liable to the minors for one-third of the value of personal property lost or destroyed during the accountant's administration, extending from the 20th of July, 1883, to the 25th of June, 1887, and fixing their interest in said valuation at $2,419.37. From this judgment all parties appealed, but in this court a statement was made to the effect that the major heirs had discontinued their claim, thus leaving the controversy to be decided between the administrator and the minors. Counsel for the minors submits the following propositions, viz.: "Under its present *status*, the case presents for discussion and decision three points, which are as follows: (1) Can the administrator of the succession of Mrs. Minerva Sparrow obtain a judgment, through a final account of administration, against the minor heirs, Mary and Kate Decker, for moneys advanced by him to their tutor for their account? (2) Can the administrator be held legally liable for the loss of mules and other property of a perishable character, for having failed to sell the same immediately after his appointment? (3) Can an administrator be allowed to sell succession property to pay debts when the debts are shown to be claims which he propounds against the heirs individually, some being minors in possession of their share of the succession property under judicial authority?"

1. The first item of opposition that presents itself is the debit of $3,287.50, entered on the tableau of debts which accompanies the account against the minors, Mary and Kate Decker. That sum is the aggregate of two separate and distinct items of indebtedness, which are therein separately stated thus, viz.: Item 1. "Balance due by minors, Kate and Mary Decker, as per judgment above mentioned, which decreed them to owe the administrator $4,018.84, and ordered him to prorate as above mentioned; thus making his collection from them $2,531.34, and leaving a balance due by them of $1,487.50." Item 2. "Amounts advanced to C. S. Wyley, tutor for minors, Mary and Kate Decker, since filing the fourth provisional account as per Exhibit A and vouchers attached, numbered from one to twenty, inclusive, $1,800." The former is explained by referring to the first preceding item on the tableau, which specifically refers to the "judgment on the fourth provisional account, which decreed," etc., and which evidently is "the judgment above mentioned," as therein referred to. This explanation is further supplemented at the foot of the tableau thus: "The items of $1,660.87, due by Mrs. Foster; of $679.03, due by Mrs. Ashbridge; and of $1,487.50, due by the minors, Mary and Kate Decker, —were approved on the fourth provisional account, and are placed hereon for the sole purpose of showing the exact amount due by the said persons after making the *pro rata* distribution ordered by the judgment on said account."

Reference to the report of our decision in this succession, to be found in 42 La. Ann., at pages 500 et seq., 7 South. Rep. 611, will show that we dealt with and disposed of the administrator's fourth provisional account, and three tableaux of debts, the second of which was made up "of debts due by the heirs to the administrator of the succession," which was opposed by the tutor of the minors, Mary and Kate Decker, on various grounds. That opinion further shows that upon that second tableaux there appeared but three items, one of which was the amount advanced to the minors Decker, $4,018.84, which is the identical sum and the exact amount that is described and dealt with on the tableau under present consideration. 42 La. Ann. 505, 7 South. Rep. 611. Our opinion thus states the controversy, viz.: "Neither of the major heirs opposed the amounts charged to them, respectively, and hence the only question is with regard to the charges against the two minors, Mary and Kate Decker. The tutor insists that it is not competent for the settlement to be made in the succession of their grandmother, on an administrator's account, but that it should be referred to him as tutor for allowance or rejection, and settlement thereof, in the tutorship. He further contends that, as no debts can be made against minors in excess of their revenues without the authority of a family meeting, (Rev. Civil Code, art. 350,) there is no legal reason for the enforcement of the administrator's demand against them." But we made reference to what had been said in our opinion (39 La. Ann. 706, 2 South. Rep. 507) on the subject, to the effect that the administrator's advances to the minors "were manifestly prompted by laudable feelings, and considerations of fairness and humanity,

for which [he] should not be made to suffer, if by any legal means he can obtain reimbursement," and that "we therefore deem it our duty to reserve the right of the administrator to demand reimbursement of all sums advanced by him to the two heirs aforesaid, as well as for similiar advances made to the minors, Mary and Kate Decker," (42 La. Ann. 506, 7 South. Rep. 613,) and said: "Hence it is clear that the whole question is remitted to this succession settlement, and that it is narrowed to the amount of money the administrator expended for their account. We can perceive no objection to this mode of proceeding, as the account and two of the tableaux concern the minors, and their interests are still united with those of the major heirs in the succession; and it is quite as much a matter of justice to the administrator that their liability to him for advance payments made on their inheritance should be adjusted in the succession as payments so made to the major heirs," (42 La. Ann. 506, 7 South. Rep. 613;) and affirmed the judgment of the lower court homologating those tableaux.

This citation is sufficient to show that in so far as the allowance of the item, *supra*, of $1,487.50 is concerned, it is fully covered by our judgment on last appeal, and that the present tableau cannot be disturbed in that respect. It is also quite sufficient authority for the settlement and judicial determination in the succession of the amounts that the administrator has advanced to the tutor of the minors "since filing of the fourth provisional account" of administration, and aggregating $1,800; for to that theory this court stands committed in two opinions rendered in this succession, and it was doubtless on the faith of them that the administrator acted—as he undoubtedly had a legal right to do—in furnishing the minors the means of subsistence from the funds in his hands subject to their demands, under the exceptional circumstances stated. It is therefore quite sufficient to state that it is our deliberate conviction that the judgment of the court homologating the tableau was jurisdictionally well grounded, in respect to the demand of the administrator against the minors. In respect to the amount of the claim of the administrator against the minors being in excess of their revenues, those two opinions (39 La. Ann. 706, 2 South. Rep. 507, and 42 La. Ann. 506, 7 South. Rep. 613) appear to be quite as conclusive as they are on the previous question, because we said of the administrator's claim that, while "all of these proceedings were irregular, and were carried on outside of the law, * * * [he] should not be made to suffer, if by any legal means he can obtain reimbursement. * * * We therefore deem it our duty to reserve the rights of * * * the present administrator to enforce their respective rights against the two heirs of age * * * by proper proceedings, in due course of administration, and we also reserve the rights of the administrator to demand reimbursement of all sums advanced by him to the two heirs aforesaid, as well as for similar advances made to the two minors, Mary and Kate Decker." 39 La. Ann. 706, 2 South. Rep. 507. When further litigation, in connection with the reserve in our previous decree, brought this succession before us a second time, (40 La. Ann. 484, 4 South. Rep. 513,) there was question made with reference to the right of the two minors to be put in possession of their interests in the succession, and it was objected on the part of the administrator that it was a condition precedent to their entering into possession that the amounts they owed him should be first paid; but this view did not obtain, the court declaring: "Besides, even if the law did not provide adequate powers to enforce any claim the administrator might have against the minor heirs, it is evident that the administrator already has in his hands funds that can be applied to the satisfaction of any demands against them." 40 La. Ann. 496, 4 South. Rep. 520. Thus we say, in one opinion, that the administrator's right to demand of the minors reimbursement of the sums paid is reserved "by proper proceedings in due course of administration," (39 La. Ann. 706, 2 South. Rep. 507;) in another, that he has in his hands funds that can be "applied to the satisfaction of any demand against them," (40 La. Ann. 496, 4 South. Rep. 520;) and in a third, "that the whole question is remitted to this succession settlement," (42 La. Ann. 506, 7 South. Rep. 613;) and, in the last case, we examined and approved the claims of the administrator against the minors, and adjudged "the shares or interests of the minors [to be] liable therefor." It is quite true that we also employed the expression, "there being no proof in the record to show that the sum expended exceeded their revenues," (42 La. Ann 507, 7 South. Rep. 613;) yet, on careful reflection, we are of the opinion that, under the circumstances of this case, the provisions of article 350 of the Revised Civil Code are not controlling. That article is found in the particular section of the Code which treats "of the administration of the tutor," and it provides a rule of action for the tutor. But in this case it is apparent that, while the succession of Mrs. Sparrow has been judicially terminated *quoad* the minors' interests, yet there has been no separation of their patrimony from the mass of the succession, or from the interests of their coheirs, and it is from the funds and property thus bound up that advances to the minors have been made, antecedent to the commencement of the tutor's actual administration of the minor's property. Inasmuch as settlement is clearly contemplated to take place, "in due course of administration," of the estate of Mrs. Minerva Sparrow, it seems to be indisputable that such settlement must be made in pursuance of the law governing successions, and not the law governing tutorships. Indeed, the Code puts upon the act of one who furnishes a minor with the necessaries of life the stamp of a contract by which the latter is bound, because it says: "When the minor has no tutor, or one who neglects to supply him with necessaries for his support or education, a

contract or *quasi* contract for providing him with what is necessary for those purposes is valid." Rev. Civil Code, art. 1785. The act of the administrator was in strict keeping with the provisions of that article. As this is the sole ground of objection that is urged to the administrator's claims against the minors, in our opinion they were correctly allowed.

2. In respect to the claim made by the opposing minors of the alleged maladministration of the administrator, resulting in a loss of about 75 mules out of a total of 106 that were included in the inventory of 1883, under which he went into possession, and which were appraised and listed thereon at $100 each, making up an aggregate valuation of $10,600, it appears that the judge below regarded it as the basis of the administrator's liability, and he gave judgment accordingly. It is on this theory that the argument of the minors' counsel proceeds; insisting that, immediately upon qualification in July of 1883, the administrator took charge, and managed, operated, and cultivated the succession plantations, upon his individual account, and continued to do so until the 1st of January, 1888, (39 La. Ann. 702, 2 South. Rep. 501;) that, in the cultivation of said plantations, the administrator used and employed the mules in question. Thereupon the insistence of the counsel for the minors is that, as administrator, it was his plain legal duty to have caused a sale to be made of the mules within 10 days after his qualification, in pursuance of the terms of Rev. Civil Code, arts. 1051, 1163. To this claim the administrator's counsel replies that it is a fact, that has been ascertained by this court, that the succession was not only perfectly solvent when opened, but owed no debts, and, consequently, there was no occasion for the sale of the mules. The further answer is made that during the years since 1883 the mules were used and worked on the succession plantations, to which they were attached, and with which they were leased annually; and that Chaffe was condemned personally to pay a rental of $4,000 per annum therefor, from July, 1883, to January 1, 1888, and that the minors enjoyed their proportionate share of the revenues of the plantations and the mules, and are equitably estopped from urging any complaint of such use and enjoyment, or of the consequent loss sustained.

Referring to the first article cited, (article 1051,) it appears to point out the steps to be taken as a conservative measure, pending the acceptance or renunciation of a succession by the heirs, for it is prefaced by the declaration that "the administrator cannot sell the immovables of the succession committed to his charge until the term for deliberation has expired;" and then it directs that "if there be any [movables] liable to be wasted, or expensive to keep, he can sell them, on the special authorization of the judge," etc. Surely, no such condition existed in this case. The mules were neither liable to be wasted, nor expensive to keep, because they were attached to the plantations, and leased and used therewith; and besides, all the heirs, minors as well as majors, have long since accepted the succession; and the law imposed no duty on the administrator to sell, but gave him permission to do so, upon first securing the special authorization of the judge. We fail to find in the other article mentioned (article 1163) any more definite duty imposed upon the administrator, though it is quite true it says, viz.: "The curator is bound, in ten days after his appointment, to demand that all the remaining movable effects * * * be sold." But the word "remaining" connects that article with the one preceding it, which declares, viz.: "When there are, in a vacant succession, in which the heirs, or a part of them, are absent from and not represented in the state, movable effects which are perishable or costly to keep, the judge can, * * * before the succession is opened, order the sale of them," etc. Rev. Civil Code, art. 1163. By no means can these articles be extended to a solvent and accepted succession, to which there are no absent heirs. Even if they are to be taken as strictly applicable, they denounce, against the curator or administrator failing to observe their requirements, no penalty of any kind, and, in the absence of such provisions, it is manifestly our province to judge of the dereliction, and of its consequences. The rule of conduct which the Code prescribes for a curator or administrator is that "every curator of a vacant succession, or of absent heirs, is bound to take care of the effects intrusted to him, as a prudent administrator, * * * He is responsible for all damages caused by his misconduct." Rev. Civil Code, art. 1147. It is not alleged, proved, or argued that the administrator did not take care of the property intrusted to him, as a faithful administrator. It is not pretended that any damage happened to the mules through any misconduct of his. On the contrary, his administration has been admittedly clean, fair, and faithful; and the loss of the mules seems rather to have been occasioned by natural causes, such as work, overage, and ordinary use will bring about. For such losses the administrator cannot be made liable on the score of misconduct. It is evident to our minds that the allowance made on this score was erroneous, and must be disallowed and rejected.

3. While, technically speaking, the debts and charges that are marshaled by the administrator upon the final account and accompanying tableau are not debts of the deceased, yet they are evidently debts of the succession, and as such they are debts of high privilege, for the Code says: "The charges against a succession, such as funeral charges, law charges, lawyers' fees for settling the succession, * * * and all claims against the succession, originating after the death of the person whose succession is under administration, are to be paid before the debts contracted by the deceased," etc., (Rev. Civil Code, art. 3276;) and those in question are of that character. It is therefore evident that the following argument of counsel fails to support the theory he has advanced, viz.: "Hence it follows that the debts for which the administrator seeks

to sell the property of the succession, with the exception, possibly, of his commission, are not even charged as debts of the succession, *inherent to it as acts of the deceased*, but they are avowedly debts of the heirs individually, contracted by them since the death of their ancestor, since the opening of her succession, and growing out of causes and transactions entirely independent of, and foreign to, the succession." (Our italics.)

4. In so far as the unmatured note for the sum of $4,000 balance due on plantation rents is concerned, we see no occasion to prolong an administration already too greatly protracted. That note may be quite as well surrendered into the possession of the heirs as any other asset of the succession, and collected by them. In our opinion the district judge erroneously sustained and perpetuated the injunction against the probate sale, and his judgment ought to be amended. It is therefore ordered and decreed that the judgment appealed from be so amended as to dissolve the opponents' injunction against the sale proceedings, at their cost, and so as to reject and disallow all of their demands. And, as thus amended, it is ordered and decreed that the judgment homologating the administrator's final account, and the accompanying tableau of debts, be affirmed, and the administrator be authorized and directed to proceed with the sale to pay the debts and charges thereon placed. And it is finally ordered that, upon due compliance with the decree of the lower court in the premises, he be finally discharged.

(44 La. Ann. 903)

STATE v. CHAMBERS *et al.* (No. 11,021.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

CRIMINAL LAW — CONTINUANCE — DEPOSITIONS — PUBLIC TRIAL.

1. Continuances are largely within the discretion of the trial judge, and his rulings in matters of this kind will not be disturbed unless manifestly erroneous.

2. It is error for a district judge to grant an order in chambers, out of the presence of the accused, for the sheriff to take him to another parish, to be present at the taking of the deposition to be used in the trial against him of a witness who is physically unable to attend the session of the court. Such an order violates article 8 of the constitution, which contemplates a public trial, in the course of which the accused has the right to be confronted with witnesses against him.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Martin; JAMES E. MOULTON, Judge.

Conviction of Lewis Chambers, Louis Michel, and Paul Comier of murder, without capital punishment. A new trial was granted Chambers. Defendant Michel was sentenced in accordance with the verdict, and appeals. Reversed.

Edward Simon, for appellant. *Walter H. Rogers*, Atty. Gen., for the State.

MCENERY, J. The accused were indicted for and convicted of murder without capital punishment. A new trial was granted to Lewis Chambers. The defendant Michel was sentenced in accordance with the verdict, and has appealed. There are two bills of exception in the record.

1. The first is to the refusal of the trial judge to grant a continuance. As repeatedly stated by this court, the matters of continuance are largely within the discretion of the trial judge, and the discretion vested in him will not be disturbed unless it is manifestly erroneous and arbitrary. The record does not show that this discretion has been abused by the trial judge in refusing a continuance to the defendant.

2. The second bill is to an order granted by the district judge to take the testimony of a witness, who was sick, in the parish of Iberia, and unable to be present at the trial and testify in the case. The district attorney presented a petition to the district judge, alleging that the witness was sick, "at the point of death, and would be unable to attend court, and give her evidence." It is stated by him in the petition that he visited the sick witness; found her in such a condition that she "would be unable to attend, and obey the summons of this court," which had been duly served on her; and the materiality of her evidence is stated at length. He "moved and prayed that your honor grant an order directed to the sheriff of St. Martin commanding him to take charge of and convey to the residence of Marie Abrams the accused, so that the district attorney may, in their presence, take the depositions and answers of the said Maria Abrams, under oath, to be used in evidence on the trial of this case, fixed for Tuesday, the 16th February, 1892." The district judge granted the prayer of the district attorney in the following order: "The foregoing petition considered, it is ordered that the sheriff of this parish forthwith take and convey to the residence of Marie Abrams, in Iberia parish, the accused Chambers and Michel; that the state attorney and the attorney for the defendant be notified of this, and requested to attend the examination of said Marie Abrams as a state witness in this case, before some justice of the peace, the deposition and testimony of said witness to be used on the trial of said cause now fixed for the 16th instant." The order was granted in chambers, out of the presence of the accused. There is no provision made by the laws of this state for the taking of the deposition of a witness for the state in a criminal proceeding. The order rendered by the trial judge, the taking of the deposition of the witness, and its use in the trial of the accused, violate article 8 of the constitution of the state, which contemplates a public trial, or preliminary examination, in the course of which the accused has the right to be confronted with the witnesses against him. The evidence against the accused must be delivered personally and orally before the jury, who are to pronounce him guilty or not guilty. 1 Bish. Crim Proc. par. 1194. It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be set aside, annulled, and reversed, and the case be remanded to be proceeded with according to law and the views herein expressed.

(44 La. Ann. 882)

STATE v. ALFRED *et al.* (No. 11,023.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

ASSAULT WITH INTENT TO KILL—VERDICT—DANGEROUS WEAPON.

1. A charge made in an indictment that the accused, "with a certain dangerous weapon, to wit, a large piece of timber, one A. B., feloniously, willfully, and of his malice aforethought, did strike, with intent then and thereby him, the said A. B., to kill and murder," is responsive to Acts 43 and 44 of 1890.

2. A verdict rendered, finding the accused guilty of "striking with a dangerous weapon, with intent to kill," is responsive to the charge of such an indictment, and to the provisions of Act 44 of 1890.

3. "A large piece of timber" is a dangerous weapon, within the intendment of each one of those statutes.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Martin; JAMES E. MOUTON, Judge.

Indictment of Adam Gaudi, Jean Baptiste, and Noel, Toussaint, and Eugene Alfred for assault with intent to kill. A *nolle prosequi* was entered as to Gaudi. On the trial, Jean Baptiste and Noel Alfred were acquitted, while Toussaint and Eugene Alfred were convicted, and appeal. Affirmed.

Edward Simon and *Robert Martin*, for appellants. *Walter H. Rogers*, Atty. Gen., for the State.

WATKINS, J. The charge of the indictment is that the several defendants, "with a certain dangerous weapon, to wit, a large piece of timber, * * * one Francois Gaudi, * * * feloniously, willfully, and of his malice aforethought, did strike, with intent then and thereby him, the said Francois Gaudi, to kill and murder," etc. *In limine* the district attorney entered a *nolle prosequi* as to the defendant Adam Gaudi; and upon the trial the two defendants Jean Baptiste and Noel Alfred were acquitted, and Toussaint and Eugene Alfred were convicted of the crime of "striking with a dangerous weapon, with intent to kill." Thereupon the two convicted parties were sentenced "to imprisonment in the parish jail of the parish of [St. Martin] for a period of six months." After trial and conviction, but previous to sentence, counsel for the convicted parties presented and filed a motion in arrest of judgment upon the grounds—*First*, that the charge of the indictment does not respond to any law of the state; *second*, that the verdict of the jury does not respond to the charge of the indictment; and, *third*, that "a large piece of timber" is not a dangerous weapon, within the intendment of the statute under which the indictment was framed. This motion was overruled, and the counsel for the accused reserved a bill.

Looking into the acts of the legislature under which the indictment was found and the conviction secured, (Acts 43 and 44 of 1890,) it appears that the former declares that "whoever shall shoot, stab, cut, strike, or thrust any person with a dangerous weapon, with intent to commit murder, on conviction," etc. Section 1, Act 43 of 1890. The provisions of Act 44 of 1890 are of similar phraseology and import; the phrase of the former, to wit, "with intent to commit murder," being replaced by the phrase in the latter, to wit, "with intent to kill." It is therefore evident that the indictment was found under the provision of the former act, though the conviction was secured under those of the latter act,—a verdict permissible in law. It is equally evident that the indictment is responsive to Act 43 of 1890, and the verdict is responsive to Act 44 of 1890. That "a large piece of timber" is, in the sense of those statutes, "a dangerous weapon," we are of opinion, is not open to doubt. In State v. Lowry, 33 La. Ann. 1224, like phraseology occurring in a similar statute was thus interpreted and applied. The accused in that case was indicted under Rev. St. § 790, which declares that "if any person lying in wait * * * shall shoot, stab, or thrust any person with a dangerous weapon, with the intent to commit the crime of murder, he shall," etc.; and the charge was that the accused "did thrust or strike with a dangerous weapon, namely, an iron bolt, rod, or pin," etc.; and this court held that "such an instrument may well be a dangerous weapon." That decision is correct, and is conclusive of the question here.

Judgment affirmed.

(44 La. Ann. 567)

STATE *ex rel.* CHANDLER v. KRUTTSCHNITT, Judge. (No. 11,030.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

CERTIORARI AND PROHIBITION—REMEDY BY APPEAL—SUFFICIENCY OF TRANSCRIPT.

1. Writs of *certiorari* and prohibition cannot be allowed in an appealable case to revise interlocutory decrees and a final judgment rendered therein. Such decrees and judgment may be reviewed and corrected on appeal.

2. A relator is the less entitled to the summary relief asked through the writs, where he has applied for an appeal and one has been allowed him.

3. An order granting an appeal would be irregular if it directed the insertion into the transcript of records filed in evidence. The direction would be a superfluity.

4. It is the duty of the clerk, without any instruction from the court, to copy into the transcript all the evidence adduced on the trial of the case.

(*Syllabus by the Court.*)

Application by the state, on relation of J. B. Chandler, against E. B. Kruttschnitt, judge *ad hoc.*, for writs of *certiorari* and prohibition. Refused.

The Relator, in pro. per. The Respondent, in pro. per.

BERMUDEZ, C. J. This is an application for writs of *certiorari* and prohibition. The relator complains that, in the course of the trial of a suit brought by him before the civil district court for the parish of Orleans, for the nullity of a judgment rendered in the Succession of Emily Glover, the judge *ad hoc* has, in a number of instances, which are elaborately specified, made erroneous and arbitrary rulings, and has finally decided the controversy by a judgment unwarranted by the

evidence and the law, rejecting the demand; that he has applied for a suspensive appeal, which was denied him. The prayer is for a writ of *certiorari*, directing the judge *ad hoc* to send up the record in the case, together with others filed in evidence therein. It asks that the judge *ad hoc* be restrained from proceeding in said case until otherwise ordered by this court, and that, after hearing, all the acts complained of be declared nullities and invalidated, and that the judge *ad hoc* be ordered to proceed in the case according to law. The judge *ad hoc* returns that the relator has applied for and has been allowed a suspensive appeal, in manner and form set forth in the certified copy of the minutes of the court *a qua*, annexed to and made part of the answer; that it is untrue that this defendant refused plaintiff a suspensive appeal; but that defendant did refuse in the order for said suspensive appeal to render further orders not germane, and in no manner relevant to, said motion of appeal. The suit instituted by the relator is appealable, judging from the description given of it by him in his application for relief in this court, and from the fact that he has moved for an appeal from the judgment rendered in it. Owing to its appealability, and to the circumstance that an appeal has been asked and allowed, it is clear that the relator cannot have the rulings and the judgment on the merits, complained of, reviewed by this court in these proceedings. When the transcript will have been filed, and the case submitted, it will become the duty of the court to consider and determine the complaints of the relator, redressing his grievances, if he has sustained any. The relator does not ask for a *mandamus* to compel the judge *ad hoc* to grant him an appeal in the form in which he says it should have been allowed. Nevertheless, as the judge *ad hoc* has put the matter at issue, and appended to his return an extract from the minutes of the court, which shows the nature of the motion for an appeal, and the action of the judge upon it, the complaint may as well be determined. The motion states that three original records designated by numbers, and four printed statements or briefs filed therein, are necessary for an intelligent review of the fraudulent practices of defendant and attorneys, and that there is error to the prejudice of the mover in the final judgment rendered dismissing the suit, and that mover desires to appeal therefrom. On this motion the judge *ad hoc* ordered that the mover be allowed a suspensive appeal from the judgment returnable to this court on the 3d Monday in March, 1892, the bond being fixed at $250. The motion does not ask that the three records be copied in the transcript, and, had it done so, it would have been a surplusage, as, if they were filed in evidence, it would be the duty of the clerk to transcribe them. The order of appeal granted is in the usual proper form, and would have been irregular had it directed the insertion of the records in the transcript. It is therefore ordered that the application herein be refused, with costs.

CANAL & C. R. CO. v. CRESCENT CITY R. CO. *et al.* (No. 10,846.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

STREET RAILWAYS—GRANT BY CITY—ELECTRIC MOTORS—USE OF ANOTHER'S TRACK—INJUNCTION.

1. The city government of New Orleans has the right to grant the privilege of the use of a part of the tracks of a street railway to another company. It can continue the use of a different car, propelled by a different motor than the one in use on the track.

2. The permission to use the electric motor is one of the means of using the public streets, and is granted for the public convenience, and is the exercise of the police power of the city over public places.

3. A company desiring to use the roadbed and material in place of another company must first make compensation. But where an injunction is granted, without the prayer for compensation, before using the track, but a prohibition for the use of the track for any and all cars, it will be dissolved.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Suit by the Canal & Claiborne Railroad Company against the Crescent City Railroad Company and the Electric Traction & Manufacturing Company to enjoin defendants from running additional cars over plaintiff's tracks, etc. Judgment for defendants. Plaintiff appeals. Affirmed.

J. R. Beckwith and *Felix P. Poche* for appellant. *John M. Bonner*, for appellee Crescent City Railroad Company. *Farrar, Jonas & Kruttschnitt*, for appellee Electric Traction & Manufacturing Company.

MCENERY, J. The petition avers that the Canal & Claiborne Railroad Company is a corporation. That in the year 1887 the Canal & Claiborne Streets Railroad Company, another corporation, acquired from the city of New Orleans, for itself and its assigns, in due form, a lawful grant to own and operate a street railway for the term of 25 years on and over Canal street and the other streets described in the petition and in a copy of the grant annexed to the petition. The term of the grant commenced to run from the 8th of May, 1887. This grant was not only a legislative act of the city of New Orleans, but was in due form, and by due authority, embodied in a solemn contract by notarial act, made a part of the petition by copy. That during the month of July, 1888, for a valuable consideration, the plaintiff, by purchase, acquired an assignment of the grant, and from that date has been the full owner of all the rights and franchises contained in said grant, and still owns the same, having acquired all the rights of its vendor, the Canal & Claiborne Streets Railroad Company, the original grantee. Among other property so purchased and acquired is the track or railway on Canal street, running from the intersection of St. Charles street with Canal to the terminus at Wells street, near the river, and back by another track or railway, on the lower side of Canal street, to the intersection of Bourbon street with Canal street. That the Crescent City Railroad Company is carrying on a street rail-

way, and operates two lines of railway,—one commonly known as the "Annunciation Line," running through Tchoupitoulas, Annunciation, and other streets, having its lower terminus on Canal street, in the middle ground, near the intersection of Camp with Canal streets; and another line, which it claims to have acquired from some alleged grantee for a street railway, commencing at the junction of Camp and Prytania streets, running along the streets named in the petition, but coming back for its final or lower terminus to the point of commencement, that is, to the intersection of Camp and Prytania streets; and defendants claim that this grant, originally made to one Seymour and his associates, was by some subsequent action of the city authorities expanded so as to give the grantee and his assigns a right to extend a line to Canal street. This line is known as the "Coliseum Line." That, after the Crescent City Railroad Company got possession of this supposed grant and its extension, they commenced running cars on this Coliseum line over the line and tracks of plaintiff on Canal street, without its consent, and unlawfully, from the intersection of St. Charles street with the upper side of Canal street to Wells street, and back on the lower side of Canal street, on petitioner's track, to the intersection of Bourbon street with Canal. That this act was unlawful, without the consent of plaintiff, and without any right or warrant of law. This first invasion of the tracks and rights of plaintiff was with mule or horse cars of the ordinary construction and weight. That the right of action to demand indemnity or damages arising from this first invasion of plaintiff's rights by the use of said mule or horse cars is reserved in the petition. That, not contented with the wrong done by running its Coliseum cars over the track of plaintiff, defendants now attempt a further outrage and invasion of plaintiff's rights, and are engaged in constructing a new railway through Erato street, so planned as to connect the Annunciation street line, whose cars could not, without such junction, run over plaintiff's tracks, with the Coliseum street line, of which line the cars had the unlawful use of plaintiff's tracks, so that additional cars from the Annunciation line, that prior to said action could not reach plaintiff's line or tracks on Canal street, can be diverted from the Annunciation street line, taken through the Erato connecting link, sent over the Coliseum line, and thence on and over plaintiff's tracks on Canal street. That they threaten and intend to run many, if not all, of their Annunciation street cars through said Erato street connection over the Coliseum line over the Canal street tracks of plaintiff, increasing the number of cars running on plaintiff's track over the number formerly running from the Coliseum track over the plaintiff's line by at least 15 additional cars, making trips over the lines at intervals not exceeding 10 or 15 minutes during the entire day. That this is not the only wrong that is contemplated by the defendants, but that the Crescent City Railroad Company has entered into a combination with the other defendant, the Electric Traction & Manufacturing Company, by which the said Electric Traction & Manufacturing Company is to operate or provide the rolling stock for the Crescent City Railroad Company on its lines, to be propelled over plaintiff's track on Canal street, the new rolling stock to involve a change of motive power from car or mule propulsion to some form of electric propulsion by electric motor and storage batteries, with a construction giving the cars a weight of at least 8,000 pounds, independent of any passenger load. That the Electric Traction Company intend to stock the road with these heavy cars, and join the defendant railroad company in its assault upon the plaintiff's rights and property. That the railway of plaintiff on Canal street was constructed and designed in accordance with the specifications and obligations contained in its contract with the city for the use of cars propelled by mules or horses, of not over 3,800 pounds in weight, and is not constructed to bear the heavy rolling stock threatened to be put upon the structure, and is not adequate to bear and sustain a traffic carried on in cars of a character that without load weigh over 4 tons. That the additional cars thrown on plaintiff's tracks by the Erato street connection from the Annunciation line will crowd petitioner's tracks on Canal street, so that, in the event that they do endure the additional cars and additional traffic without destruction, there will be practical eviction of plaintiff from the use of its own property in its tracks for its own legitimate use in the management and operation of its own lines for its own business. The relief demanded is an injunction prohibiting the defendants from running any cars coming through the new roadway on Erato street, connecting the Annunciation street line with the Coliseum line, and from any unlawful use, meddling, or interference with the plaintiff's line on Canal street by any additional cars running through Erato street from Annunciation street over the Coliseum line and over plaintiff's tracks, and from running any electric motor cars of heavy weight, and from meddling and interfering in any manner with plaintiff's rights in the complete dominion, control, and use of its street railway line and property on Canal street.

The Crescent City Railroad Company, after pleading the general issue, averred that all the matters and things set up in the petition relative to the right of the plaintiff to that part of the track on Canal street, and relative to the right of the Crescent City Railroad Company to use the same, were in issue between said Canal & Claiborne Streets Railroad Company and this defendant in suit, (Claiborne Railroad Company vs. Crescent City Railroad Company,) and that a final judgment has been rendered therein in favor of the Crescent City Railroad Company, and which final judgment was affirmed on appeal to the supreme court;[1] and this defendant pleads said record and said judgment as

[1] 6 South. Rep. 849.

res adjudicata, and makes the record of said suit a part of this answer for reference and proof. That all that portion of the track on Canal street, claimed as being the exclusive property of the plaintiff, was originally constructed for a common trunk line, which all the railroads running cars on Canal street had the right to use under the conditions of the city ordinance providing for the construction of said trunk line. That the pretended new grant of 1887, set up by the plaintiff, was necessarily obtained subject to the conditions of the old grant, and subject to the rights acquired under the provisions of the old grant by the Crescent City Railroad Company in pursuance of certain ordinances from the city of New Orleans; and that, under the provisions of said old grant, and the right acquired from the city of New Orleans, the Crescent City Railroad Company is as much the owner of said line, and has as great a right to run cars upon said line, as the Canal & Claiborne Railroad Company has; the only obligation upon the Crescent City Railroad Company or the city of New Orleans being to reimburse to the plaintiff a fair and reasonable proportion of the value of the portion or portions of the road to be so used. That the grant of 1887 was obtained from the city of New Orleans under the present charter, which provides that the council shall have power to compel all railways on any one street to run on and use one and the same track. That the defendant has been lawfully and peaceably running its cars over the trunk tracks on Canal street since 1881, and that its right so to run its cars has been adjudged in the suit above set forth. That this defendant has obtained permission from the city of New Orleans to use electricity in propelling its cars, and that the plaintiff has no right to say what kind of cars, or what number of cars, or what weight of cars, this defendant, under authority from the city of New Orleans, shall run in the streets, over its own tracks, in accordance with its franchises. That for more than a year it has operated one of said motor cars over the said common track, without injury of any kind thereto. That the ordinance No. 4,348, approved March 17, 1890, is not a new grant to this defendant, but is simply a modification of a grant made in the year 1880, and not a substantial change thereof. That, even if it were a new grant, it is clearly within the police power of the city of New Orleans over its streets. That the defendant has constructed tracks through Erato street in accordance with the provisions of the ordinance approved March 17, 1890, and that it intends to run a portion of its Coliseum cars through the said street and over the Annunciation street tracks, and that it intends to run some of the Annunciation street cars through said connection, as the exigencies of travel and the requirements of business may demand; and defendant says it clearly has the right so to do under its various grants from the city of New Orleans. Judgment was rendered in favor of the defendants in the lower court, and the plaintiff has brought the case here on appeal.

The right of the defendant to run cars belonging to the Coliseum & Upper Magazine line has already been definitively settled in the decree in the case of Canal & C. St. R. Co. v. Crescent City R. Co., 41 La. Ann. 561, 6 South. Rep. 849. It is claimed, however, that the Crescent City Railroad Company is operating two lines of railroad,—one known as the "Annunciation Line," which was extended through certain streets, so as to bring its cars over plaintiff's track on Canal street, thus increasing the number of cars run by defendants over the track of plaintiff, which is recognized as a trunk line. The defendants had the permission of the city government to run over this line and over plaintiff's track. It is immaterial to consider the question raised whether this was a new franchise, as the city had the undoubted authority to permit any company to use the track of plaintiff. Id. In the occupation and use of plaintiff's track there can be no interference with the right of the plaintiff to run its cars on schedule time, in accordance with its contract with the city. To permit this would be to practically evict plaintiff from the use of its roadbed, and in the management and operation of its business. There is no evidence, however, that such an eviction has taken place.

It appears from the record that the co-defendant the Electric Traction & Manufacturing Company placed its cars on the track of plaintiff, under the franchise enjoyed by the defendants, and in accordance with a contract entered into between them They were manufacturers of a certain description of car, which the defendants placed on their line, and ran over plaintiff's track. That the track was originally constructed for horse cars, and was not strong enough to bear the weight of electric cars, is no reason why they should not be placed on the track. There are constant improvements in the mode of travel. New and improved conveyances are daily coming into use. Public convenience and necessity require the adoption of the most improved methods. The streets belong to the public. Their use for the public cannot be abridged. Hence, when the municipal government in its discretion sees the necessity of permitting the use of the streets by improved cars, driven at greater speed by a new motor, no one can complain, as no franchise can be granted over a street exclusively to any one for the continued use of any particular kind of conveyance. The electric motor is but one means of using the streets, and the permission to use the electric car is established for the public convenience, and is the exercise of the police power of the city over its public places. It cannot be questioned, unless, as stated above, its use evicts the company which owns the roadbed and material in place from its property. The principle has been announced by this court that before one company can avail itself of the use of the roadbed and material in place of another the road so desiring to enter upon the part of the track of another must first make compensation. Canal & C. Co. v. Orleans R. Co., 43 La. Ann. ——.[1] This question is not pre-

[1] 10 South. Rep. 889.

sented in this case. The relief asked is an absolute prohibition to the putting of any and all cars on plaintiff's track by the defendant. The defendant has used the track of plaintiff. It has its cars of the Annunciation line now on plaintiff's track. It is true the injunction was bonded, but there is no prayer in the petition that compensation be made to the plaintiff before use of its tracks. The relief is now one of damages. Judgment affirmed, with reservation of the right of plaintiff to sue defendants for damages for use of its tracks.

(29 Fla. 455)

CONNOR v. STATE.

(*Supreme Court of Florida.* May 2, 1892.)

OBTAINING PROPERTY UNDER FALSE PRETENSES—INFORMATION—CONSTRUCTION OF ALLEGATIONS—VENUE.

1. The receipt or obtaining of property obtained under false pretenses is the consummation of the offense; and when the pretenses are made in one jurisdiction, and the property is obtained by the offender in another jurisdiction, the prosecution can be instituted only in the latter jurisdiction, unless there is a valid statute permitting it elsewhere.

2. An allegation that the party defrauded "then and there, by reason of said false pretenses" (they having been previously set forth in the information) "of the said defendants, and fully relying upon and believing in the truth thereof, were then and there induced to part with their ownership of and in said thirty-two hundred dollars to the said" defendants, "and did then and there part with their ownership in said thirty-two hundred dollars to said defendants," is not tantamount to an allegation that the defendants obtained the money.

3. An allegation that the defendants "obtained" by false pretenses, previously described, certain money, but not indicating where they obtained it, and one that the party defrauded, then and there relying upon the pretenses, and believing in their truth, were then and there induced to part with their ownership of and in the money, and did then and there part with their ownership in the same to the defendants, do not show where the money was obtained by defendants, or that it was obtained in the county or jurisdiction where the pretenses were, as previously alleged, made.

4. An information charging the crime of obtaining property under false pretenses is uncertain as to the venue or jurisdictional locality of the offense where, having previously named two or more places, it simply uses the word "there" (in the expression "then and there") in charging the obtaining of the property; and it is consequently insufficient, and should be quashed.

5. An information for obtaining property under false pretenses, which, by reason of its uncertainty, does not make it appear that the property was obtained in the county where the pretenses were made, nor elsewhere in the state of Florida, does not show that a court of the county where the pretenses are alleged to have been made has jurisdiction of the offense; and this even under a statute (section 4, p. 446, McClel. Dig.) which provides that in all cases where an indictable offense shall be perpetrated in Florida, and the same shall commence in one county and terminate in another, the person offending shall be liable to indictment in either county.

(*Syllabus by the Court.*)

Error to criminal court of record, Marion county; W. S. BULLOCK, Judge.

Information against Claude E. Connor for obtaining property under false pretenses. Defendant's motion to quash the information was overruled, and he brings error. Reversed, with directions to quash the information.

R. L. Anderson and *R. W. Davis*, for plaintiff in error. *W. B. Lamar*, Atty. Gen., for the State.

RANEY, C. J. The information is for obtaining property under false pretenses. There was a motion made in the trial court to quash the information, but the motion was overruled, and error has been assigned on this action. The first ground of the motion to be noticed is the one asserting that the information does not show jurisdiction of the court to try the cause. The principle of law relied upon in support of this contention is that the receipt of money or other property obtained under false pretenses is the consummation of the offense, and the place of its receipt by the offender is the locality of jurisdiction. The receipt or obtaining of the property is the consummation of the offense, and in the absence of a valid qualifying statute the place of its receipt is the sole locality of jurisdiction. If the false pretenses are made in one jurisdiction, but the property is obtained in another, the prosecution must, in the absence of such a statute, be instituted in the latter jurisdiction. 7 Amer. & Eng. Enc. Law, 758, 762. In State v. House, 55 Iowa, 466, 8 N. W. Rep. 307, where the property alleged to have been fraudulently obtained consisted of promissory notes and a mortgage securing the notes, the false pretenses were made, and an agreement of settlement providing for the execution and delivery of the notes and mortgage was executed in Wright county, and afterwards the notes and mortgage were made and delivered to the defendant in Polk county, where he was indicted, tried, and convicted, and it was held that the false pretenses made in Wright county were not a crime; that an indictment would not lie there, because the notes were not obtained there; and that as the crime was consummated in Polk county, by the delivery of the papers in that county, the indictment was properly found there, no matter where the false representations which induced their delivery were made. In Skiff v. People, 2 Parker, Crim. R. 139, the county of the delivery of the property was held to be the proper county for the trial of the offense, though the note for the property was not made and delivered until subsequently, and in another county. Norris v. State, 25 Ohio St. 217, decides that where one, by false pretenses contained in a letter sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the writer in another county, the offense of obtaining goods by false pretenses is complete in the former county, and the offense must be prosecuted therein; the delivery of the goods to the common carrier being a delivery to the defendant's agent, and hence in law a delivery to the defendant. In People v. Adams, 3 Denio, 190, Adams and another were indicted in the city of New York for obtaining money from a firm of commission merchants in that city by exhibiting to them fictitious receipts signed by the other defendant in Ohio,

falsely acknowledging the delivery to such other defendant of a quantity of produce for the use of, and subject to the order of, the firm; and Adams pleaded that he was a natural-born citizen of Ohio, and had always resided there, and had never been in the state of New York; that the receipts were drawn and signed in Ohio; and that the offense was committed by the receipts being presented in New York to the firm by innocent agents there, employed by the defendant in Ohio,—and the plea was adjudged to be bad, and the indictment to have been properly found in New York. And, in entire consistency with this decision, it was held in Stewart v. Jessup, 51 Ind. 413, that a person is not liable to conviction and punishment in Indiana for obtaining property under false pretenses, where the property has been obtained outside of that state, although the false pretenses may have been made within it. See, also, In re Carr, 28 Kan. 1; State v. Round, 82 Mo. 679; State v. Shaeffer, 89 Mo. 271, 1 S. W. Rep. 293; Com. v. Taylor, 105 Mass. 172; Com. v. Wood, 142 Mass. 459, 8 N. E. Rep. 432; Com. v. Van Tuyl, 1 Metc. (Ky.) 1.

We will defer any consideration of the statutory provision that in all cases where an indictable offense shall be perpetrated in this state, and the same shall commence in any one county and terminate in another, the person offending shall be liable to indictment in either county, (section 4, p. 446, McClel. Dig.,) and will test the information, upon the point of venue, by the rules of law laid down above.

The allegations of the first count, as to obtaining the money, are, substituting figures for words, as follows: "And the said Connor, Chambliss, and Vogt, by means of the said false pretenses, obtained from the said bank, and the said Rollins, Morgan, and Greeley, as its managing agents and directors, certain moneys, to wit, $3,200, of the value of $3,200, the property of said bank. And the said bank, and the said Rollins, Morgan, and Greeley, as its directors and managing agents, then and there, by reason of the said false pretenses of the said defendants, and fully relying upon and believing in the truth thereof, were then and there induced to part with their ownership of and in the said $3,200 to the said Connor, Chambliss, and Vogt, and did then and there part with their ownership in said $3,200 to said defendants." It is apparent that there is nothing said in the first of the above-quoted sentences as to place, and hence no express statement as to where the defendants obtained the money. Assuming, as we will, for the purpose of the point under discussion, that the venue of the pretenses, as previously laid in the count, is in Marion county, still such distinctive allegation of venue cannot be invoked to show that the defendants did obtain the money in the same locality or jurisdiction, in the absence of apt words connecting the obtaining of the money with it. The first sentence, then, fails altogether to show where the money was obtained, or where, in the light of the above authorities, the offense was consummated or is indictable; and consequently the count must be held to be insufficient unless we can find from the succeeding or second sentence of the quoted words that the money was obtained by the defendants in Marion county. We will admit it was the intention of the pleader that the word "there," as used in the second sentence, should refer to the county of Marion, in this state, when mentioned in the preceding parts of the information, in designating the venue of the pretenses. Still this sentence, if it is not in substance and effect an allegation that the defendants obtained the money, will not save the count under consideration. Giving the word "there" the effect and meaning of the words "in the county of Marion, in the state of Florida," has the sentence the meaning and effect suggested? We do not think that the allegation that the person defrauded, or owner of the property, or his agent, was by reason of, and in reliance upon, false pretenses of a defendant, induced to part with, and did part with, his ownership of and in certain moneys or other property to the defendants, is the equivalent of an allegation that the defendants obtained the money by or through such pretenses, or at all. This is not a prosecution for obtaining under false pretenses a signature to any written instrument, the false making whereof would be punished as forgery, but it is for obtaining or getting the possession of the money itself. The ownership of the bank in the money could have passed to the defendants without the defendants obtaining the money or the bank having parted with the money itself, or having delivered it to the defendants, or to any one. To "obtain," as defined by Webster, means "to get hold of by effort; to gain possession of; to acquire." The two former definitions give more accurately than the third the meaning of the word as used in the statute. In State v. Lewis, 26 Kan. 123, the information charged that, upon certain false pretenses of Lewis, one Burton "paid" to him the stated sum of $330, the money, property, and effects of certain parties, but it was not alleged that Lewis obtained any money or any other property of any one; and the question was whether the word "paid" was the equivalent of the word "obtained." "The crime defined by the statute," says the opinion, "is not that of making a false pretense; but the provision is directed against one who obtains something, or who, in other words, gets possession of something purposely by effort,—that is, by false pretenses. This being true, the information does not describe the offense either in the exact words of the statute, or by adoption of other words of substantially the same meaning with the words of the statute." Kennedy v. State, 34 Ohio St. 310; Com. v. Lannan, 1 Allen, 500; People v. Court, 13 Hun, 395. The bank and its agents might have been induced by the defendants to part with the bank's ownership of and in the money to the defendants, and might have actually parted with the bank's ownership of and in the money to the defendants, and all this might have been in

Marion county; and still the defendants may not have obtained possession of the money in that county, or even at all. This count does not show that the defendants obtained the money in Marion county, and hence it, when judged in the light of the law as it is set forth above, is insufficient.

Proceeding now to consider the amenability of the second count to the objection that it does not show the jurisdiction of the court, or, in other words, does not show that the money was obtained or the offense committed in Marion county, it is proper to state that the averment of this count as to the defendants' obtaining the money is that the defendants, by means of the said false pretenses, and said false and privy tokens, did then and there obtain from the said Land Mortgage Bank of Florida, Limited, of England, as aforesaid, and the said John F. Rollins, Morgan, and Greeley, as its agents, certain property, to wit, the sum of $2,993, and a check and order for the payment of money, of the value of $2,993, of the property, goods, and effects of the said Land Mortgage Bank of Florida, Limited, of England; and the said Rollins, Morgan, and Greeley, as its directors and managing agents, as aforesaid, and the said bank and the said Rollins, Morgan, and Greeley, as its directors and managing agents, aforesaid, relying upon and fully believing in the truth of the said false pretenses, and said false and privy tokens and paper writings, of the said defendants, were then and there induced, by reason of same, to part with the said money, and the said check and order for money, and the ownership therein of the said bank, and the said Rollins, Morgan, and Greeley, directors and agents, aforesaid, to said defendants.

It is a settled rule that if the indictment or information is uncertain or repugnant to itself, as to the county or other jurisdictional locality of the commission of the offense, or, in other words, as to the venue of the offense, it will be held insufficient. 2 Hale, P. C. 180; 1 Bish. Crim. Proc. (3d Ed.) § 379; 1 Chit. Crim. Law, 160. In Cain v. State, 18 Tex. 391, the indictment, after "State of Texas, county of Fayette," and the usual commencement, charged that James Cain, late of Travis county aforesaid, yeoman, with force and arms, in the county aforesaid, on, etc., did then and there feloniously steal, take, and carry away, etc., it was held that there was manifest repugnancy as to the place or county where the offense was committed, and that it was good ground in arrest of judgment. And in Bell v. Com., 8 Grat. 600, Campbell county, the county in which the indictment was found, was mentioned in the caption, and in the body of the indictment it was charged "that Alonzo G. Bell, late of the county of Roanoke, in the state of Virginia, laborer, on the 10th day of March, A. D. 1850, with force and arms, at the parish of Russell, in the county aforesaid," one bay mare, of the value, etc.; and the indictment was held bad, as not showing with sufficient certainty that the offense was committed in Campbell county. It is observed in State v. McCracken, 20 Mo. 411, where two different counties were named, and the indictment was quashed, that when two different times and two different places are mentioned in an indictment, and a material fact is afterwards averred, it will not be sufficient to give venue to such fact by stating "then and there" only; for it will not do to say that, grammatically, "then and there" refer to the last antecedent time and place. See, also, Reg. v. Rhodes, 2 Ld. Raym. 886; King v. Inhabitants, 2 East, 65; Rex v. Kilderby, 1 Saund. 308; Queen v. Gunn, 11 Mod. 66.

In view of what appears in the second count, in its averments of the pretenses, and preceding what is quoted above, it is impossible to say that the word "there," as used in the quotation, this count, refers only to Marion county, or locates the obtaining the money and check in that county. Though at the outset of the count it is alleged that it was in such county the defendants designedly and fraudulently pretended, still such pretending or pretenses are charged to have been made to the Land Mortgage Bank of Florida, Limited, of England; and though afterwards, but preceding the above quotation, it is charged that certain false and fraudulent papers were made in Marion county, yet, in connection with these allegations the bank, the party alleged to have been defrauded, is again, and more than once, described as "of England;" and in one place it, in designating a draft or order as one of the false pretenses used in obtaining the money or check, is designated as "of England, Jacksonville, Fla." If it be that the absence of the word "city" before the word "Jacksonville" will prevent our taking judicial notice that the city of Jacksonville, in Duval county,—a city, we may observe, which is incorporated by special statute, (chapter 3775, approved May 31, 1887, and chapter 3776, approved June 2, 1887, and chapter 3952, approved May 16, 1889, and chapter 3953, approved May 31, 1889, and chapter 4039, approved June 9, 1891,)—is the place meant by the words "Jacksonville, Florida," still we think the word "there," in the expression "then and there," in the averment as to the obtaining the money or check, is, in view of the preceding statement of the two jurisdictions, Marion county and England, entirely insufficient to show where the defendants obtained the money or check, and hence that the count is entirely uncertain as to the venue or jurisdiction of the obtaining of the things mentioned. It cannot be held to refer any more to Marion county than to England.

Tested by the rule laid down in the first paragraph of this opinion, neither of the two counts is sufficient, and for the reasons indicated as to each count; yet, without saying that the first is not subject also to the criticism made of the second, the information must be quashed, unless the statute first referred to above (section 4, p. 446, McClel. Dig.) will save it. This statute cannot be invoked as aiding a case of this character unless the information or indictment shows a consummation of the offense in Florida. There has been no

crime committed in Florida unless the money or the check was obtained here, and this is not shown by either count. If the information duly represented that the things were obtained in Marion county, the information would be good upon its face as against the objections considered; or if it represented that the pretenses were in Marion county, and the money and check were obtained in another county in the state, it would also be good, under the above statute, unless there is something in the nature of cases of this kind which has not been suggested. If there is nothing of such kind in the nature of the case, and an information should lay both the pretenses and the obtaining in the same county, when in fact they are in different counties, a question of variance might arise, rendering it necessary to decide the question of the proper way of pleading offenses which the statute last cited was intended to apply to. The authorities cannot be held to be in harmony. Mr. Bishop approves a statement of them as they occurred, (2 Bish. Crim. Proc. § 381; 1 Chit. Crim. Law, 195;) and certainly this is fairest to the accused. People v. Dougherty, 7 Cal. 395.

The information should have been quashed; and, in view of the jurisdictional reasons leading to this conclusion, we cannot be expected to consider the numerous other objections made to the information.

The judgment will be reversed, and the cause remanded, with directions to quash the information.

(29 Fla. 408)

SMITH v. STATE.

(*Supreme Court of Florida.* April 16, 1892.)

FORGERY—INDICTMENT—ADMISSIONS—MOTION IN ARREST OF JUDGMENT—EXCEPTIONS—QUALIFICATIONS OF JURORS—CONSTITUTIONAL LAW

1. Section 1, c. 4015, Laws Fla., providing that grand and petit jurors shall be taken from the registered voters who have paid their last assessed capitation tax in their respective counties, does not contemplate that said tax shall be paid before it becomes due and payable under section 44, c. 4010, Acts 1891; and where a grand jury was duly organized for a term of court on the 13th day of October, A. D. 1891, it is held that a failure to pay the capitation tax for that year does not disqualify them to serve as jurors.

2. The act supra, c. 4015, is not in conflict with article 3, § 16, Const. 1885.

3. When an indictment for forgery undertakes to set forth the instrument alleged to be forged according to its tenor, great particularity is required, and any variance as to the words of such instrument, unless the same be mere fault of spelling, will be fatal; but, in an indictment for forgery of an order for the payment of money, the words and figures in the margin of the order, and which constitute no part of the instrument, need not be set out, unless they constitute an essential description of the order.

4. Where the ground of the objection to the introduction of a paper in evidence is not stated, and no exception is taken at the time to the decision of the court overruling the objection, the party cannot avail himself of an exception to such decision in a motion for a new trial.

5. The voluntary statement of an accused, in reference to his connection with an offense, may be shown by the state to be untrue.

6. An order drawn by a county board of public instruction, as an allowance for an account approved by the board, and directed to the county treasurer for the payment of money, is such an instrument, within the meaning of our statute, as can be the subject of forgery.

7. In an indictment for forgery of a check, promissory note, or order for the payment of money, it is sufficient to set out in the indictment the alleged instrument *in haec verba*, with the names of the makers and payees on it, together with proper averments that the accused falsely made, forged, and counterfeited said instrument with the intent to defraud.

8. Motions in arrest of judgment reach only such errors as are apparent upon the record, and the sufficiency of the evidence to sustain a verdict cannot be considered on such motion.

9. Evidence of venue in a criminal prosecution need not exclude every reasonable doubt, but where the evidence raises a violent presumption that the offense was committed within the jurisdiction alleged, or if this can be reasonably inferred from the evidence, it will be sufficient.

10. A general exception to an entire charge that contains a correct proposition of law is not good, but, under our practice, it devolves upon the party to properly except in the trial court to the portion of the charge supposed to be erroneous.

11. *Held*, that the testimony, as shown by the record, fails to connect the accused with the act of forgery, or with the instrument in its altered condition, or with the proceeds thereof, or with the person to whom it as altered was paid, and, though showing circumstances of suspicion, was insufficient to sustain a conviction. MABRY, J., dissenting, *held* that the testimony was sufficient to connect the accused with the alteration, and sustain the verdict.

(*Syllabus by the Court.*)

Error to circuit court, Madison county; JOHN F. WHITE, Judge.

Indictment against Henry C. Smith for forgery. He was convicted, and, his motion in arrest of judgment and for a new trial being overruled, he brings error. Reversed.

W. C. McCall, for plaintiff in error. *W. B. Lamar*, Atty. Gen., for the State.

MABRY, J. On the 15th day of October, A. D. 1891, the plaintiff in error was indicted in the circuit court for Madison county. The indictment, leaving out some of its formalities, is as follows:

"The grand jurors for the state of Florida, duly chosen, impaneled, and sworn diligently to inquire and true presentment make, in and for the body of the county of Madison and third judicial circuit of said state, upon their oaths present that Henry C. Smith, late of said county, laborer, on the first day of June, A. D. 1891, at and in the county, circuit, and state aforesaid, with force and arms, with intent unlawfully, willfully, and wickedly to injure and defraud the board of public instruction of Madison county, state of Florida, of moneys held by said board for the use of the common schools of said county, then and there in the hands of the county treasurer of said county, one order given by the said board as aforesaid, payable to the order of one R. L. Williams, for the sum of three dollars, said order being in writing, and having the words 'three dollars' and the figures '$3.00' written thereon, and being directed to and drawn on the county treasurer of said county for payment, and signed by J. E. Pound, chairman of the board of public instruction of said county, and R. L. Williams, superintendent of public instruction of said coun-

ty, which said order is in words and figures as follows, to wit:

"'$3.00. Office of Board of Public Instruction of Madison Co., Fla.

"'To the Treasurer of Madison Co.: Please pay to the order of R. L. Williams the sum of three dollars, and charge to account of board of public instruction of Madison Co., Fla.; account approved by board of public instruction, May 26, 1891. No. 388.

"'J. E. POUND,
"'Chmn. Bd. Publ. Inst.
"'R. L. WILLIAMS,
"'Supt. Publ. Inst.

"'Not intended as a circulating medium.' —Did then and there forge, by altering the words 'three dollars,' and the figures '$3.00,' and changing them from 'three dollars' into 'thirty dollars,' and from '$3.00,' into '$30.00,' and which said forged order is in words and figures as follows, to wit:

"'$30.00. Office of Board of Public Instruction of Madison Co., Fla.

"'To the Treasurer of Madison Co.: Please pay to the order of R. L. Williams the sum of thirty dollars, and charge to account of board of public instruction of Madison Co., Fla.; account approved by board of public instruction, May 26, 1891. No. 388.

"'J. E. POUND,
"'Chrm. Bd. Publ. Inst.
"'R. L. WILLIAMS,
"'Supt. Publ. Inst.

"'Not intended as a circulating medium.' —Contrary to the form of the statute in such cases made and provided."

At the same term the accused was arraigned upon this indictment, and, after plea of not guilty, was tried and convicted of the offense therein charged. Motions in arrest of judgment and for a new trial were made and overruled, and the case is before us by writ of error. The grounds of the motion in arrest of judgment are: (1) "Because there is no crime charged; the instrument alleged to be forged not being included in the statutes of this state, and as such could be forged." (2) "The indictment does not allege that J. E. Pound, as chairman, and R. L. Williams, as superintendent, had authority to sign, and did sign, said forged paper; it does not allege that they were such officers." (3) "The indictment does not charge that the offense was committed in two years before the finding of the indictment, and the evidence does not show the offense was committed on the day alleged." (4) "The evidence does not establish the guilt of the prisoner, and the forging and intent to defraud does not appear therefrom."

The grounds for new trial are: (1) "The prosecution failed to prove the venue." (2) "The verdict is contrary to the law and the evidence." (3) "The verdict of the jury is contrary to the charge of the court." (4) "The court erred in admitting in evidence school warrant No. 378." (5) "The court erred in defining to the jury what a reasonable doubt is." (6) "The indictment does not allege the offense was committed in two years before the filing of the indictment." (7) "The court erred in admitting school warrant No. 388, over the objection of defendant, because it was not the paper alleged to have been forged and set forth in the indictment."

We will dispose of the assignments of error in the order in which they are made here. The first and second are that the court erred in sustaining the demurrer to the first and third pleas in abatement, and in adjudging the second insufficient.

It appears from the record that before arraignment the accused filed a plea in abatement, alleging that the indictment was found by an illegal grand jury—*First*, because an act entitled "An act relating to jurors," approved June 8, 1891, under which said grand jury was summoned, impaneled, and organized, was and is in violation of article 3, § 16, of the constitution of the state, and is void; *second*, because, if said act should be held by the court to be constitutional, no member of said grand jury, at the time of the organization thereof, had paid the last capitation tax which had been assessed against him in said county of Madison for the year 1891, before the summoning, impaneling, and organization of said grand jury, and which said tax was assessed on the 1st day of October, A. D. 1891, and the same is still unpaid; *third*, because the act of June 8, 1891, does not go into effect until January 1, 1892. It appears that the state attorney joined issue on the first and third grounds of defendant's plea, and demurred to the second. The demurrer was sustained, and the record recites that the court adjudged the first and third insufficient. We assume from the recital in the record that a trial was had by the court on the issues tendered as to the first and third grounds of the plea. A demurrer to all the grounds of the plea would have presented a proper issue, because whatever questions they sought to present were of a legal nature, and to be settled by the court. It appears that the legal sufficiency of the entire plea was passed upon by the court, and we will examine it to see if there are any merits in it. The court during which the indictment was found was organized on the 13th day of October, A. D. 1891. Upon its appearing to the court that no grand jury had been drawn and summoned as provided by law, by special order of the court the jurors for the term were summoned from the body of the county at large.

The second ground of the plea, the one demurred to, attempts to set up the nonpayment of the capitation tax for the year 1891 as a disqualification of the jurors who found the indictment. The act of the legislature approved June 8, 1891, (chapter 4015, Laws Fla.,) in the first section provides that "grand and petit jurors shall be taken from the registered voters who have paid their last assessed capitation tax in their respective counties." Section 14, c. 4010, passed at the same session of the legislature, provides a "poll tax of one dollar shall be levied upon each male person over the age of twenty-one years, which tax shall be paid into the county school fund, and shall be collected when taxes on property are collected." Section

44 of this act provides that all taxes shall be due and payable after the first Monday in November of each and every year. It is evident that the capitation tax for the year 1891 was not due when the indictment was returned against the accused, as this was on the 15th day of October, A. D. 1891. It is true that the county assessor regularly, between the 1st day of January and the 1st day of July of each year, shall make out an assessment roll of all the taxable property in the county, including the names of all persons subject to pay the capitation tax, and return it to the board of county commissioners at their meeting in July. This roll, after being examined and equalized by the county commissioners under certain proceedings extending to the 1st of October, shall then be certified by them as having been examined and found correct. The assessor after this annexes, to one of the rolls required to be made, the warrant provided by the statute, and delivers it to the collector of revenue. Taxes then become due and collectible after the first Monday in November of each year. If for any cause a delay has occurred in preparing the assessment rolls, provision is made for an extension of time. The statute of 1891, in providing that jurors shall be taken from the registered voters who have paid their last assessed capitation tax in their respective counties, does not, in our opinion, contemplate the payment of this tax before it becomes due. Within the meaning of this statute, the terms "last assessed capitation tax" refers to a tax that is due and payable. The jurors in the present case were summoned and impaneled in October, before the tax became due, and the failure to pay the poll tax for that year did not disqualify them as jurors. Under the revenue act, taxes shall be due and payable after the first Monday in November of each year, and the collector is required to collect, by levy and sale of the goods and chattels assessed, all taxes that remain unpaid on the 1st day of March of each year. Whether or not a juror would be so in default in not paying his capitation tax as to disqualify him, before the expiration of the time allowed to pay without coercion, it is not necessary here to say. The facts of this case only make it necessary for us to decide that, within the meaning of the jury act, the last assessed capitation taxes do not include those not payable.

The first ground of the plea in abatement is that the act of 1891, c. 4015, under which the grand jury was organized, is in violation of article 3, § 16, Const. 1885. It is claimed, in the first place, that the title of the act is not broad enough to include the provisions of the act. The title of the act is "An act in relation to jurors." The constitution provides that each law shall embrace but one subject, and matter properly connected therewith. The subject of the act in question is "jurors," and it becomes apparent, from a reading of this statute, that all of its provisions are germane to the subject, and properly connected therewith. Gibson v. State, 16 Fla. 291. In the second place, it is contended that this act repeals or revises a law without setting forth the law repealed or revised. There is nothing in this contention. The constitution provides that "no law shall be amended or revised by reference to its title only; but, in such case, the act as revised or section as amended shall be reenacted and published at length." The statute before us does not undertake to revise or amend any former law. The effect of it may be to repeal portions of former laws, but this would not render it invalid because the portions repealed were not specially mentioned and set out. As to the other ground, that the act did not take effect until January, 1892, it is only necessary to say it was approved June 8, A. D. 1891, and no provision is therein made when it shall take effect. The constitution provides that "no law shall take effect until sixty days from the final adjournment of the session of the legislature at which it may have been enacted, unless otherwise specially provided in such law." Our conclusion is that the plea in abatement presented no valid objection to the indictment.

The third and fourth assignments of error are that the court erred in admitting in evidence the two school orders, one numbered 378, and the other numbered 388. The indictment shows that the accused was charged with forging order No. 388. The objection to the introduction of this order is that there is a variance between it and the paper set out in the indictment, and alleged to have been forged. The variance alleged consists in the omission from the top of the paper set out in the indictment the words, "Not intended as a circulating medium." It seems that the order in question had printed or written at the top, and also at the bottom, the words, "Not intended as a circulating medium," and in the copy set out in the indictment the words at the top were omitted. The indictment undertakes to set out the alleged forged order in words and figures. Great particularity is required of the pleader in such cases. Mr. Wharton says: "When an indictment undertakes to set forth, as in forgery or libel, a document 'according to its tenor,' or 'as follows,' then any variance as to the words of the document, unless such variance be mere fault of spelling, is fatal." Whart. Crim. Ev. § 114. The authorities cited by this author fully sustain the rule he announces. Ex parte Rogers, 10 Tex. App. 655; State v. Townsend, 86 N. C. 676. On the other hand, an indictment for forgery of a promissory note, or order for the payment of money, need not set out any matter written upon the same paper, constituting no part of the obligation, and not entering into an essential description of it. While a strict recital of the very words of the forged order is required, the numbers, vignettes, and devices, or the words and figures in the margin, which constitute no part of the contract of the instrument, need not necessarily be given. Of course, such marginal characters can be made descriptive of the instrument, and then the same strictness will be required of them as any part of the paper. The forgery alleged in the present indictment consists in raising the amount

of a school order or warrant. We have not the original before us, but from the record it appears that the words omitted are written or printed in the margin above the date and body of the order. The same words appear in the margin at the bottom, and they are accurately set out in the indictment. It has been held that where the counterfeit bill offered in evidence contained the word "three" six times on the margin at the top of the bill, and also close upon the margin the words and figures, "Capital stock $100,000, secured by pledge of $100,000 Pennsylvania 6 per cent. bonds," and no mention was made of such words and figures in the copy set forth in the indictment, there was no variance, because what was omitted constituted no part of the bill. The same view was taken where the forged note offered in evidence had upon its face the words, "Countersigned and registered in the bank department," with the signature of the register. And so the words "School order" on the face of an instrument, constituting no part of the contract, but being the trade-mark of the printer of the order, may be omitted on the copy in the indictment. Our judgment is that the omitted words in the margin of the order in question constituted no part of the forged order, and there was no essential variance between the order recited in the indictment and the one introduced in evidence. The following authorities on this point are referred to: Langdale v. People, 100 Ill. 263; State v. Wheeler, 35 Vt. 261; Wilson v. People, 5 Parker, Crim. R. 178; Perkins v. Com., 7 Grat. 651; Com. v. Bailey, 1 Mass. 62; Com. v. Stevens, Id. 203; Com. v. Taylor, 5 Cush. 605; State v. Carr, 5 N. H. 367; Griffin v. State, 14 Ohio St. 55; People v. Franklin, 3 Johns. Cas. 299; Miller v. People, 52 N. Y. 304; Mee v. State, 23 Tex. App. 566, 5 S. W. Rep. 243; State v. Grant, 74 Mo. 33.

Objection was made to the introduction in evidence of school order No. 378. This order, as introduced in evidence, was for $30.80, payable to the order of H. C. Smith. The state proved by the superintendent and the chairman of the board of public instruction of Madison county that this school order was issued and delivered to the accused for $3.80, and that it had been altered to the larger sum. The ground of the objection to the introduction of this order in evidence is not stated, nor was any exception taken to the decision of the court in overruling the objection. The two forged school orders were issued at the same time, one to Williams, and indorsed to the accused, and the other directly to him. A fraudulent intent is a material and essential ingredient in the crime of forgery. If the accused fraudulently altered the school order No. 378, it would afford legitimate evidence tending to prove a fraudulent intent in altering, if he did, the order upon which the indictment was based. Whart. Crim. Ev. § 38 et seq.; Hennessy v. State, 23 Tex. App. 340, 5 S. W. Rep. 215. It is true that he could not be convicted on the indictment in question for forging school order No. 378, and the only legitimate purpose for which it could be admitted in evidence was to throw light upon his motives in altering the other order, if he did alter it. The state having shown that both orders went into the hands of the accused in their original state, and were subsequently changed, in the absence of rebutting testimony on his part, a presumption arises that he fraudulently altered the order upon which the indictment is based. It was the right of the accused, however, to have the evidence submitted to the jury in its legal bearing, and, if he had made the proper objections, he could have availed himself of this right. This he did not do, and no further discussion is necessary on this point.

The fifth error assigned is that the court erred in admitting in evidence what the accused said before the school board about school order No. 378. It seems that the accused appeared before a meeting of the school board in September, 1891, and asked permission to remain in the room during its session. While there the order No. 378, which had been returned by the treasurer to the board as paid, was examined and found to be changed. The accused stated to the board that he gave the order to Mrs. Morrison, and had no more to do with it, and that he was not guilty. Mrs. Morrison testified that the accused did not give her the order. We perceive no error in the ruling of the court admitting this statement of the accused in evidence. It was a voluntary statement, made at the time the forgery was detected, and it was competent for the state to put in evidence this statement, and then show that it was not true.

It is alleged that the court erred in overruling the motion in arrest of judgment. The first ground of the motion is that the indictment does not charge any crime, because the instrument alleged to have been forged is not one embraced within the forgery statutes of this state. Among other instruments of writing which are the subjects of forgery under our statute, it is provided that "whoever falsely makes, alters, forges, or counterfeits a * * * bill of exchange or promissory note, or an order, acquittance, or discharge for money or other property, or an acceptance of a bill of exchange, or indorsement or assignment of a bill of exchange or promissory note, for the payment of money, or an accountable receipt for money, goods, or other property, with intent to injure or defraud any person, shall be punished," etc. The position of counsel for plaintiff in error is that there is no law authorizing the issuance of the order alleged to have been forged, and the same is void, and not the subject of forgery. It is conceded that if the paper on its face does not appear to have any legal validity, and is in its essence void, and incapable of effecting a fraud, no forgery can be predicated upon its alteration. Mr. Bishop says: "Forgery, at the common law, is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Crim. Law, § 523. Under our statutes, county treasurers are the custodians of

the county school funds, and the county boards of public instruction, which are made bodies corporate, have control and management of county school interests. A chairman of the board is elected, and the county superintendent is made, by statute, secretary of the board. This board is authorized, among other things, to purchase school sites and premises, and to employ teachers for the education of the youth of the county, and also to audit and pay all accounts due by the board of public instruction. The order alleged to have been forged shows on its face to be an allowance for an account approved by the board of public instruction as a proper charge against said board. It is an order directed to the treasurer to pay the sum mentioned therein for an account approved as a valid demand against the county board of public instruction, and in our judgment is such an instrument, within the meaning of our statute, as can be the subject of forgery. It is a writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability against the board of public instruction of Madison county, and, within the light of the authorities, is such an instrument as can be forged. Crain v. State, 45 Ark. 450; Ball v. State, 48 Ark. 94, 2 S. W. Rep. 462; State v. Fenly, 18 Mo. 445; Rembert v. State, 53 Ala. 467; Arnold v. Cost, 3 Gill & J. 219, 22 Amer. Dec. 302, note; Hendricks v. State, 26 Tex. App. 176, 9 S. W. Rep. 555, 557, 8 Amer. State Rep. 463, note; Langdale v. People, supra.

The second ground of the motion in arrest of judgment is that the indictment does not allege that J. E. Pound, as chairman, and R. L. Williams, as superintendent, had authority to sign, and did sign, said forged paper, and does not allege that they were such officers. The authorities hold that, where a party is charged with forging a check, promissory note, or order for the payment of money, it is sufficient to allege in the indictment that he falsely made, forged, and counterfeited the writing with intent to defraud some person, setting out the instrument *in haec verba*, with the names of the makers, indorsers, and payees on it. By pursuing this course, it is made to appear to the court that the forging was of an instrument in writing, being, or purporting to be, the act of another, by which rights or property are liable to be affected, and the court can see and judge for itself what is the nature and extent of the obligation contained in the paper. Cross v. People, 47 Ill. 152; State v. Fenly, supra; Rembert v. State, supra; State v. Johnson, 26 Iowa, 407. The order before us shows that it was signed by J. E. Pound, chairman board of public instruction, and R. L. Williams, superintendent of public instruction. The testimony showed that these parties were, respectively, the officers mentioned, and that they acted for the board in issuing the order in question. The indictment was sufficient in this respect.

The third ground of the motion in arrest of judgment, that the indictment does not charge that the offense was committed within two years before the finding of the indictment, has no foundation in the record. The indictment distinctly alleges that the offense was committed on the 1st day of June, A. D. 1891. The other grounds of this motion need not be noticed. Motions in arrest of judgment reach only such errors as are apparent upon the record, and we cannot consider, on such motion, the sufficiency of the evidence to sustain the verdict of the jury. Bacon v. State, 22 Fla. 51; Jordan v. State, Id. 528.

The overruling of the motion for a new trial is also assigned as error. The first ground of this motion is that the prosecution failed to prove the venue. It is essential that the state should prove the venue alleged, but this need not be done to the exclusion of every reasonable doubt. If the evidence raises a violent presumption that the offense was committed within the county named, or if this can be reasonably inferred from the evidence, it is sufficient. Andrews v. State, 21 Fla. 598; Warrace v. State, 27 Fla. 362, 8 South. Rep. 748. The evidence shows that the school order was issued in Madison county, Fla., in June, 1891, and was delivered to the accused, in said county, the day it was issued. He lived in Madison county, and was teaching school there. Within the liberal rule applicable in proving venue, we think enough is shown in the record from which the jury could reasonably have inferred that the offense was committed, if at all, in Madison county.

The fourth and seventh grounds of the motion for new trial, in reference to the admission in evidence of the school orders, have already been considered.

The fifth ground is that the court erred in defining a "reasonable doubt." The particular portion of the charge supposed by counsel to be erroneous is not pointed out. In one portion of the charge the judge instructed the jury that the evidence should satisfy them of the guilt of the accused beyond a reasonable doubt. This portion is certainly correct. There is more of the charge on the subject of a reasonable doubt. A general exception to an entire charge that contains a correct proposition of law is not good. The good and the bad, if any be bad, cannot, under such an exception, be separated. Under our practice, it devolves upon the party to properly except in the trial court to the portion of the charge supposed to be erroneous. Metzger v. State, 18 Fla. 481; Baker v. Chatfield, 23 Fla. 540, 2 South. Rep. 822; Pinson v. State, 28 Fla. —, 9 South. Rep. 706.

The following is substantially the testimony introduced on the trial of this cause:

R. L. Williams, a witness for the state, superintendent of public instruction and secretary of the board of public instruction of that county, testified that J. E. Pound is chairman of the board, and, on being handed the warrant or order in question, No. 388, stated, in substance: "It was issued by the board to the order of witness, and was given by him to the defendant, it being then an order for $3, but having since been altered to $30. The account was approved by the board, May 26, 1891, and issued June 6, 1891. The way in which I came to give this order to Smith

was this: I owed Smith three dollars, and offered to pay him cash, but Smith said 'scrip would do him as well; he could use it dollar for dollar.' School scrip was then at a discount from ten to fifteen per cent. The county treasurer returns all the school scrip paid by him to the board of public instruction once a year, when the board meets to verify his accounts. Among the warrants returned by him was one No. 388. That the board met on the 22d of September last. The object of the meeting was to verify the orders returned by the county treasurer. Smith came in and presented to Mr. Pound his recommendation from the patrons of the school he had been teaching as principal thereof. Mr. Pound told him it was all right as far as it went, but was not indorsed by the supervisor of the school, and that, as the board required that, he could not consider it. Smith then asked permission to remain in the room during the meeting of the board. No other teachers were present. In verifying the orders we came to No. 378, payable to the order of H. C. Smith, and found it was raised from $3.80 to $30.80. As soon as we found it out, Smith got up and explained that he knew nothing about it, and that he gave the order as a $3.80 order to Mrs. Morrison. In about ten or twenty minutes we reached warrant No. 388, the one I gave Smith for what I owed him. Smith said I did not give it to him; that I paid him in cash; and that he knew nothing about the forgery of either of these warrants. Warrant No. 388, when returned to the board by the county treasurer, was changed from $3 to $30."

Cross-examination: "The change in warrant 388 is not in Smith's ordinary handwriting. I stated on the preliminary examination that I was not certain that I gave Smith this warrant, but since then I have had occasion to examine my stub books, and found that this is the only $3 warrant issued to my order during the whole year, and, as I am positive I gave Smith a $3 warrant payable to myself, therefore I am positive this is the warrant I gave Smith. He has taught school here ever since I have been superintendent of public instruction, about three years."

The warrant was put in evidence, as was the stub to the warrant, which was identified by the preceding witness. Warrant No. 378, payable to the order of defendant, was also put in evidence, it purporting at the time to be for $30.80.

J. E. Pound, a witness for the state, testified, in substance: "I was present on September 22d last, at the meeting of the board of public instruction." He makes about the same statement as that of Williams as to Smith's coming in and presenting his certificate of election as teacher, and the defect in the same, remarking, however, that Smith said the supervisor was away; and then says: "Smith asked permission to remain in the room during the sitting of the board. I told him there would be no objection, if he would not disturb us. We proceeded with the work, and, when the scrip which was issued to him was reached, he arose and stated that he gave that scrip to Mrs. Morrison, and had no more to do with it, and was not guilty. After talking about it a few minutes, we proceeded, and came to the scrip issued to R. L. Williams. Williams said to Smith, 'That is the scrip I let you have.' Smith said, 'You paid me the money for what you owed me. I did not get that scrip from you. You paid me the cash.'" William McDaniel, the county treasurer, testified that he paid warrants 378 and 388 as warrants for $30.80 and $30, but stated, on cross-examination, that he never paid either of them to H. C. Smith, defendant, and never paid him any money on any warrants during the year 1891.

Mary M. Morrison, a witness for the state, testified that Smith never gave her either of these two warrants; and that she had been convicted of forgery at this term of the court, but had not been sentenced.

A. M. Michelson, a state witness, testified that defendant told witness that warrants 388 and 378 were delivered to defendant by R. L. Williams, and given by defendant to Mary M. Morrison, and that he had nothing to do with the forgery of them.

Lula Carter, a witness for defendant, testified that she saw defendant deliver warrant payable to R. L. Williams for $3 to Mary M. Morrison; that she remembered it because they were in Mr. Parramore's store in Madison; that Smith first handed it to witness, when she noticed it was for $3, and payable to R. L. Williams; that witness saw his name on it, and handed it back to Smith, and told him it was not hers, (witness.') He then handed it to Mrs. Morrison, and gave witness hers, which was for $22. This happened at Mr. Parramore's store about the 1st of June, in this town, at the corner at Parramore's store. On cross-examination she stated that she was assistant teacher in Academy No. 2; that her feeling towards Smith is that of any other common friend; was not engaged to be married to him; that the ring on her finger was not given to her by Smith, and is not an engagement ring; that she taught with him for three terms, and they are both single.

Chandler H Smith testified he had known Smith for four years, and knew his reputation for honesty and truthfulness. Never heard any one say anything against him; that his character is good, so far as witness knows. Cabel Carter, a witness for defendant, and father of Lula Carter, also testified that he had known defendant for two or three years, and that he had borne a good character all that time, and witness had never heard anybody say anything against him; and stating, upon cross-examination, that he had no special good feeling for him; that he had a good feeling for all good preachers and teachers; that witness asked Tom McLeary if he would go on Smith's bond, who said he would go on it for $50; witness was willing to go on it for $250; the bond was for $500; that H. J. McCall, attorney for Smith, asked witness to go on the bond, and aid him in getting it up for Smith.

The statement made by Smith on the trial is as follows: "I gave warrant No. 388 to Mrs. Morrison. When I gave it, it was then a $3 warrant. It was at Mr. Parramore's store, on the 6th day of June, 1891. I had nothing to do with the forgery. I got nothing out of it. I asked the board permission to stay while it was in session, because I did not want to be where I was not wanted. I wanted to see how the board conducted its business."

R. L. Williams, recalled, testified that the school commenced October 1st, and lasted eight school months. A school month is 20 days. The school was out some time in May, 1891. "The last scrip I issued to Lula Carter was issued May 16, 1891. The account was approved April 28, 1891. The scrip was issued in Madison county, Fla. There was no school taught in June last. I delivered the scrip to Smith the day it was issued."

As will appear in what is stated by the majority of the court in the sequel of this opinion, the conclusion reached is that the testimony fails to sustain the verdict. In this conclusion I have not been able to concur. The forgery of the paper is clearly shown. That it went into the hands of the accused in an unaltered condition is also established. The conclusion of the majority of the court is that the testimony fails to connect the accused with the forgery of the instrument, or with the instrument in a forged condition. I concede that it is necessary for the testimony to connect the defendant with the forgery, and, if there is no testimony to establish this fact, the verdict should be set aside. I concede, further, that the testimony connecting the accused with the forgery must be sufficient to satisfy the minds of the jury beyond a reasonable doubt; but, where there is pertinent testimony bearing upon the guilt of the accused, its sufficiency for this purpose is a question for the jury. It is not controverted that the criminal connection of the accused with the forgery can be shown by circumstantial evidence, and that this character of evidence, if enough, can establish guilt. Let us see what are the facts and circumstances bearing upon the guilt of the accused in the case before us. First, he had an opportunity to commit the forgery, as the instrument, in its unforged condition, went into his hands. The indictment is based upon the paper issued to R. L. Williams, and delivered by him to the defendant. Williams owed Smith three dollars, and offered to pay him cash, but Smith said scrip would do as well, as he could use it dollar for dollar. Scrip at that time was at a discount of from 10 to 15 per cent. He elects to take scrip instead of cash, when he could only use the scrip at par. These are the circumstances under which he received the order. We next find Smith before the school board, at a meeting held to verify the orders of the county treasurer. It is true that he presented at this time to the chairman of the school board a recommendation from the patrons of a school as a teacher, but, after doing this, he asks permission to remain in the room during the meeting of the board. The scrip issued to Smith was reached by the board, and found to be forged, and he stated that he knew nothing about it, but gave it to Mrs. Morrison as a $3.80 order. When the order issued to Williams, and which he testifies that he delivered to Smith, was reached, and found to be also forged, he denied receiving it, and said Williams paid him cash. This denial was made at the time the forgery was detected. There is no contradiction or explanation of this fact by Smith. As appears from the testimony of A. M. Michelson, Smith admitted receiving both of the orders in question from Williams, and delivered them to Mary Morrison, but stated that he had nothing to do with the forgery. Mary Morrison testified that Smith never gave her either of the two orders. The county treasurer testified that he paid the two orders in their forged condition, but not to Smith. Williams says that the changed portion of the order upon which the indictment is based is not in Smith's ordinary handwriting. Before the school board Smith stated that he delivered order No. 378, the one issued to him, to Mary Morrison, and denied having the one issued to Williams. He admitted to Michelson the possession of this order, and on the trial undertakes to show that he parted with it in an unforged condition to Mary Morrison. In this he is contradicted by her. Lula Carter says that she saw Smith deliver order No. 388 to Mary Morrison about the 1st of June, and at the same time received her order from Smith for $22. She was teaching in the same school with Smith. In Smith's statement he says he delivered the order No. 388 to Mary Morrison on the 6th day of June, 1891. Williams testifies that the last order he issued to Lula Carter was on the 16th day of May, 1891. In considering the effect of the testimony to sustain the verdict, however, we must proceed upon the theory that the jury has the right to disbelieve that offered by the accused, and to base their verdict upon the state's evidence, if that be sufficient to justify the verdict. This is the exclusive province of the jury in weighing testimony. Are the facts and circumstances offered by the state sufficient to connect Smith with the forgery? To my mind they are strong, and amount to more than suspicion. Smith's election to take the order, then at a discount, in lieu of the money; his expressed desire to remain in the room when he knew that the board was checking up warrants; his denial that he ever had the order when its forgery was detected; then his admission of this fact, and his position that he parted with it to a party who denies that he ever did so,—are facts and circumstances showing a guilty connection with this paper, and, if they satisfied the minds of the jury beyond a reasonable doubt, (which, from the verdict, we must conclude was the case,) I do not believe the appellate court should disturb their finding. To do so, it seems to me, would be to determine the sufficiency of evidence to produce on the minds of jurors a reasonable doubt, and this, I believe, is a question for the jury. They had before them the living witnesses, and an

opportunity to observe their conduct and manner of testifying, all of which we do not have. In the case at bar I think the facts and circumstances tending to connect the accused with the forgery are strong enough to render it improper for the appellate court to disturb the deliberate finding of a jury, and its sanction, on a motion for a new trial, by the presiding judge.

RANEY, C. J., (TAYLOR, J., *concurring*.) The testimony not only fails to prove that the alteration of the school order No. 388, described in the indictment, is in the handwriting of the prisoner, or to otherwise show directly that he altered it, or procured or assisted in or was present at the alteration thereof, but it does not in any way connect the prisoner with the order after it had been altered. The order is not shown to have been passed or uttered by him in a forged condition, or to have ever been in his possession in that condition. The above observations, we may remark, are also equally true of the testimony as to the order No. 378. Treating as true the testimony of Mrs. Morrison that the prisoner did not deliver the order No. 388 to her, and as false the contrary statement of Lula Carter and of the prisoner, all of which it must be assumed the jury concluded, we still fail to find evidence to sustain the verdict. Not only is it not shown that the order was never in his possession in its altered condition, and that he never had any connection with it in that condition, but it is affirmatively shown, by the uncontradicted testimony of a state witness, that the order was paid, in its forged condition, to some one else than the prisoner. It cannot be inferred, from the mere fact that the prisoner had the order in its honest condition, either that it was changed before it went into the hands of the party to whom it was paid, or that the prisoner was a party to such an alteration; nor is the possession of a forged order by one person, and the payment thereof to that person, evidence that a person in whose possession the order in its legal condition is shown to have previously been, altered such order, or was a party to such alteration; nor is the fact that Smith was willing to take the warrant instead of money, when such warrant was at a discount, or it and the above facts, evidence sufficient to establish his connection with the alteration of the order. The same insufficiency attaches to the fact that the prisoner stated at the meeting of the school board that Williams had not given him the warrant numbered 388, (a fact of which Williams' memory also seems to have been doubtful at one time subsequently.) Here there is nothing to show at what exact time before the presentation of the warrant for payment it was altered, nor anything that connects the defendant with that alteration. This connection cannot be assumed, nor can a time of alteration sufficiently prior to such presentation to connect Smith with the alteration. They must be proved, and proved beyond a reasonable doubt, either directly, or by circumstances inconsistent with any other reasonable hypothesis shown by the testimony. Whart. Crim. Ev. §§ 1, 2; 1 Greenl. Ev. §§ 13, 13*a*; Costley v. Com., 118 Mass. 1; State v. Porter, 34 Iowa, 131.

Circumstances may often be sufficient to excite suspicion without establishing guilt, (8 Amer. & Eng. Enc. Law, 540;) and we do not say that there are not circumstances of such suspicion shown by this record; but when the state shows, as it does here, that the forged instrument was in the hands of, and was paid to, some other person than the accused, but fails to connect the accused with the act of forgery, or with the instrument in its altered condition, or with the proceeds thereof, or even with the person to whom it was paid, we do not think that the circumstances of suspicion shown by this record are sufficient to establish guilt, within the rule of law as it is laid down by us in this opinion, and where the testimony connects the defendant with the paper only in its honest condition.

The testimony, in our judgment, entirely fails to prove the guilt of the prisoner beyond a reasonable doubt, and cannot be said to establish his guilt to the exclusion of any other reasonable hypothesis shown by the proofs. State v. Morgan, 2 Dev. & B. 348, and Perkins v. Com., 7 Grat. 651, are not inconsistent with this conclusion.

For these reasons we think the judgment should be reversed, and a new trial granted. It is ordered accordingly.

(29 Fla. 527)

REEVES v. STATE.

(*Supreme Court of Florida.* April 23, 1892.)

LARCENY—INDICTMENT—PLEA IN ABATEMENT—DEMURRER—SELECTION OF JURY—INSTRUCTIONS.

1. A demurrer to a replication to a plea in abatement will reach the plea if defective.

2. The greatest accuracy and precision are required in pleas in abatement merely setting up irregularities in the selection or drawing of jurors, and such pleas must be free from uncertainty or ambiguity.

3. The statute (section 1, c. 3125, Laws 1879) providing a time for the boards of county commissioners to select from the list of registered voters in their respective counties a jury list of persons properly qualified to serve as jurors is directory; and, should said commissioners fail to make the selection at the January meeting mentioned in the statute, it would be competent for them to do so at a subsequent meeting.

4. The provision of the statute, supra, that the boards of county commissioners shall select from the registered voters of their respective counties a list of 300 persons properly qualified to serve as jurors, who shall be such persons only as said commissioners know, or have good reason to believe, are of approved integrity, fair character, sound judgment, and intelligence, provided that if in any counties of this state said commissioners shall not be able to select the number required, they shall be authorized to select a less number, but said number to be the highest possible, invests such boards with authority to pass upon the integrity, character, judgment, and intelligence of the persons to be selected as jurors; and, in the absence of an illegal purpose, fraud, or corruption in the selection of a less number than 300, the discretionary power of the commissioners in such matters will not be disturbed.

5. An objection that the offense charged in the indictment is vague, indefinite, and insufficient to protect the accused against a subsequent prosecution, shall be made in the shape of an at-

tack on the indictment, and not by a motion for a new trial on the ground that the verdict is contrary to law.

6. An accused is entitled to the presumption of innocence until this presumption is overcome by testimony beyond a reasonable doubt, and also to the benefit of a reasonable doubt in his favor arising from the evidence, and to have the court to so charge the jury. It is error to refuse a request in behalf of an accused to so charge when the court has not already fully covered in its charge what is requested.

(*Syllabus by the Court.*)

Error to circuit court, Wakulla county; JOHN W. MALONE, Judge.

Indictment against Frank Reeves for larceny. Verdict of guilty, and judgment thereon. Defendant brings error. Reversed.

Nat. R. Walker and *S. C. Miller*, for plaintiff in error. *W. B. Lamar*, Atty. Gen., for the State.

MABRY, J. The plaintiff in error was indicted at the November term, A. D. 1891, of the Wakulla circuit court for the larceny of a domestic animal. The averment as to the offense is that said "Frank Reeves, late of the county of Wakulla, aforesaid, in the circuit and state aforesaid, laborer, on the 19th day of June in the year of our Lord one thousand eight hundred and ninety-one, with force and arms, at and in the county of Wakulla, aforesaid, a certain domestic animal, to wit, a hog, of the value of two dollars and fifty cents, of the goods and chattels of Ellen Epps, then and there being found, feloniously did steal, take, and carry away, against the form of the statute," etc. The plaintiff in error, as defendant in the trial court, filed a plea in abatement. It is necessary to set out this plea, and the proceedings on it, in order that the objection sought to be raised by it may be presented.

In this plea it is alleged that said defendant should not be required to plead to the indictment because "the board of county commissioners of said county did not meet on the first week in January, 1891, for the purpose of selecting from the list of registered voters and make out a list of persons qualified to serve as jurors for this term of the circuit court, but did meet thereafter as soon as practicable, to wit, February 22, 1891, and selected the names of two hundred and eighty-five, said list being improperly certified to and signed by the chairman of the board."

(2) "The defendant further asks the court that he should not be required to plead to the indictment, because that there are over six hundred registered voters, as is shown by the records of said county, in said county, and that the said county commissioners, as aforesaid, were able to select more than the number so selected to serve as jurors."

(3) "And defendant further asks not to be required to plead, because that the officers of this court, after the drawing of the grand and petit jurors from said list as aforesaid, which were placed in a box, the names of the registered voters, did draw therefrom the grand and petit jurors who served as such jurors at the last spring term of said court."

(4) "The defendant further says that by instructions of said board of county commissioners, the officers, after drawing from said box the grand and petit jurors for the last spring term of this court, that said commissioners did instruct said officers to throw the names of said persons so selected to serve as grand and petit jurors, as aforesaid, out of said box, and the said officers did obey said instructions; further, that said board of county commissioners did meet on the 6th day of July, 1891, in the clerk's office in said county, without any judicial instructions from said circuit court, and proceeded again to select from the list of registered voters qualified to serve as grand jurors, and did select, the names of two hundred and eighteen out of the number of six hundred and more registered voters of said county, and from said list, which was improperly certified to by the chairman of said board to the clerk of this court, the officers of this court did draw the grand and petit jurors now serving as such jurors for this court, who are serving as such jurors without authority of law; and that at said meeting in July, 1891, the board of commissioners were able to select more than the number of two hundred and eighteen from the registered voters of said county, who are persons of approved integrity, fair character, sound judgment, and intelligence, as is shown by the annexed affidavit from the officers of this court and citizens of this county, and filed as 'Exhibit A,' and made a part of this plea."

The affidavit referred to in the plea is signed by the county judge, sheriff, collector of revenue, and two others. It is stated in this affidavit that the affiants had "examined the list of names recorded by the clerk, furnished to him by the board of county commissioners at their July meeting of the year 1891, and recorded on their minutes, and from said list the names of persons who were selected to be placed in a box to be drawn as grand and petit jurors for the fall term of the circuit court," and that said list does not, in their judgment, contain all the qualified registered voters in said county who are qualified to sit as grand and petit jurors; that the names of many persons are omitted who would be qualified jurors; and the names of 10 persons are mentioned.

The state attorney filed the following replication (omitting formal parts) to the plea: "That, notwithstanding anything by the said Frank Reeves above in pleading alleged, this court ought not to be precluded from taking cognisance of the indictment aforesaid, because he says that the court having discharged the jurors at the spring term of said court, for the reason as is made to appear to said court, as set out in said plea of said defendant, the county commissioners had not up to the holding of said spring term caused a proper list of names to be given to the clerk, as required by law, to be placed in the jury box to be drawn from; and therefore, there being no proper jury box for said county at said spring term, the said county commissioners proceeded, as early after the first week in January as practicable, to select names to be placed in the

jury box for the county of Wakulla, to wit, on the 6th day of July, 1891, the list of which said names, properly certified to and signed as required by law, was duly recorded, from which said list the clerk put names in said box, on pieces of paper, as required by law, and from which said box the names of the grand jurors and petit jurors for the present term were duly drawn, after due notice as required by law. To all of which said matters and things reference is prayed to the records of this honorable court," etc.

There was a demurrer filed by said accused to this replication. The grounds of the demurrer are that the replication is bad, because "the defendant's pleas do not allege that it was made to appear, as mentioned in the state attorney's replication, that the court discharged the jurors at the spring term of said court for the reason therein set forth, or for other reasons as made to appear by order of the circuit court as alleged; and, further, that the legality of the drawing of the grand and petit jurors by the county commissioners was not determined or considered by said court, as was alleged in defendant's plea."

There was a joinder on the part of the state attorney in the demurrer to the replication, and the record shows that the court overruled the demurrer and overruled the plea, and required the accused to plead to the indictment.

There is copied into the record what purports to be copies of the minutes of the board of county commissioners in reference to the selection of jury lists in February and July, A. D. 1891, but they are not embodied in the bill of exceptions, and there is nothing to show that they or the originals were introduced in evidence before the court, or were in any way used by the court in the disposition of the plea in abatement. Not being incorporated properly into the bill of exceptions, we are unable to refer to them, and hence no further notice will be taken of them.

After the demurrer to the replication was overruled, the accused was, upon arraignment and plea of "not guilty," convicted by the jury, and sentenced by the judgment of the court to four months' imprisonment in the state penitentiary, from which judgment he brings a writ of error to this court.

The action of the court in overruling the demurrer to the replication and setting aside the plea in abatement of the accused is assigned here as error. If either the plea in abatement be bad, or if the replication present a sufficient answer thereto, there is no error in the disposition made of the plea by the court. The demurrer to the replication will reach back to a defective plea, if such be the case, and, should the plea be found good, and the replication to contain a good answer to it, the issue has been properly determined against the sufficiency of the plea. It is true that, where a replication sets up issuable matter in avoidance, issue may be taken on it, and a trial had on this issue. But, in the absence of any such issue tendered on the part of the accused, after demurrer to the replication overruled, and a trial on the plea of "not guilty," it will be taken in the appellate court as a concession on his part that the facts of the replication are true. In construing pleas in abatement setting up simply irregularities in the drawing of jurors great strictness is required. Such pleas, which come under the class of what are known as "dilatory pleas," are not looked upon with favor by the court. In framing such pleas, the authorities hold that no uncertainty or ambiguity should exist, and in fact the greatest accuracy and precision are required, and they must be certain to every intent. Dolan v. People, 64 N. Y. 485; State v. Bryant, 10 Yerg. 527; State v. Brooks, 9 Ala. 9; Hardin v. State, 22 Ind. 347; 1 Bish. Crim. Proc. § 324. The pleas before us do not attempt to question the qualifications of any of the grand jurors who found the indictment. The sole objection is to the manner of selecting them. The rule of strict construction should be applied to such pleas, and, unless they fully comply with the rule, they should not be sustained. The statute provides "that the board of county commissioners, at a meeting to be held the first week in January of each year, or as soon thereafter as practicable, shall select from the list of registered voters in their respective counties and make out a list of three hundred persons properly qualified to serve as jurors, who shall be such persons only as they know or have good reason to believe are of approved integrity, fair character, sound judgment, and intelligence, which list, certified and signed by the chairman of the board, shall be forthwith delivered to the clerk, and by him recorded in the minutes: provided, that if in any counties of the state the county commissioners shall not be able to select the number required by this section, they shall be authorized to select a less number, such number to be the highest possible." Section 1, c. 3125, Laws 1879. As to the time when the board of county commissioners shall meet and select the jury list, the statute must be held to be directory. This is evident from the terms of the act itself, as it provides the list shall be made at the meeting in January, or as soon thereafter as practicable. It is the duty of the county commissioners to act in such matters at the January meeting, and they should perform this duty, in order to provide jurors for any term of court that may be held in the county during the year; but, should they fail to make the selection at the January meeting, it would be competent for them to do so at a subsequent meeting. Burlingame v. Burlingame, 18 Wis. 299; Thomas v. People, 39 Mich. 309; Colt v. Eves, 12 Conn. 248.

The first and fourth pleas allege a selection of a less number than 300 names to serve as jurors. The second plea avers that there were over 600 registered voters in Wakulla county, as shown by the public records, and that the county commissioners were able to select more than the number selected at the first meeting, which was 285. Under the act of 1868 the county commissioners were required to select the names of 300 persons to serve as jurors. In Gladden v. State, 13 Fla. 623,

where the commissioners, under this act, furnished to the clerk a list of 302 names, from which the grand and petit jurors were drawn, it was held to be a proper ground of challenge to the array of the petit jury. A plea in abatement will reach the organization of a grand jury from such a list. Id. The act of 1879, supra, contains a proviso that, if the county commissioners shall not be able to select the number of 300, they are authorized to select a less number, such number to be the highest possible. The selection is to be made from the registered voters of the county, and they shall be such persons only as the commissioners know, or have good reason to believe, are of approved integrity, fair character, sound judgment, and intelligence. The commissioners are the judges as to the integrity, character, judgment, and intelligence of the persons to be selected as jurors. The statute has delegated to this board the authority to pass upon such qualifications of persons to be selected as jurors, and, in the absence of an illegal purpose, fraud, or corruption in the selection of the jury list, we think the discretionary power of the commissioners in such matters cannot be set aside. Hardin v. State, supra. Conceding that the affidavit attached as an exhibit to the fourth plea is a part of it, and giving due consideration to its statements, it extends no further than to allege that the list selected by the county commissioners does not, in the judgment of the affiants, contain all the registered voters in said county who are qualified to serve as grand and petit jurors. It is the judgment of the county commissioners, in the absence of fraud or corruption, that controls in such matters; and their determination will not be set aside by the opinion of others that a large number of persons could have been selected who are possessed of the requisite qualifications. We fail to find in the first two pleas any sufficient allegations to constitute any valid objection to the indictment. If the commissioners made the selection at the February meeting instead of the January meeting, there is nothing alleged to show that it was not competent for them to do so, nor is there any sufficient allegation to show that the selection of a less number than 300 was in violation of the statute conferring authority upon the board to do so. But, independent of the question of the sufficiency of the allegations of the pleas, there is no connection between what is therein alleged and the indictment upon which the accused was tried. It is not therein alleged that the indictment was found by a grand jury drawn from the list selected in February, A. D. 1891; and, this being so, there is nothing in said pleas standing alone or in connection with each other which presents any objection to said indictment. It is difficult to ascertain what defense is designed to be set up by the third plea. It may be that something has been omitted which would make its meaning more definite, but, aside from its uncertainty and ambiguity, its failure to allege anything in connection with the indictment in question renders it defective.

In the fourth plea there is an allegation in effect that the officers, after drawing from said box the grand and petit jurors for the last spring term of the court, by instructions of the county commissioners threw the names of said persons so selected to serve as grand and petit jurors aforesaid out of said box, and said officers obeyed said instructions. According to this allegation, the names thrown out of the box were those drawn for the spring term of the court. The pleader's purpose doubtless was to allege that after the spring drawing by instructions from the county commissioners, all the names remaining in the box were thrown out, but this is not stated. The most that can be made of the allegation is that the officers threw out of the box the names of persons drawn to serve as grand and petit jurors for the spring term of the court. The further allegation of this plea, in effect, is that the county commissioners met in July, 1891, and again selected the names of 218 out of the number of 600 and more on the list of registered voters of said county qualified to serve as grand jurors, and from the list of names selected, which was improperly certified to by the chairman of said board to the clerk of the court, the officers of the court did draw the grand and petit jurors serving as such for the court, but without authority of law; and, further, at said July meeting the said county commissioners were able to select more than the number of 218 from the registered voters of said county possessed of the requisite qualifications. If the commissioners had the right to make a selection at all in July, the selection of a less number than 300, as we have already seen, was a matter of discretion with them; and it follows from what we have already said that, if the board of county commissioners had not, prior to the July meeting, 1891, performed the duty of selecting a jury list for that year, they could do so at that meeting. If the fourth plea alleged that the board met in February, A. D. 1891, and selected 285 names, which were properly placed in the jury box, and then caused these names to be thrown out of said box after the spring term of the court, and again, at a meeting in July of the same year, selected 218 names to serve as jurors, and that the grand jury in question was drawn from the last selection, a serious question as to the validity of such a selection and drawing would be presented. But this plea does not allege these facts. The first plea alleges a drawing in February, but there is no reference to this plea in the fourth, nor any such connection between them as to aid one by a reference to the allegations of the other. The fourth plea, depending upon its own allegations, does not show that what the board did at the July meeting was not in compliance with the statute. The mere fact of meeting in July and selecting a jury list does not render that action void, nor does the selection then of only 218 names of qualified persons to serve as jurors accomplish the same thing. The allegation that they met in July, 1891, and proceeded again to select a jury list, does not show that the

board had at any previous meeting in that year so acted in the matter of selecting juries as to have exhausted their power in this respect. In fact, to allege that the board met in July, 1891, and proceeded again to select a jury list, does not definitely state that the board had prior to that time, in the same year, made any selection at all. This plea does not negative the conditions necessary to make the alleged July selection illegal.

As stated in the beginning of the discussion of these pleas, the greatest accuracy and precision are required in them, and, in order to be good, they must exclude the idea of a legal selection in July. State v. Brooks, supra. In this respect this plea is defective. The other allegation, that the list was improperly certified by the chairman of the board, is simply a legal conclusion, and does not state any facts upon which the court can determine the sufficiency of the certificate. Tested by the rules applicable to such pleas, we think those before us are defective, and the court did not err in overruling them.

The action of the court in overruling the motion for a new trial is also assigned as error. The grounds of this motion are that the verdict is contrary to law, contrary to the evidence, and contrary to the charge of the court. It is alleged to be contrary to law in this: that the material allegation in the indictment as to the animal alleged to have been stolen is "vague and indefinite, and insufficient to describe its identity, as required by law for the protection of the defendant against a subsequent prosecution for the same offense." No objection was made to the indictment, either by motion to quash or in arrest of judgment. The objection sought to be raised by the ground of the motion for new trial, that the verdict is contrary to law, because the indictment is vague and indefinite, came after trial and conviction. The verdict of the jury is based upon the testimony as applied to the law given by the court, and in the case before us is sufficient, in our judgment, to sustain the finding of the jury. The objection sought to be raised by this ground of the motion should have been presented in the shape of an attack on the indictment. The verdict, it is claimed, is contrary to the evidence, because the ownership of the hog was not sufficiently shown. We think the testimony was sufficient in this respect. The state witness, Johnson, first testified that the hog which he saw the defendant cleaning belonged to witness, but in the same connection he further testified: "I say it is my hog. It is not mine, either; it belongs to Ellen Epps, my wife's mother. I gave it to Ellen Epps when it was a little pig; and it was sure Ellen Epps' hog!" The testimony introduced by the state, if true, is sufficient to sustain the allegation of ownership, and its credibility is exclusively a question for the jury.

It is also contended that the court erred in refusing the first charge asked by the defendant. The instruction refused is as follows: "That the innocence of the defendant must be presumed until the case proved against him is in all its material circumstances beyond a reasonable doubt; that to find him guilty as charged the evidence must be strong and cogent; and, unless it is so strong and cogent as to show defendant's guilt to moral certainty, the jury must acquit." Before this charge was asked the court charged the jury: "If you have any doubt as to the guilt of the defendant, you should give him the benefit of that doubt, and acquit him." It will be seen that the judge did not define in his charge what was a reasonable doubt, or instruct the jury that they should act upon such a doubt. The accused is entitled to the benefit of a reasonable doubt arising from the evidence in his favor, and to have the court instruct the jury that he is so entitled. He is also entitled to the presumption of innocence until this is overcome by testimony beyond a reasonable doubt. The charge asked contains correct propositions as to the presumption of innocence, and what is a reasonable doubt, and should have been given. The charge given cannot be said to cover fully what was asked and refused. In this respect the court was in error. If an exception had been taken to the charge of the court on the subject of larceny, we would express our views on its accuracy. We doubt its correctness, because of its failure to state that there must be a felonious taking.

For the error above mentioned the judgment is reversed, and a new trial awarded.

MOODY v. ALABAMA G. S. R. CO.†

(*Supreme Court of Alabama.* April 26, 1892.)

NEGLIGENCE OF RAILROAD COMPANY—KILLING STOCK—INSTRUCTIONS—ARGUMENTS OF COUNSEL—DEPOSITIONS.

1. Code, § 2810, which provides that all objections to the admissibility of the entire deposition must be made before entering on the trial, applies not only to depositions taken pursuant to section 2802, but also to depositions irregularly taken, and lacking the preliminary affidavit required by section 2802.

2. In an action against a railroad company for the negligent killing of a cow, an argument of counsel that, if the employes of defendant testified otherwise than they did, they would be discharged, will be excluded, where unsupported by evidence.

3. Where the supreme court held that the jury should have been instructed to find for defendant if they believed the evidence, an instruction by the lower court, on a retrial, that, "in his opinion, the supreme court, by its decision, had settled the case," will not be considered as the expression of an opinion on the credibility of the evidence, where, immediately before and afterwards, he charged that the determination of the case depended on whether the jury believed the evidence.

Appeal from circuit court, Tuscaloosa county; S. H. SPROTT, Judge.

Action by F. S. Moody against the Alabama Great Southern Railroad Company for negligently killing a cow. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Frank S. Moody and *J. M. Foster*, for appellant. *A. G. Smith*, for appellee.

MCCLELLAN, J. The statute provides that "all objections to the admissibility of the entire deposition in evidence must

† Opinion withdrawn. New opinion substituted. See 13 So. 233.

be made before entering on the trial, and not afterwards, unless the matter is not disclosed in the deposition, and appears after the commencement of the trial." Code, § 2810. It is insisted for appellant that this statute "means a deposition taken pursuant to section 2802 of the Code," and has no application to or bearing upon a paper filed in the cause as a deposition, and offered on the trial as such, and which is in the form of a deposition, but which appears on its face not to have been regularly taken, in that, for instance, —the present case,—the preliminary affidavit has not been made as required by the section last referred to. This construction, we think, is entirely too narrow. Its adoption would lead to the practical emasculation of the statute quoted first above, since objections to entire depositions are in many, if not most, instances, based upon some infirmity of the deposition resulting from nonconformity to section 2802. We apprehend the true interpretation of the act to be such as to make it applicable to every paper filed in a cause which is in the form of a deposition taken therein, wholly irrespective of the defects it discloses in the manner of taking it. In one sense, no paper in this form, which the court adjudges to be inadmissible, is "a deposition," and the judgment of exclusion is essentially a judgment that it is not a "deposition." But manifestly this is not the sense of the word, as used in section 2810, else the operation of that section would be confined to depositions regularly taken in all respects, but containing no evidence relevant to the issue,—a case which could rarely occur, and in which, when it does occur, the statute, if it applies at all, might be easily avoided by making separate motions to exclude different parts of the deponent's testimony. We are clear that a deposition, the infirmity of which lies in the absence of the affidavit required by section 2802, should not be excluded on a motion made after the commencement of the trial, and hence that the court's action on the objection made by plaintiff, after the trial, had been entered to the deposition of the witness Ham as an entirety, was free from error.

This cause has been twice tried. The evidence on the first trial was substantially that adduced on the last, and which we find in the present record On the first trial the court refused to give the general affirmative charge requested by the defendant, and there was a verdict and judgment for plaintiff. On appeal to this court, it was held that the circuit court erred in its refusal to charge the jury to find in favor of the defendant, if they believed the evidence. Railroad Co. v. Moody, 90 Ala. 46, 8 South. Rep. 57. We see no reason now to depart from the ruling then announced, and we therefore adhere to it, and, of consequence, hold that the court on the last trial properly instructed the jury affirmatively to find for the defendant, if they believed the evidence.

It does not appear of this record that the court prevented any line of argument on the part of plaintiff's counsel, as is here insisted. What was done is thus stated in the bill of exceptions: "Plaintiff's counsel, in addressing the jury in his argument, stated: 'The witnesses whose depositions had been read, and who were employes of the defendant, were bound to testify as they did; that, if they had testified differently, they would have been promptly discharged.' Counsel for defendant objected to this argument, and asked the court to rule it out, which motion the court granted." This action of the court was not with reference to counsel's further argument, but solely upon and with reference to a statement, wholly unsupported by evidence, which had already been made in argument. That this statement was improper, and properly ruled out by the court, we do not doubt. Railroad Co. v. Bayliss, 75 Ala. 471; Railroad Co. v. Orr, 91 Ala. 548, 8 South. Rep. 360. It is not conceivable that this action of the court could have denied to plaintiff the benefit of any legitimate argument his counsel might thereafter have seen proper to advance.

Nor do we discover any ground for a reversal in the remarks of the presiding judge to which an exception was reserved. It is not questioned but that his statements were, in point of fact, entirely in harmony with the history of the case. They involved no tendency to mislead the jury, and they are such statements as trial judges would naturally make, and often do make, under the circumstances. What the presiding judge said to the effect that, "in his opinion, the supreme court, by its decision, had settled the case," obviously had reference, even to the mind of a layman, to the law of the case, as, immediately both before and after this expression, he gave the jury to understand that a settlement of the case as to the facts depended upon whether they should or should not believe the evidence; thus excluding the idea that the court had any purpose to or did in fact express any opinion as to the credibility of the evidence, which was the sole question before the jury. We find no error in the record, and the judgment of the circuit court is affirmed.

(94 Ala. 237)

GOREE v. CLEMENTS.

(*Supreme Court of Alabama.* Dec. 2, 1891.)[1]

CANCELLATION OF DEED—LACHES.

1. In a suit by a mortgagor to set aside a conveyance of his equity of redemption to the mortgagee on the ground of fraud, complainant testified that when the mortgage became due defendant promised that if he would make a deed to the property he would allow him a reasonable time to repay the debt, and would permit him to collect and hold the rents for the current year. The mortgage debt was $560, and complainant testified that the property was worth $1,200. The bill alleged a long friendship between the parties, and an agreement on the part of defendant to extend the mortgage debt when due, which agreement was denied by defendant. It was not alleged that defendant made any false representations as to the legal effect of the deed. *Held*, that the evidence failed to show fraud or undue advantage.

2. Conceding that there was fraud, complainant was barred by laches where he failed to file his bill for more than seven years after the execution of the conveyance, and more than six years after he was informed that defendant re-

[1]Publication delayed pending rehearing, which was denied.

pudiated the agreement, and refused to permit him to redeem.

3. Where a conveyance of an equity of redemption by a mortgagor to the mortgagee is intended as a conditional sale, the agreement to reconvey must be in writing.

4. In a suit to set aside an absolute conveyance of an equity of redemption by a mortgagor to the mortgagee, which is intended as a mortgage, there is a fatal variance where the bill alleges that defendant promised a "reasonable and convenient time in which to pay the debt," and complainant testifies that he was to pay it when able.

Appeal from chancery court, Tuscaloosa county; THOMAS COBBS, Judge.

Bill by Napoleon D. Goree against N. N. Clements to set aside a conveyance of an equity of redemption, and to be permitted to redeem from a mortgage lien. Decree for defendant. Complainant appeals. Affirmed. Rehearing denied.

The bill in this case was filed by the appellant against the appellee. The purposes and prayer of the bill are sufficiently stated in the opinion. The averments of the answer, which were filed by the respondent, are also shown by the opinion. On the submission of the cause upon the pleadings and proof the chancellor decreed that the complainant was not entitled to the relief prayed, and ordered that the bill be dismissed. Complainant brings this appeal, and assigns as error this final decree of the chancellor.

Hargrove & Vande Graaff, for appellant. *Wm. Cochran Fitts* and *Wood & Wood*, for appellee.

CLOPTON, J. On May 5, 1880, appellant executed to John Bowen a mortgage on the land in controversy to secure the payment of a note for $500, payable 8 months after date, with interest. The note not having been paid at maturity, Bowen advertised the land for sale under the mortgage. Appellant applied to appellee to assist him, and thereupon, by arrangement between the parties, appellant drew a bill of exchange, March 14, 1881, for $560, payable at 90 days after date, which was indorsed by appellee, and discounted in bank. The money raised by the discount of the bill was applied to the payment of the note held by Bowen, and on the same day appellant executed to appellee a mortgage on the land to secure him as such indorser. It is true, the mortgage recites that it was executed for the purpose of securing an indebtedness from appellant to appellee, "as evidenced by his promissory note of even date herewith, in the sum of five hundred dollars, payable with interest from date;" but it is undisputed that no such note was given, and that the real object of the mortgage was to secure the liability of appellee by virtue of his indorsement of the bill of exchange. Appellant having failed to provide for the payment of the bill at maturity, appellee paid it, and thereafter advertised the land for sale under the mortgage on the 3d day of September, 1881. After the land was advertised, appellant executed, August 19, 1881, to appellee, a conveyance thereof on the recited consideration of $560. Appellant, who files the bill, seeks to be let in to redeem, notwithstanding the deed. Counsel for the respective parties differ as to the nature and purpose of the bill. Counsel for defendant insist that its object is to have the conveyance, absolute in its terms, declared a conditional sale, and to enforce the right to repurchase; and counsel for complainant contend that the case made by the bill is an attack upon the fairness and validity of a sale and conveyance of the equity of redemption by a mortgagor to the mortgagee. After setting forth the facts above stated, the bill alleges that when complainant met defendant, August 19, 1881, the latter stated, in explanation of his course, that, it having become inconvenient for him to extend the debt, which the bill alleges he originally agreed to do, he had advertised the property in order to bring the complainant to town, not knowing how to get word to him otherwise, and that a new arrangement must be made. The bill further avers: "Your orator being still wholly without any ready money, or other available property than said land, and knowing of no one from whom he could obtain assistance, Clements [the defendant] finally proposed to him that, if orator would make him a deed to the property, he would allow orator a reasonable and convenient time to repay the debt to himself, and would allow orator to collect and hold the rents of the current year." It then avers that complainant, being unversed in such business, and ignorant of the law, and trusting to the representations of defendant, who had long been his friend and attorney at law, that the arrangement would be to his advantage, as saving trouble and expense, accepted the proposal, and executed the deed to defendant without any new consideration. The bill further alleges that defendant agreed, at the time of the arrangement to raise the money to pay Bowen by discounting the bill of exchange, to attend to the extension of the debt when it matured; also that the land was worth not less than $1,200. The special prayer is that the deed be set aside and canceled as having been obtained without consideration, by unfair dealing, and undue advantage taken of the necessitous condition of the complainant, and that the relation of mortgagor and mortgagee be decreed to still subsist. As the allegations and special prayer apparently sustain the contention of appellant as to the structure and purpose of the bill, and as the error insisted on by counsel in argument consists in the denial of the special relief prayed, we will first consider the right of complainant to maintain the bill for the purpose of canceling the conveyance, and thereby restore the relation of mortgagor and mortgagee, with the right to redeem.

The well-recognized rule that a mortgagor may, by subsequent contract, make a valid sale or release of the equity of redemption to the mortgagee; and that such sale or release will be maintained in equity, if shown to be free from fraud, oppression, or undue advantage, and supported by a sufficient consideration, is not controverted. The contention is that de-

fendant's acquisition of the equity of redemption cannot stand the test of the principles governing transactions between parties who deal on unequal terms,—between power on the one side and weakness on the other,—if the watchfulness with which courts of equity investigate such cases is observed, and the bill, answer, and evidence are closely and searchingly scrutinized. The principal facts averred in the bill as constituting unfair dealing are the existence of the relation of mortgagor and mortgagee, an agreement on the part of defendant to attend to the extension of the debt when the bill of exchange matured, the necessitous condition of the mortgagor, and the inadequacy of the consideration. As to an agreement to attend to the extension of the debt in bank, or to allow complainant any time in which to repurchase or redeem by payment of the debt, and as to the circumstances attending the execution of the conveyance, the testimony of complainant and defendant is in irreconcilable conflict. The necessitous condition of complainant is shown. As is usually the case, the witnesses widely differ as to the value of the property. If the value be determined by the testimony of the witnesses on the part of complainant, the consideration was grossly inadequate; if by the testimony of defendant's witnesses, it was not unreasonable. The expression, sometimes used, that the release must be for an adequate consideration, is thus defined by FIELD, J., in Peugh v. Davis, 96 U. S. 332: "That is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding." It may be conceded that, though there is the absence of actual fraud and undue advantage, gross inadequacy of consideration, "marked undervaluation of the property," will of itself avoid an absolute and unconditional release. Also, if the circumstances are merely suspicious, casting a shadow over the fairness of the acquisition of the equity of redemption, but not rising to the dignity of proof, a consideration, so unreasonable that a party, not unduly influenced, free to act according to his own volition and judgment, would not surrender the property for the price paid, may suffice to vitiate the release. The averments of the bill make the case of a conveyance of the land to defendant upon condition that complainant should be allowed a reasonable and convenient time to pay the debt,—a deed absolute in form, but intended to operate as a security, or conditional sale. When the sale or release is conditional, the rules as to the inadequacy of consideration sufficient to vitiate it do not apply with the same strictness, or to the same extent, as when absolute. In such case the comparative quantum of the consideration paid and the value of the property become significant and important, because connected with the previously existing relation of mortgagor and mortgagee; but, to be effectual of itself, the inadequacy must be so great as to induce the belief that the power of the mortgagee, growing out of the relation of the parties, has been oppressively exercised, or undue influence exerted, or unconscionable advantage taken. Peagler v. Stabler, 91 Ala. 308, 9 South. Rep. 157; In Stoutz v. Rouse, 84 Ala. 309, 4 South. Rep. 170, it was held that a conveyance of the property to the mortgagee in payment of the mortgage debt, with the right to redeem within two years from the date of the deed, in like manner and upon the same terms and conditions as if the property had been sold under a decree of the chancery court, was a sale with the privilege of repurchase within two years, having the effect to reduce the equity of redemption to a statutory right of redemption; and that mere inadequacy of consideration will not justify the setting aside of such a transaction. In the conclusion of the opinion it is said: "The transaction clearly extinguished the mortgage debt, which amounted to nearly six thousand dollars. Admitting the mortgaged lands to be worth nominally as much as ten thousand dollars, as averred in the bill, the complainant shows, in our opinion, no grounds for relief." Complainant knew, at the time of the transaction, that, if the land was sold under the mortgage, he had the statutory right to redeem within two years. The transaction occurred about two weeks before the day of sale. Being surprised at seeing his land advertised for sale under the mortgage, as averred in the bill, he sought defendant, who, after stating his reasons for advertising the property, said that a new arrangement must be made. The result of the interview was, in view of the fact that complainant had no money or other available property, defendant finally proposed, if complainant would make a deed to the property, he would allow him a reasonable and convenient time to repay the debt, and allow him to collect and retain the rents of the current year, which proposition was accepted, and the deed executed, no consideration other than the mortgage debt being paid. This is the substance of the transaction as averred in the bill. There are averments of long and intimate friendship between the parties, and of an agreement on the part of defendant to attend to the extension of the debt when the bill of exchange matures, which he denies both in his answer and evidence. Admitting that there was such agreement, it is neither averred nor shown that complainant made any efforts to provide for the payment of the debt, or went to see about making arrangements for its extension. In the usual course of business, a new note or bill would be required to extend the debt in bank; and complainant could have scarcely expected defendant to give such note or bill without himself becoming primarily liable. Neither is it averred that defendant made any false representations as to the legal effect and operation of the deed. The only inducement held out by defendant, so far as the bill alleges, was that the transaction

would save the trouble and expense of a foreclosure of the mortgage under the power of sale.

The conclusion of fraud, oppression, or unjust advantage is not deducible from any or all of these facts standing alone; neither is any shown by the evidence. As appears from the bill and the evidence, complainant made the transaction with full knowledge of all the facts and his rights. There was no concealment, or suppression, or misrepresentation. If admitted that the land was worth $1,200, as averred in the bill, the inadequacy of the consideration is not, in view of the nature and character of the transaction as shown by the bill, so gross as to produce the conviction of unfair dealing, whatever might have been the conclusion had the bill averred that this conveyance was an absolute and unconditional sale of the equity of redemption. It is also significant and suggestive that in none of the subsequent interviews did complainant offer to rescind the contract on the ground that the equity of redemption was acquired fraudulently, oppressively, or by undue advantage, or make any such charge. On the contrary, in his offers to settle the debt and redeem the property he acted on the assumption that the transaction was valid and binding on both parties. The *gravamen* of the complaint of fraud consists in the subsequent repudiation of the agreement, and the refusal to allow complainant to redeem. By the transaction defendant substantially extended and carried the mortgage debt. It was not increased in amount, so as to render it more burdensome. If the transaction is a conditional sale of the equity of redemption, it comes directly within the principle declared in Stouts v. Rouse, supra; and, if a mortgage, the existing relation between the parties remained the same; and the equity of redemption was unimpaired and unembarrassed. The legal effect of the transaction is the substitution of a conveyance absolute in form, with a condition of the right to repurchase or redeem within a reasonable and convenient time, for a mortgage regular in form, but misdescribing the debt. It is no reply that defendant denies in his answer and evidence that there was any agreement to allow the right to repurchase or redeem within any time whatever. Complainant, if he recovers at all, must recover on the case made by his bill. So long as unamended, he is bound by its allegations. He cannot recover on a case inconsistent therewith, though admitted in the answer, or established by the proof.

Independent of this conclusion, we think the long acquiescence of complainant, and the delay in filing the bill, are fatal to the right of relief. The general rule is that a party seeking to rescind a contract on the ground of fraud must act with reasonable promptness and diligence in the assertion of his remedial rights. Long acquiescence, unnecessary and unexplained delay for an unreasonable time after the discovery of the fraud, will bar the equitable relief. Especially is this rule applicable when the relative value of money and the property has changed in favor of the complaining party. What is reasonable promptness depends upon the character and facts of the particular case. In Cox v. Montgomery, 36 Ill. 396, it was held that delay in filing a bill to avoid a contract for the sale of land because of fraudulent representations for 18 months after the discovery of the fraud would be an unreasonable time. The conclusion is rested on the impolicy, in a country where the value of land changes as rapidly as in Illinois, of permitting the purchaser to retain possession for that length of time after the discovery of the fraud before filing his bill to rescind, and may be a too stringent application of the general rule where the values do not change so rapidly. In Coal Co. v. Neill, 87 Ala. 158, 6 South. Rep. 1, it was held that the vendor's right to a rescission of a contract for the sale of land is bound by laches after the lapse of more than two and a half years, when it appears that the vendor retained the notes and mortgage, and the market value of the land recently increased, notwithstanding there was an offer to rescind before the increase in value.

Defendant had the right to sell the land under the power of sale contained in the mortgage. Had he done so, and purchased, the sale would have been voidable at the option of complainant, seasonably expressed. As inferable from the allegations of the bill, complainant, for the purpose of preventing a sale under the mortgage, executed to defendant a conveyance on a parol agreement that he could avoid it by paying the debt in a reasonable time. In respect to what constitutes a reasonable time, when the mortgagee becomes the purchaser at his own sale, there being no varying, peculiar circumstances, it was said in Ezzell v. Watson, 83 Ala. 120, 3 South. Rep. 309: "But, in view of the importance of fixing some definite time, in ordinary cases, in order to impart more certainty to the law, and afford greater repose to title, our later decisions have inclined to settle two years as reasonable, by way of analogy to the time fixed by statute for the redemption of realty sold under mortgages, and purchased by other persons than the mortgagee." This may now be regarded as the established rule in this state. Alexander v. Hill, 88 Ala. 487, 7 South. Rep. 238. The transaction between the parties is assimilable, in its nature and effect, to a purchase by a mortgagee at his own sale, the mortgagor reserving by contract the same option to defeat the conveyance which the law would have given him to disaffirm the sale had it been made under the mortgage and the mortgagee become the purchaser. Where the mortgagor seeks to set aside such conveyance on the ground of fraud, and remove it as an impediment to his right to redeem, it seems that the sale rule of limitation should by analogy be applicable, and that two years after the discovery of the fraud would constitute a reasonable time. But we need not apply the rule so strictly in the present case. The bill was filed October 8, 1888, more than seven years after the execution of the conveyance, and more than six

years after complainant was informed that defendant repudiated the agreement and refused to allow him to redeem. In the mean time the property had increased considerably in value, and defendant had made some improvements. Under these circumstances, the long acquiescence of complainant, the unexplained delay in the assertion of his rights, bars the special relief prayed,—the restoration of the relation of mortgagor and mortgagee, with the right to redeem from the mortgage of March 14, 1881, by way of cancellation of the deed. The only explanation for the delay stated in the bill is that complainant applied to attorneys to prosecute his rights, and, because of his poverty, was unable to employ one. There is no evidence that he made any effort to employ an attorney, and we cannot presume that no member of a profession distinguished for high sense of right and justice, and noted for lending aid to the helpless, could be found, who would observe the duty enjoined by statute, "never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed." If the bill is regarded as a bill to have the conveyance of August 19, 1881, though absolute on its face, declared a mortgage, and to redeem therefrom, a different rule of limitation would govern. In such case the right to redeem is not barred until the expiration of 10 years. Parmer v. Parmer, 88 Ala. 545, 7 South. Rep. 657.

So far we have considered the right to the special relief on appellant's theory,—that the purpose of the bill is to set aside a sale or release of the equity of redemption as having been fraudulently, oppressively, or inequitably acquired. It remains to consider complainant's right to relief on defendant's theory of the character and purpose of the bill. The majority of the court are of the opinion that the evidence of complainant, who is the only witness testifying to the terms of the agreement, if accepted as true, shows a conditional sale. Peeples v. Stolla, 57 Ala. 53; Adams v. Pilcher, (Ala.) 8 South. Rep. 757. If the transaction be so regarded, complainant must fail on the ground that the agreement to allow the right to repurchase, not being in writing, is void under the statute of frauds. Peugler v. Stabler, supra. Applying the well-recognized principle that, when it is doubtful whether the parties intended a conditional sale or a mortgage, courts of equity are inclined to consider the transaction as a mortgage, the averments of the bill and the proof on the part of complainant, if believed, make, in my opinion, a case where the intention was that the deed should stand as a security for the debt; and, if such be the construction, complainant must fail because of a material variance between the descriptive terms of the defeasance as alleged and as proved,—the averments of the bill being that defendant would allow complainant a reasonable and convenient time to pay the debt, and his testimony being, until he was able to pay it; and if, as the majority of the court hold, the transaction shown by the evidence is a conditional sale, the variance would be equally fatal. In either view of the case, the result is the same.

Affirmed.

Rehearing denied.

(95 Ala. 342)

CHANCELLOR v. DONNELL *et al.*

(*Supreme Court of Alabama.* April 13, 1892.)

CANCELLATION OF DEED—BURDEN OF PROOF.

The burden of proof is on a complainant who alleges that the grantor of deeds was mentally incompetent at the date of their execution.

Appeal from chancery court, Dale county; JOHN M. FOSTER, Chancellor.

Bill by Maggie T. Chancellor, daughter of Thompson Donnell, deceased, against A. J. Donnell and others, for the removal of the administration of her father's estate from the probate court to the chancery court, and for the cancellation of certain conveyances made by him. The chancery court took jurisdiction of the administration of the estate, but refused to disturb the conveyances. Complainant appeals. Affirmed.

M. E. Milligan, for appellant. *W. D. Roberts* and *H. L. Martin*, for appellees.

WALKER, J. The appellant is a daughter of Thompson Donnell, deceased. She filed her bill in this case for the removal of the administration of her father's estate from the probate court into the chancery court, and for the cancellation of certain conveyances of land executed by her father to her three brothers and her sister, who are parties defendant to the bill. The conveyances are attacked on the grounds that when they were made the grantor therein was not mentally competent, and that he was unduly influenced to execute them. The chancery court, by the decree which is appealed from, took jurisdiction of the administration of the estate of Thompson Donnell, deceased, but refused to disturb the conveyances made by him in his lifetime to his children. The decree was adverse to the appellant only so far as the validity of the conveyances was sustained. The burden was upon her to show that the grantor in the conveyances was mentally incompetent at the date of their execution. The presumption of mental soundness must be overcome by proof. The evidence is in some conflict upon the question of Thompson Donnell's mental condition in December, 1886, when the deeds were made. He was then an old man, and had had an attack of sickness in the summer of 1885. From that time, according to the complainant's contention, his mind was impaired, and he was not, during the year 1886, mentally competent to attend to ordinary matters of business. The defendants, on the other hand, offered much evidence tending to show that while Mr. Donnell's health was not as good as it had been before his sickness in 1885, yet he so far recovered that he was able to get about and to manage his affairs as intelligently as he did formerly until the spring of 1887, when he was stricken with paralysis. It is conceded that after the last-mentioned attack his mental faculties were seriously impaired. No good

purpose would be served by a discussion of the voluminous evidence in the case. The impression made by a careful review of all the proof is that, when the deeds were executed, Thompson Donnell was fully competent, mentally, to manage his own affairs, and that he executed the deeds voluntarily, and with an intelligent comprehension of their import. We are fully satisfied that it was not shown by a preponderance of the evidence that at the date of the deeds the grantor was mentally incompetent to convey his property. The charge that the deeds were executed under duress or undue influence is unsupported, and is clearly negatived by the evidence introduced by the defendant. We concur in the conclusion of the chancellor that the attack upon the deeds was not sustained. The complainant has nothing to complain of in any other feature of the decree. Affirmed.

(95 Ala. 293)

JOHNSON *et al.* v. DAVIS.

(*Supreme Court of Alabama.* April 18, 1892.)

MORTGAGE—VALIDITY OF EXECUTION.

A note and mortgage are properly signed where the mortgagee writes the obligor's name to each instrument, the latter affixes his mark, and a disinterested witness attests the subscriptions. Carlisle v. Campbell, 76 Ala. 247, distinguished.

Appeal from circuit court, Clarke county; WILLIAM E. CLARKE, Judge.

Detinue by W. J. Johnson & Co. against Bevily Davis. The court excluded certain evidence offered by plaintiffs, and the latter thereupon took a nonsuit and appeal. Ruling reversed, and nonsuit set aside.

On the trial the plaintiffs offered to introduce in evidence a note and mortgage given by the defendant to the plaintiffs to secure the said note executed to him. One of the plaintiffs, as a witness, testified that he wrote both the mortgage and the note offered to be introduced in evidence, and signed the defendant's name thereto, he being unable to write; that the defendant made his cross mark between the two names, both to the note and mortgage, which was witnessed by one R. W. Davis, who also subscribed to both the instruments as a witness; that the said witness, Davis, has since died, but that the witness is familiar with the handwriting, and that the signature of the subscribing witness to the said instruments was that of Davis; and that the defendant did make his mark on both of the said instruments in the presence of said Davis. Upon this testimony the defendant objected to the introduction in evidence of both the note and mortgage, on the ground that one of the plaintiffs had written the name of said defendant thereto. The court sustained this objection.

John Y. Kilpatrick, for appellants. *George W. Taylor*, for appellee.

MCCLELLAN, J. The case of Carlisle v. Campbell, 76 Ala. 247, is relied on to sustain the ruling of the circuit court to the effect that the paper purporting to be a mortgage, which evidenced plaintiffs' title to the property in suit, had not been efficiently executed by the defendant. But to our minds there is such a material difference between the facts of that case and this as that the principle there declared cannot be applied here. In both cases, it is true, the alleged maker of the paper was unable to write his name. In that case, however, the payee not only wrote the promisor's name under the obligation, but also made his mark for him, while in this, the agency of the payee, or more properly grantee, extended no further than to subscribe the letters constituting the grantor's name, and the latter himself affixed his mark thereto; thus doing not only all the law prescribes in such cases as necessary for him to do, but all that he could possibly do, under the circumstances, towards efficiently signing the instrument. And the subscription there made was duly attested, and the attestation fully proved on the trial. It is immaterial by whom the name is written. It cannot be written by the grantor, nor, standing alone, could it be the signature of the grantor. His signature is his mark, and the requirements of law are fully satisfied if, finding his name subscribed to an instrument, he set his mark near it. The sole purpose of the name being there at all is by way of identifying and individualizing the mark; and this purpose can be as fully conserved when the name is written—as is by no means unusual in practice—by the other party to the contract as by a stranger; the act of either in so doing being as purely clerical as writing the body of the paper. The authorities cited in Carlisle v. Campbell all refer to instances where the obligee had acted as the agent of the obligor in the execution of the instrument; the latter being able to write. The circuit court erred, we think, in holding the mortgage offered in evidence not to have been signed by the defendant. Its ruling in that regard is reversed, the nonsuit suffered in consequence of it is set aside, and the cause is remanded.

PAYNE v. CRAWFORD.†

(*Supreme Court of Alabama.* April 18, 1892.)

ARBITRATION AND AWARD—VALIDITY—SUBMISSION PURSUANT TO CHURCH RULES—OATH OF ARBITRATORS—AMENDMENT OF COMPLAINT—SIGNATURE OF COUNSEL.

1. An amended complaint in ejectment is not demurrable because the amending clause, intended to be substituted for another, and thereby to change the description of one of the parcels of land, was not signed by counsel, when, the substitution having been effected, the complaint, as amended, would present his signature.

2. An arbitration and award are none the less binding because made pursuant to the regulations of a church to which the parties belong.

3. In a common-law submission to arbitration the arbitrators need not be sworn unless the parties demand it, and it will be presumed to have been dispensed with if not required in the submission.

4. A submission to arbitration, and award thereunder, sufficiently show the subject of the contention, and what was decided, when the one provided that the parties agreed to submit the "matters in dispute" between them, "in reference to the boundary line between" them, and the other, after describing the boundary line, found that one of the parties was entitled to the land lying south thereof, between courses run between designated monuments.

† New opinion substituted. See 11 So. 725.

5. An award of arbitrators as to a boundary line between certain land cannot be avoided on the ground that a survey was not made in compliance with a verbal condition requiring it; there being no such provision in the written submission.

6. Compliance with such condition was waived by allowing the trial of an action of ejectment, in which the arbitration and award were pleaded as a defense, to proceed without making the same known.

Appeal from circuit court, Lee county; J. M. CARMICHAEL, Judge.

Statutory action of ejectment by L. W. Payne against Mary A. Crawford. The parties had made the following submission to arbitration: "We, the undersigned, hereby agree and bind ourselves to submit the matter in dispute between us, in reference to the boundary line between our land, to arbitrators, each to select one arbitrator and these to select a third. We furthermore agree and bind ourselves to abide by the decision of said arbitrators." That award was in writing, signed by the arbitrators, and was in the following language; "We, the undersigned arbitrators in the case of sister Mary A. Crawford and brother L. W. Payne, respecting the disputed line between them, viz., the east and west and north and south line, after examining numerous and reputable witnesses, and retracing the east and west line between the said Crawford and Payne, we are of the opinion that Payne is entitled to the land lying south of the aforesaid line first run by us, beginning at a pine stob about 60 or 70 feet south of the mouth of the lane from Auburn to the colored graveyard, and running six degrees north of east to a sweet gum tree at the northeast corner of said Payne's woodland: thence south along the wire fence of said Payne, forming the eastern boundary of said Payne, to the Henry Sills place." At the request of the plaintiff the following written charges were given to the jury: "(1) We ask the court to charge the jury that the fact that the submission for arbitration was in writing is no evidence that the arbitration was not a church arbitration. (2) If the jury find that this arbitration was a church arbitration, then the jury must not consider it at all. (3) If the jury find from the evidence that Mrs. Crawford was in possession of the disputed land, claiming to own it up to the line claimed, before Payne took possession of it, and that she held such possession up to the time that Mr. Payne took possession, then she is entitled to recover, whether her paper title covered it or not." The defendant duly excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give the two charges requested by him, which were as follows: "(1) An arbitration may be both a church arbitration and a common-law arbitration. (2) If the parties went into an arbitration as citizens, as well as church members, intending to settle their differences outside of as well as in the church, they could bind themselves thereby as well as if the church had had nothing to do with it." From a judgment for plaintiff, defendant appeals. Reversed.

George P. Harrison, for appellant. *J. M. Chilton*, for appellee.

STONE, C. J. There was a demurrer to the complaint, as second amended, because the amendment was not signed by counsel. That amendment consisted simply in a change of the description of one of the pieces of land sued for. The amending clause was intended to be substituted for another, and thereby displace and eliminate the original clause. Carried into effect, the complaint, as amended, would present the signature of counsel, and would be complete. In amendments, such as here made, it would be better to rewrite the count, and cause it to show at a glance how it would read when amended. This would avert confusion and misunderstanding. Our constitutional rule in regard to amending statutes furnishes a safe and simple guide to be followed in such cases. We do not think, however, that a failure to do so in a case like the present is a ground of demurrer.

This is a statutory real action brought by Mary A. Crawford against L. W. Payne, for the recovery of a strip of land lying between their several possessions. Their lands were and are coterminous, and their contention raised the issue whether the strip belonged to the one or the other. The situs of the dividing line was the only subject of litigation, so far as this particular tract was concerned, for neither contended that their asserted titles overlapped each other. Neither asserted claim save as they severally contended a proper survey and measurement would show the rightfulness of their several claims. Our defense pleaded and relied on by defendant, Payne, was that, before the action was brought, they had, by written agreement, submitted the matter of the disputed boundary to arbitrators, one named by each, with authority to them to name a third; that the two selected arbitrators had agreed on and chosen an umpire; that the arbitrators had acted, having the parties and their witnesses before them; and that they had made a written award, finding that the disputed strip of land was the property of Payne, the defendant. Copies of the agreement of submission and of the award are set forth in the statement of facts. Very many objections were raised to the sufficiency alike of the submission and of the award. Some of these we will proceed to notice. We will premise, however, that this was not a statutory submission. Code 1886, § 3221 et seq. The questions presented must be determined according to the rules of the common law. Brewer v. Bain, 60 Ala. 153.

It is objected to the sufficiency and binding effect of the submission and award that the subject of the contention is not described in such manner as to show what was intended to be submitted, and what was decided. The language they employed was: "We hereby agree and bind ourselves to submit the matter in dispute between us, in reference to the boundary line between our lands, to arbitration." The agreement then contin-

ued: "We furthermore agree and bind ourselves to abide by the decision of said arbitrators." This was signed by both parties. The award is very specific, and describes the proper dividing line between them in language that would be sufficient in a deed of conveyance. They give to Payne the land lying south of a dividing line, "beginning at a pine stob about sixty or seventy feet south of the mouth of the lane from Auburn to the colored graveyard, and running six degrees north of east to a sweet gum tree at the northeast corner of said Payne's woodland; thence south along the wire fence of said Payne's woodland, the eastern boundary of said Payne's, to the Henry Sills place." The law favors and encourages the settlement of disputes by arbitration, and neither exacts nor expects technical precision either in the submission or the award. It is enough if certainty to a common intent be observed. We think the descriptions in this case are sufficient to show what was intended, and, with reasonable care and skill, to prevent mistakes. See the many authorities collected in 1 Amer. & Eng. Enc. Law, p. 656, and note 1; Id. p. 699, and note 2.

It is objected in the second place that the arbitrators were not sworn. That is not indispensable in a common-law arbitration; and if not required by the submission, or demanded by the parties, it will be presumed it was dispensed with. Id. p. 674, and notes.

It was attempted to be shown in avoidance of the award that plaintiff, Crawford, verbally required that the line should be surveyed as a condition of her agreement to be bound by the action of the arbitrators. What did actually take place was a demand to that effect made known to her pastor, but neither embodied in the written submission nor shown to have been communicated to the arbitrators. When the controversy came up for consideration and decision, it is not shown that she claimed this step should be taken. We think there are two complete answers to this contention: *First*, it was an attempt to vary and add to the terms of the submission by proof of an oral, qualifying stipulation not embraced in the writing; and, *second*, by allowing the trial to proceed without making known the condition on which her consent to arbitrate had been obtained, she must be held to have waived a compliance with it.

It is further objected that the arbitration in this case was had in obedience to a mere church regulation, and that it is not binding or conclusive upon the parties as to the title to the property in dispute. The precise form in which this question is presented is as follows: Plaintiff and defendant were members of the same church,—the Methodist Episcopal Church South. By the discipline and regulations of that church, it is made the duty of the pastor having charge of the church, whenever any dispute arises between two or more members concerning the payment of debts or otherwise, which cannot be settled by the parties concerned, to "recommend to the contending parties a reference, consisting of one arbiter chosen by the plaintiff, another chosen by the defendant, which two arbiters so chosen shall nominate the third. * * * If any member of the church shall refuse, in cases of debt or other disputes, to refer the matter to arbitration, * * * or shall enter into a lawsuit with another member before these measures are taken, he shall be expelled, unless the case be of such a nature as to require and justify a process at law." The award of the arbitrators was rendered in writing, signed by each of them, and sufficiently specifies the dividing or boundary line between the two litigants. It states that "after examining numerous and reputable witnesses, and retracing the east and west line between the said Crawford and Payne," they proceeded to describe and declare what they ascertained was the true dividing line. Is there anything in the objection that this arbitration was had under a church regulation, if it is sufficient in other respects? What is the *rationale* of such regulation? Manifestly the cultivation and preservation of harmony and brotherly love between the members caused its adoption. The observance of it by the members cannot be enforced either by the church or by the courts of the country. The only penalty for its nonobservance is a church trial, and its consequences; and the infliction of that penalty rests exclusively with the church. Compliance with it is a matter of pure volition, which law neither enforces nor restrains. What are the purpose and policy of arbitration? All will agree that speedy and inexpensive adjustment of disputes concerning property rights, without the exasperating tendencies of a suit in court, is its high commendation. Is it entitled to that commendation if it accomplishes nothing? Why arbitrate, if no right is settled by it? Why should the church require arbitration if the rights in dispute remain in the same unsettled condition they were in before it was entered upon? Is it a mere empty form? We hold that an arbitration held and award rendered pursuant to church regulation is equally binding (no more and no less) as if held without reference to such regulation. If valid and binding without the regulation, it is equally valid and binding notwithstanding the rules of the church brought it about. To hold otherwise would be to convict the church of establishing a rule that can lead to no practical result. We hold that the award rendered in this case is an estoppel upon plaintiff's right to maintain this action. Cox v. Jagger, 2 Cow. 638; French v. New, 20 Barb. 481.

Many of the rulings of the circuit court are not reconcilable with what we have declared. Reversed and remanded.

(95 Ala. 4)

YOUNG v. STATE.

(*Supreme Court of Alabama.* April 14, 1892.)

HOMICIDE — DYING DECLARATIONS — INSTRUCTIONS — REASONABLE DOUBT.

1. On a trial for murder, the dying declarations of decedent to his attending physician were not admissible, when the only evidence that they were made under a sense of impending death was that the physician had told him that he was

going to die, and where he had expressed an intention to "get even" with defendant "when he got up," though at what stage of his illness he had done so did not appear.

2. There was no error in an instruction that, "in case of homicide, the law presumes malice from the use of a deadly weapon, and casts on the defendant the *onus* of repelling the presumption, unless the evidence which proves the killing shows also that it was perpetrated without malice, and whenever malice is shown, and is unrebutted by the circumstances of the killing or by other facts in evidence, there can be no conviction for any less degree of homicide than murder."

3. The court properly refused an instruction that if, from all the evidence, "it is possible, * * * it may be, or perhaps, the defendant is not guilty," and if the jury "are not morally certain that he is guilty, this amounts to a reasonable doubt, and entitles the defendant to an acquittal."

Appeal from city court of Mobile; O. J. SEMMES, Judge.

Robert Young was indicted for murder. The facts necessary to a full understanding of the decision of the court are sufficiently stated in the opinion. The court, at the request of the state, gave, among others, the following charges: (1) "In case of homicide, the law presumes malice from the use of a deadly weapon, and casts on the defendant the *onus* of repelling the presumption, unless the evidence which proves the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is unrebutted by the circumstances of the killing, or by other facts in evidence, there can be no conviction for any less degree of homicide than murder." The defendant excepted to the giving of this charge, as well as the other charges given at the request of the state; and also separately excepted to the refusal of the court to give the several charges requested by him, and, among the number, the following: (7) "The court charges the jury that if from all the evidence the jury believe that it is possible, or that it may be, or perhaps, the defendant is not guilty, and if they are not morally certain that he is guilty, this amounts to a reasonable doubt, and entitles the defendant to an acquittal." There was a judgment of conviction, and defendant appeals. Reversed.

Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was tried and convicted of murder in the second degree, and was sentenced by the court to confinement in the penitentiary for 10 years. The first exception relates to the admission of statements by the deceased as dying declarations. The testimony tends to show that the attending physician was called professionally to see deceased on the 7th day of May, 1891, immediately after the fatal shot was fired. The physician testifies that deceased "was suffering very much, and was then in a dying condition;" "that he died at 6 o'clock A. M. on May 9, 1891; that it was hardly two days from the time he was first called that he told deceased that he was going to die." With the exception of a description of the wound, and that it caused the death of White, the deceased, the foregoing statement contains the entire predicate upon which the declarations were admitted. Before declarations of deceased are entitled to be received in evidence as dying declarations, it must appear that declarant, at the time they were made, was impressed with the belief that death was impending, and would certainly ensue. It is not necessary to their admissibility, in point of fact, that they be made *in articulo mortis*, and that dissolution resulted immediately afterwards, but declarant must be impressed with the conviction that he cannot possibly recover. Hammil v. State, 90 Ala. 580, 8 South. Rep. 380; Pulliam v. State, 88 Ala. 3, 6 South. Rep. 839; Reynolds v. State, 68 Ala. 506; Whart. Ev. §§ 282, 286; 1 Greenl. § 158. The facts and circumstances testified to by the physician, and the statement made by the physician to deceased, were all legitimate for the consideration of the court, which must determine the admissibility of the evidence. Faire v. State, 58 Ala. 80. We fail to discover anything in his testimony, or elsewhere in the record, which indicates directly the state of mind of the deceased at the time the declarations were made. After laying the predicate as we have stated it, the witness says: "I asked deceased who shot him, and deceased replied that Bob Young shot him; that he got into a quarrel, and got scared, and ran; that he did not have a knife." We cannot say, from the statement of the physician here detailed, that, at the time deceased made the statements testified to, he had given up all hope of recovery. It nowhere appears that deceased expressed the belief that he was mortally wounded, and there is nothing to show that his confidence in the opinion of his physician was of that degree that an expression of opinon by him to the deceased that he "was going to die" was of itself sufficient to convince deceased of its truth. It was not necessary, to render them admissible, that deceased should have expressed the conviction that he would not recover, and an expression to this effect would not necessarily make them competent. The court must consider all the circumstances attending the declarations, and if, from them all, the fair and reasonable inference arises that declarant was convinced in his own mind that his wound was mortal,—that death was impending,—his declarations are entitled to be considered in evidence. Wills v. State, 74 Ala. 24; 58 Ala. *supra*. We think a just and salutary administration of the law requires that courts should have due regard to the rules and limitations placed upon declarations made by a person in the absence of the defendant against whom they are offered, and in regard to which he has had no opportunity to cross-examine declarant, before they can be regarded as dying declarations, and thus become admissible against him. We find in the record another statement by the deceased, to wit, "that he would get even with him [referring to the defendant] when he got up." No question is raised on this latter statement, and it is not shown at what period of his illness the declaration was made, and we refer to it

simply to show that, notwithstanding the wound and the suffering of deceased, he expected to "get up." We do not think the predicate in this case was sufficient to authorize the introduction of the statements of deceased as dying declarations.

We find no error in the first charge given by the court defining murder. It is unnecessary to consider the other charges given, which undertake to define murder in the first degree. The defendant was convicted of murder in the second degree, and cannot be retried for a higher offense than that for which he was convicted. There was no error in refusing the charges asked for by the defendant. All of them are objectionable, and with the exception of the one numbered 7, ignore certain facts testified to by witnesses examined on the part of the state, from which, if believed, the jury might infer that the defendant was not free from fault in bringing on the difficulty. The definition given to a "reasonable doubt," in charge No. 7, finds no warrant in any decision of this court. For the error in admitting the dying declarations the case must be reversed and remanded.

(95 Ala. 230)

KEARNEY v. KLING.

(*Supreme Court of Alabama.* April 14, 1892.)

PLEADING—DEMURRER—ERRORS WAIVED BY JOINING ISSUE—INSTRUCTIONS.

In an action against the charterer of a steamboat, the complaint alleged that defendant had committed a breach of the charter party by failing and refusing to return the steamboat. Defendant answered, alleging, among other things, that said vessel sank and perished before a month had run, and any payment of hire had accrued, and the evidence proved the truth thereof. *Held* that, although said answer was demurrable, yet the court having overruled a demurrer thereto, and, plaintiff having thereupon joined issue thereon, the refusal of the court to intruct the jury to find for defendant, if they believed the evidence, was ground for reversal, the record not showing that the errors had neutralized each other.

Appeal from circuit court, Mobile county; W. E. CLARKE, Judge.

Action by August Kling against Phillip Kearney on a charter party or contract by which plaintiff leased the steamer Lillie to Peter Burke. Defendant was sued as surety thereon. The charter party and guaranty are as follows: "This charter party, entered into by and between August Kling, owner of the steamboat Lillie, on the first part, and Peter Burke of the second part, witnesseth: *First.* August Kling, of the first part, agrees to charter to Peter Burke the steamboat Lillie, for the term of five months, at and for the sum of sixty dollars per month, payable monthly, which the said Peter Burke doth agree to pay. *Second.* It is hereby agreed that the said Peter Burke shall assume all liabilities, of any and all kind, arising from or suffered by the said Lillie during the continuance of this said charter party. *Third.* The said Peter Burke is to insure the said Lillie, if she can be insured, in and for the benefit of the said August Kling, for the sum of fifteen hundred dollars, he, the said Burke, paying all the premiums on said insurance policy; and said policy is to be delivered to the said Kling within two weeks from the signing of this charter party. *Fourth.* It is expressly agreed and understood that the said Peter Burke shall not run said Lillie into debt; that he is to create no debts or liabilities on said vessel of any kind; and he does hereby covenant and agree to keep the said vessel free from all debts of any kind, and to hold the said August Kling and said vessel harmless from any and all debts or liabilities that may or shall be created or sustain or accrue during the continuance of this charter party. *Fifth.* The said Peter Burke doth agree to return the said steamboat Lillie to August Kling, in the city of Mobile, state of Alabama, upon the expiration of this charter party in the same condition as when received, ordinary wear and tear excepted. If said Lillie should sink, the said Peter Burke is to do all in his power to raise her. *Sixth.* It is mutually agreed between the parties that if the said Peter Burke, at any time during the continuance of this charter party, should decide or conclude to purchase the said steamboat Lillie, the said August Kling doth hereby agree to sell her to him for the sum of one thousand dollars in cash; and it is understood that, in that event, the amount said Burke shall have paid said Kling as charter money, under this charter party, shall be allowed him as so much paid on the one thousand dollars." "For and in consideration of the chartering or letting of the said steamboat Lillie to the said Peter Burke by the said August Kling, and for the sum of one dollar, I hereby become surety for the punctual payment of the said sixty dollars per month, and the performance of the agreements and covenants in the above written agreement or charter mentioned to be paid and performed by Peter Burke; and, if any default shall be made therein, I do hereby promise and agree to pay unto August Kling such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of the said agreement, without requiring any notice of nonpayment or proof of demand being made. [Signed] PHILLIP KEARNEY." From a judgment for plaintiff, defendant appeals. Reversed.

Pillans, Torrey & Hanaw, for appellant. *Overall & Beston*, for appellee.

STONE, C. J. The complaint contains two special counts, and each count sets out *in extenso* a copy of the contract, and a copy of Kearney's guaranty of Burke's faithful performance. Burke leased the boat from Kling, September 14, 1889; was to man and run her on his own account, and return her at the end of the lease, February 14, 1890, in the same condition as when received, "wear and tear excepted." No ruling appears to have been had on the first count, and we will not notice it. The case was tried on the second count, and the only breach assigned in it was and is "that said Burke has committed a breach of said contract or charter party, in this: that he has failed and refused to return said steamboat Lillie to plaintiff at Mobile, Ala., after the expiration of said charter party." There was a demurrer to the

complaint, assigning grounds; but, as there is no assignment of error which brings up the ruling on the demurrer, we will not consider it. Defendant, Kearney, then filed eight pleas to the complaint. The *first* was that at the time of the charter the steamboat Lillie was not river worthy, and was not fit for carrying freight and passengers up and down the Mobile and Tombigbee rivers; *second*, that in consequence of said river unworthiness, and not from any peril of the navigation, said steamboat sprung a leak, and was lost on her first voyage; *third*, that by said charter party Kling warranted that the steamboat "was in all respects fit and suitable, in strength, structure, and condition, to carry a cargo in the river trade;" and defendant then negatived these qualities, and averred that on her first trip, in less than a month after the contract, from no peril of the navigation, but from her own unfitness and river unworthiness, she sank, and was lost; *fourth* plea avers that, by force of the contract, plaintiff was bound to see that the boat was river worthy, and in suitable condition for the service, and neglected to do so, and that in less than a month the boat was lost, in consequence of her own river unworthiness; *fifth*, that the boat sunk, and perished in less than a month after she was chartered, before any hire had accrued; *sixth*, same as fifth, with the additional averment that the boat was lost without the fault of Burke or defendant; *seventh*, that boat was lost, on her first voyage, from no peril of the river, but from inherent weakness and river unworthiness, and that it was not in Burke's power to raise her; *eighth*, that the steamboat, by her own inherent weakness and river unworthiness, was rendered incapable of being returned to plaintiff. Plaintiff demurred in gross to 1st, 2d, 3d, 4th, 7th, and 8th pleas of defendant, "raising the question of river unworthiness." He assigned grounds of demurrer: "*First*, because, by the terms of said contract of charter party, defendant's principal hired said boat as she was, and expressly agreed to return her to plaintiff in same condition as when received." Second assignment is not materially different from first. Third assignment denies that by the terms of the charter party there is any warranty of the river worthiness of the steamboat. Fourth assignment is substantially like the first and second. Plaintiff also demurred "to the fifth and sixth pleas, because they present no issue of law or fact." The court overruled these demurrers, and the plaintiff then took issue on the pleas.

The contract or charter party contains no express guaranty or other provision in reference to the soundness or river worthiness of the steamboat Lillie. If there was any guaranty, it was one implied from the nature of the contract. We have stated above that the only breach of Burke's contract stipulations which is assigned in the second count is that he failed and refused to restore the steamboat to Kling. The contract or charter party expressly imposes many duties on Burke. We mention only two of them. "*Third*. The said Peter Burke is to insure the said Lillie, if she can be insured, in and for the benefit of said August Kling, for the sum of fifteen hundred dollars; he, the said Burke, paying all the premiums on said insurance policy, and said policy to be delivered to said Kling within two weeks from the signing of this charter party. * * * *Fifth*. The said Peter Burke doth agree to return the said steamboat Lillie to August Kling, in the city of Mobile, state of Alabama, upon the expiration of this charter party, in the same condition as when received, ordinary wear and tear excepted. If said Lillie should sink, the said Peter Burke is to do all in his power to raise her." The testimony, without conflict, surely proved the truth of defendant's fifth plea. The only averment of fact set up by that plea in bar of plaintiff's action was "that said vessel sunk and perished before a month had run and any payment of hire had accrued." On this plea plaintiff had taken issue, and, when its truth was proved, defendant was entitled to a verdict. Defendant had in writing requested the court to charge the jury that, if they believed the evidence, they must find for the defendant, and the court had refused to so charge. This was excepted to, and is assigned as error. In the then state of the pleadings, this charge ought to have been given. Brewing Co. v. Handley, 90 Ala. 486, 7 South. Rep. 912. This plea had been demurred to by plaintiff, and the demurrer overruled. The plea being insufficient, if defendant had succeeded in the court below, and plaintiff had appealed, we would have reversed the judgment of the circuit court overruling the demurrer to the fifth plea. So, if defendant had succeeded in obtaining a verdict on the fifth plea, it is not improbable that plaintiff would have moved for a repleader. Mudge v. Treat, 57 Ala. 1; Irion v. Lewis, 56 Ala. 190; Railway Co. v. Propst, 90 Ala. 1, 7 South. Rep. 635.

In view of these principles, there possibly might be conditions in which we would hold that one error had neutralized the other, and on that account refuse to reverse. To justify such possible ruling, it would be necessary for the record to show affirmatively and clearly that no injury was done. The record before us is not in a condition to authorize us to make that statement. It is not satisfactorily shown that all the meritorious questions which arise out of this transaction have been raised by the pleadings or passed on in the court below. We state some inquiries which suggest themselves, which should be probably considered on a second trial, but we must not be considered as intimating a positive conviction in regard to them. The contract being in writing, all its provisions must be taken into the account in giving it its proper interpretation. The inquiries we suggest are—*First*. Does the contract impose on Burke an unconditional liability to return the vessel at the expiration of the lease? Does not the clause, "if said Lillie should sink, the said Peter Burke is to do all in his power to raise her," relieve him of such absolute liability? *Second*. Does not that clause impose on Peter Burke the duty of doing all

in his power to raise the vessel if she sunk, or to show that such efforts would be fruitless, and that she could not be raised? *Third.* Was it not Burke's duty to insure the vessel before starting her on a voyage, or to show he could not obtain insurance on her? and are not the two weeks allowed for delivering the policy confined to the mere act of delivery, without enlarging the time for suing out the policy?

Reversed and remanded.

(95 Ala. 322)

UNITED STATES ROLLING STOCK CO. v. CLARK *et al.*

(*Supreme Court of Alabama.* April 14, 1892.)

SHERIFF'S FEES—ATTACHMENT.

Code, § 3687, relating to sheriff's commissions, provides that "when an attachment is by him levied on personal property, which is replevied, or the cause is settled without a sale, he is entitled to one half the commissions on the amount of the demand sued for, allowed him for making money on execution, to be paid by the party paying such demand or replevying such property." *Held*, that the word "demand" means the amount which plaintiff in attachment is entitled to recover.

Appeal from city court of Anniston; F. B. CASSADY, Judge.

Proceedings in attachment by Clark & Co. against the United States Rolling Stock Company. Settled without sale. Defendant's motion to retax costs overruled. Defendant appeals. Reversed.

J. J. Willett and *Tompkins & Tray*, for appellant. *Caldwell & Johnston*, for appellees.

WALKER, J. The attachment in this case was sued out for the sum of $12,000. The amount really due to the plaintiffs was less than $4,200. That amount was paid by the defendant to the plaintiffs before judgment. In taxing the costs the sheriff was allowed commissions on $12,000, and the circuit court refused to reduce this item, or to order the commissions to be taxed only on the amount really due and paid. The following is the provision fixing the sheriff's commissions in such a case: "When an attachment is by him levied on personal property, which is replevied, or the cause is settled without a sale, he is entitled to one half the commissions upon the amount of the demand sued for, allowed him for making money on execution, to be paid by the party paying such demand or replevying such property." Code, § 3687. The word "demand," as used in this statute, does not mean the amount claimed or the damages laid in the attachment affidavit or in the complaint. It means what the plaintiff was entitled to require the defendant to pay. In ordinary legal usage, the words "debt" and "demand" are of kindred meaning, but the latter word is a term of much more comprehensive signification than the former. The term "debt" imports a sum of money owing upon a contract, express or implied; while the term "demand" embraces rightful claims, whether founded upon a contract, a tort, or a superior right of property. In re Denny, 2 Hill, 220; Drews v. Coles, 2 Tyrw. 510. The statute which enumerates the classes of "demands" for which attachments may issue in the first place, authorizes the issue of the writ "to enforce the collection of a debt;" next, "for any moneyed demand, the amount of which can be certainly ascertained." Code 1886, § 2929. In such connection the meaning of the words "debt" and "demand" is plain. They are used to describe certain classes of rights of action. Neither of them covers anything more than what is due to the plaintiff in attachment,—the amount which he is entitled to recover. We think it is plain that the phrase, "the amount of the demand," as used in the statute fixing the sheriff's commissions when the attachment suit is settled, means the amount which the plaintiff was entitled to be paid by the defendant. To construe these words as requiring the commissions to be calculated on the amount claimed by the plaintiff, regardless of what was really due, would result in putting it in his power to defeat one of the purposes of the statute. It was evidently intended by the statute to secure to the defendant the right to save costs by discharging his liability or by replevying the property before a sale of it under the writ. If the plaintiff could swell the commissions to be paid by the defendant on a settlement, merely by making an extravagant claim, then the defendant, by paying all that was confessedly due, might become chargeable with a larger sum for the sheriff's commissions than if he had allowed the execution of the writ to proceed; and if, as in the present case, the plaintiff had claimed more than twice as much as was really due, the one half commissions on the amount of the claim would be more than the whole commissions which would be payable if there had been no settlement, but the property had been sold under the writ, and the plaintiff had recovered judgment for all that was really due. It was never intended to give the plaintiff in attachment the power to make it a positive disadvantage to the defendant to discharge his liability or to replevy the property before a sale. A construction of the statute involving such a result is unreasonable, and is not required by the language used. The one half commissions of the sheriff should have been computed on the amount which was really due, and which was paid by the defendant to the plaintiffs.

Reversed and remanded.

(95 Ala. 459)

DE LOACH MILLS MANUF'G CO. v. MIDDLEBROOKS.

(*Supreme Court of Alabama.* April 14, 1892.)

COMMISSIONS OF AGENT—EVIDENCE—INSTRUCTIONS.

1. In an action by an agent to recover commissions for the sale of certain chattels, where there was no dispute as to the agency, and the only issue was whether plaintiff had made the sales, testimony by defendant that it had other agents for the sale of its wares in the county where plaintiff lived and did business was irrelevant.

2. The court properly refused to charge "that, when plaintiff fails to prove a material fact in his case," and neglects to offer evidence of the fact when he has the opportunity, the presumption is that such fact does not exist, since it assumed

that plaintiff had failed to prove a material fact.

3. Where there was no evidence that defendant had become liable to pay or had paid a commission on these sales to another agent, the court properly refused to charge that it was plaintiff's duty to promptly notify defendant of the sales, to prevent it from paying commissions to some other person who might have sent the order, and that, if plaintiff failed to exercise such care, he could not recover.

Appeal from circuit court, Conecuh county; JOHN P. HUBBARD, Judge.

Action by J. C. Middlebrooks against the De Loach Mills Manufacturing Company to recover a commission for certain sales. Judgment for plaintiff. Defendant appeals. Affirmed

This was an action brought by the appellee against the appellant, and sought to recover commissions for 15 per cent. for making sales of appellant's mills and machinery to one Douglass and Deer. The defendant pleaded the general issue. The terms of the contract existing between the plaintiff and the defendant, the prices of the machinery sold to Deer and Douglass, respectively, and the terms at which the sales were made, which cover a period and relate to the character and subject-matter and dealings between the parties, are not controverted. As stated in the opinion, the only controverted fact is whether Middlebrooks worked up and made either of said sales, or is entitled to such commissions. There is only one exception reserved to the ruling of the court upon the evidence, and that was the court's refusal to allow the defendant's counsel to ask De Loach "if he did not have other agents for the sale of his goods here in Conecuh county during the years 1888–89." The court, in its general charge, among other things, instructed the jury as follows: (1) "If the jury believe from the evidence that there was an agreement between plaintiff and defendant by which defendant was to pay plaintiff a commission on all sales made by plaintiff, and on all sales that plaintiff worked up, and they believe from the evidence that plaintiff worked up the sale with Deer, and that Deer bought, then defendant would be liable as to the sale to Deer, although L. Finch & Co. may have ordered the mill for him, and he procured it through such order; or although defendant may have sold directly to Deer, if in the other respects plaintiff makes out his case." The defendant duly excepted to the giving of this charge, and separately excepted to the refusal of the court to give the following charges, requested by it in writing: (1) "The court charges the jury that the burden of proof is upon the plaintiff to make out his case, and that when he, the plaintiff, fails to prove a material fact in his case, and has the means and opportunity to prove such fact, fails or neglects to offer evidence of it, the presumption is fair and just that it does not exist." (2) "The court charges the jury that if the plaintiff effected a sale, or procured a customer for the defendant, that then it was the duty of the plaintiff within a reasonable time that the sale was effected by him, or customer was procured by him, (the plaintiff,) and prevent defendant paying commission to some other person who might have sent the order; and, if the evidence fails to show you reasonably that plaintiff exercised such care in notifying defendant, then there can be no recovery of commissions for such sales or customers." There was judgment for the plaintiff; and the defendant brings this appeal, and assigns as error the rulings of the court upon the evidence and the charges.

Stallworth & Burnett, for appellant. *Farnham & Crum*, for appellee.

MCCLELLAN, J. This action is by Middlebrooks for commissions on sales which he alleges were made or "worked up" by him for the defendant company as its agent. There is no conflict in the evidence as to the agency or the terms of it. Plaintiff was authorized to make sales of machinery, etc., for defendant, and was to receive 15 per cent. commissions on all sales made by him, and also on all sales which resulted from his efforts,—were worked up by him,—though not in fact consummated by or through him. The only material controversy as to the facts was in respect of the inquiry whether the sales upon which commissions were claimed had been made or worked up by the plaintiff; and in this connection the defendant corporation sought to prove that it had other agents for the sale of its wares in Conecuh county, where plaintiff resided and did business. The court, we think, properly excluded this proposed evidence from the jury. It was irrelevant to the issue. To have admitted it would have been to allow the jury to find that plaintiff had not made or worked up the alleged sales from the mere fact that they might have been made by another agent, without any proof that they were so made, and notwithstanding even though it had been further shown that they were actually made by another agent, yet they might have been worked up by the plaintiff in such sort as to entitle him to the commissions he claimed. Nor can the admissibility of this testimony be rested on the theory that it went to impeach plaintiff as a witness. Whether or not he had testified that defendant had no other agent in that territory, he could not be impeached by evidence contradicting him in that respect, because neither his rights nor defendant's liability depended upon that fact. It was an immaterial inquiry, which could not be gone into for the purposes of impeachment. Griel v. Solomon, 82 Ala. 85, 2 South. Rep. 322.

The only objection urged to that part of the court's general charge to which an exception was reserved is that "it assumed facts of which there was no evidence." The objection is untenable. It predicates only these facts: That there was a contract on the part of defendant to pay plaintiff 15 per cent. commissions on all sales made or worked up by him, (and this is uncontroverted;) that plaintiff worked up the sale to Deer, (and this plaintiff's evidence tends to establish;) and that a sale was made to Deer, (and this is undisputed.) Charge 1, requested for defendant, is faulty in that it assumes

that plaintiff had failed to prove a material fact in his case, having reference, we suppose, to plaintiff's connection with the sale to Deer, since that fact only was in dispute. There was evidence tending to show that plaintiff's efforts had brought about this sale, and its sufficiency was for the jury. It was not for the court to assume, but for the jury to determine, whether it had or had not been proved. Charge 2, requested for the defendant, was well refused on the ground of its being abstract, if upon no other ground. Its assumption that defendant became liable to pay or had paid commissions on these sales to some third person in consequence of plaintiff's negligent delay in giving notice of his claim is entirely gratuitous; there is no such evidence in the record. The judgment of the circuit court is affirmed.

(99 Ala. 125)

PEARSON *et al.* v. KING.

(*Supreme Court of Alabama.* April 26, 1892.)

EJECTMENT—PARTIES—CONVEYANCE OF LAND—USE OF GRANTOR'S NAME.

The heirs of a person who has conveyed land to another, which at the time is in the adverse possession of a third person, and the title to which, therefore, does not pass as against such person, cannot, by a subsequent release or conveyance to the adverse holder, defeat ejectment by the grantee in the name of his grantor. Scranton v. Ballard, 64 Ala. 402, and Jackson v. Demont, 9 Johns. 55, distinguished.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

This was an action of ejectment brought by David Pearson, the ancestor of the present plaintiffs, Baxter Pearson and others, against Peyton G. King. There was a demurrer to plaintiffs' replication, which was sustained, and plaintiffs appeal. Reversed.

Webb & Tillman, for appellants. *W. M. Brooks*, for appellee.

WALKER, J. This is a common-law action of ejectment. David Pearson, in whom one of the demises was laid, having died pending the suit, it was revived as to that demise in the names of his heirs at law and of the administrator of his estate. The defendant interposed a special plea to the effect that, since the commencement of the suit, the heirs of David Pearson had executed a conveyance of the land sued for to the defendant. A demurrer to this plea having been overruled, the plaintiffs interposed a replication thereto to the effect that before the beginning of the suit David Pearson was seised of the legal title to the land sued for, and executed a conveyance thereof to Strange and White, when he knew that the land was in the adverse possession of the defendant's tenant; that this action was begun and is prosecuted for the use and benefit of said Strange and White; that the deed to them was duly recorded before the execution of the conveyance by Pearson's heirs to the defendant; and that the defendant had notice of David Pearson's deed to Strange and White when he obtained the deed from David Pearson's heirs to himself pending this suit. The defendant's demurrer to this replication was sustained. It is well settled that a sale and conveyance of lands, which are at the time in the possession of a third person, holding adversely to the grantor, is void as against the adverse possessor, and will not support ejectment by the grantee against him. 3 Brick. Dig. p. 18, § 51. The grantor in such conveyance may still maintain ejectment against the adverse holder, and the latter cannot plead the conveyance in bar of the suit. The conveyance is void as to him, and he cannot set it up as a defense. Davis v. Curry, 85 Ala. 133, 4 South. Rep. 734. The conveyance is void only as against the adverse possessor and persons in privity with him. As to all others, and as between the parties, it is valid and operative. Yarbrough v. Avant, 66 Ala. 526; Harvey v. Doe, 23 Ala. 637; Abernathy v. Boazman, 24 Ala. 189. The execution of the deed imports that the grantor intends to vest the title in his grantee, and to confer upon him the beneficial enjoyment of the property, so far as that result may be accomplished legally. Because of the rule of law which invalidates the deed as against the adverse holder, it cannot operate to authorize the grantee to sue in his own name for the recovery of the land from such adverse holder. But this rule of law does not stand in the way of the grantor authorizing the use of his name in a suit for the recovery of the property. Courts of law long ago recognized the right of a transferee of a chose in action which was not assignable under the common law, to use the name of the transferrer in a suit thereon. Though such assignment was void as to the debtor, yet it bound the creditor to permit the use of his name by his transferee for the enforcement of the demand. On like considerations, it has been held that a conveyance of land adversely held authorizes the grantee therein to use the grantor's name in a suit for the recovery of the property. The question was presented in the case of Steeple v. Downing, 60 Ind. 478–487. It was there said: "We are satisfied, both upon reason and authority, that where one conveys land to another, which at the time is in the adverse possession of a third person, whereby the title cannot pass as against the party thus in possession, the grantor impliedly authorizes the grantee to use his (the grantor's) name, in an action to recover the land from the party thus in the possession thereof." The result of the decisions has been stated to be that the deed is construed to be a power of attorney authorizing the grantee to use the grantor's name, as plaintiff in ejectment, to recover the lands, even against the will of the latter. Sedg. & W. Tr. Title Land, (2d Ed.) § 190. The recovery inures to the benefit of the grantee, though the action is prosecuted in the name of the grantor. Brunson v. Morgan, 86 Ala. 318, 5 South. Rep. 495. It is a general rule that there can be no recovery in favor of the plaintiff on the record after he has released or transferred his claim to the defendant. This court has recognized an exception to this rule in suits prosecuted in the name of an assignor for the benefit of the assignee of a chose in

action Before the statute required a certain class of such suits to be prosecuted in the name of the party really interested, courts of law, even in suits in the name of the assignor, took notice of the rights of the assignee, and would not permit them to be prejudiced by the acts, declarations, or admissions of the assignor, done or made after the assignment. 1 Brick. Dig. p. 127, §§ 56-58. The assignment was given such effect, as between the parties, that thereafter the assignor could not defeat the action prosecuted in his name for the benefit of the assignee. The position of a grantee in a conveyance of land held adversely is similar to that occupied, at the common law, by an assignee of a chose in action. In each case the transfer is binding between the parties, and is void only as to third persons who, according to the theory of the law, might be prejudiced by having claims against them put in the hands of others than the original holders. In each case, if the suit is against such third person, it may be prosecuted in the name of the transferrer for the benefit of the transferee. The reasons against permitting the transferrer to defeat such suit by anything said or done by him after the transfer are equally applicable in each of the two cases. Those reasons have led several courts, in which the question has been presented, to the conclusion that a grantor in a conveyance of land held adversely cannot, by a subsequent release or conveyance to the adverse holder or by an order to dismiss, defeat an action brought in his name for a recovery of the land from the adverse holder for the benefit of the first grantee. Steeple v. Downing, 60 Ind. 478; White v. Patten, 24 Pick. 324; Farnum v. Peterson, 111 Mass. 148; McMahan v. Bowe, 114 Mass. 140. This conclusion is supported by a consideration which is well illustrated in the present case. David Pearson's heirs, who executed the deed relied on by the defendant, had only such right to the land as descended to them from their ancestor. So far as the defendant claims under their deed, he stands in their shoes. He has no greater rights by virtue of that deed than his grantors had at the time it was executed. Their ancestor's prior conveyance was binding on them in favor of his grantees. That conveyance conferred upon the grantees therein the right to use the name of the grantor or of his heirs in an action of ejectment against the adverse holder. Neither the grantor nor his heirs could refuse the use of their names for such a purpose. They could not confer upon another a right which they did not themselves have. The defendant's adverse possession entitles him to treat the deed to Strange and White as a nullity. But when he abandons this position, and sets up a claim under the grantor in that deed, to that extent he puts himself in privity with that grantor, and derives from him only such rights as the latter had. So far as the defendant claims under the deed to him from David Pearson's heirs, he relies on their rights as against Strange and White; and that deed cannot have effect to defeat this suit, as the grantors therein had no right to prevent the prosecution of the suit in their names for the benefit of their ancestor's grantees. It results from this conclusion, which, we are satisfied, is correct, that the demurrer to the replication to the defendant's special plea numbered 2 should have been overruled. The authorities cited for the appellee are not against this ruling. They only assert the general rule that in actions of ejectment, as in other forms of action, a release or transfer of his claim by the plaintiff pending the suit will defeat his right to recover. Doe v. Collins, 7 Ala. 480; Scranton v. Ballard, 64 Ala. 402; Jackson v. Demont, 9 Johns. 55. Neither of the cases cited is an authority against the proposition that a grantor, in a conveyance of land held adversely, cannot prevent the use of his name by the grantee in an action for the recovery of the land for the benefit of the latter. In actions of ejectment, as in other actions which may be prosecuted in the name of one person for the benefit of another, when the facts are brought to the attention of the court, it will not shut its eyes to the rights of the person beneficially interested in the prosecution of the suit, but will protect them against the unauthorized conduct of the nominal plaintiff. Roden v. Murphy, 10 Ala. 804. For the error in sustaining the demurrer to the replication the judgment must be reversed.

Reversed and remanded.

(95 Ala. 621)

HUDSON v. GERMAIN FRUIT CO.

(*Supreme Court of Alabama.* April 26, 1892.)

SALE—INSPECTION BEFORE ACCEPTANCE.

Where fruit which was to be shipped from a distance was subject to inspection by the buyer before acceptance, and an opportunity for inspection was given within a reasonable time after arrival, which the buyer refused to make, it is no defense to an action for the price that an inspection was refused by the carrier immediately on the arrival.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Action by the Germain Fruit Company against B. B. Hudson to recover a balance due from the sale of oranges under a contract. Plaintiff had judgment, and defendant appeals. Affirmed.

Upon the introduction of all the evidence, the substance of which is sufficiently set forth in the opinion, the court, at the request of the plaintiff, gave the following charges in writing: (1) "The court charges the jury that the plaintiff had a reasonable time after the sale of the fruit, under all the circumstances of the case, to deliver the fruit, and to allow an opportunity for inspection; and if the jury further believe that the 9th day of May was within such reasonable time, and if the jury further believe that on the 9th day of May the plaintiff, through Jones, offered the defendant an opportunity to inspect the fruit, and that the defendant refused to inspect the oranges, and to accept them, then the refusal of the defendant to inspect the fruit was wrongful." (2) "The court charges the jury that if defendant informed Jones that he would not examine the fruit, and would not accept it because he had made other

arrangements, then the plaintiff was not bound to make any further offer or provide any further opportunity for inspection; and if the jury further believe from the evidence that the reasonable time for examination after arrival had not then expired, then the defendant's refusal to inspect the fruit was wrongful." (3) "The court charges the jury that if, within a reasonable time after the arrival of the fruit in Birmingham, the defendant was offered an opportunity to examine the fruit and refused to do so, then his refusal was wrongful." (4) "If, within a reasonable time after the arrival of the fruit in Birmingham, the defendant was offered by the plaintiff, through Jones, a reasonable opportunity to inspect the fruit, and refused to do so, or to accept the fruit, then his refusal to inspect the fruit was wrongful, although you further find that the railroad company had before then refused to allow an inspection." (5) "If the jury believe from the evidence that the defendant was offered an opportunity, within a reasonable time after the sale of the fruit, to inspect the same, and that defendant refused such offer or privilege of inspection, then his refusal was wrongful." (6) "If the jury believe from the evidence that the defendant refused, within a reasonable time after the sale, to inspect the fruit, and that he stated that he would not inspect or receive it, then the plaintiff was not bound to make any further offer, or offer any further opportunity of inspection." (7) "Although the defendant may have demanded of Jones, plaintiff's agent, to be given an opportunity to examine the fruit, and Jones failed at that time to allow such examination without refusing to do so, if within a reasonable time after such demand was made the opportunity was given defendant to make such examination, and defendant refused to examine it, such refusal on the part of defendant was wrongful." (8) "If the jury believe from the evidence that, within a reasonable time after the arrival of the fruit here, the plaintiff offered the defendant an opportunity to examine the fruit, and defendant declined to examine such fruit, and to take the same, then such refusal on the part of defendant was wrongful." The defendant separately excepted to the giving of each of these charges, and also reserved an exception to the court's refusal to give the following charge requested by him in writing: (1) "The court charges the jury that if the plaintiff through its agent, W. H. Jones, agreed to let defendant examine the fruit, and not to take unless the same was found to be sound and bright; that defendant, upon the arrival of the fruit, demanded the right to examine the fruit; and that the right to examine the fruit was denied him by the railroad company, —this gave the defendant the right to then refuse to take the fruit."

Lane & White, for appellant. *Cubaniss & Weakley*, for appellee.

COLEMAN, J. All the assignments of error are based upon the charges given by the court for plaintiff, and the refusal to charge as requested by defendant. The cause of action is founded upon a contract for the purchase of a car load of oranges, sold by appellee to the appellant, and was brought to recover the difference between the contract price and the amount realized from the sale of the oranges. The evidence shows that the fruit was sold by plaintiff though its agent, W. H. Jones, of Birmingham, Ala., to be shipped to the defendant at Birmingham, Ala., "subject to inspection, and to be received, if found by him to be sound and bright, and, if otherwise, to be rejected." The fruit was shipped from Los Angeles, Cal., to Birmingham, Ala. The defense relied upon for refusing to accept the car load of oranges is set up in the special plea of the defendant, which avers that the "plaintiff agreed, by and with the defendant, that the said defendant would be allowed to open said car, and examine the fruit, on its arrival in Birmingham, before taking or receiving the same; and defendant says, on the arrival of the said car, he asked and sought permission to open the car, and to examine the fruit, all of which was denied him," etc. It is not pretended that the fruit did not arrive at its destination within due time, or was not of the quality agreed to be shipped; neither is it controverted that the defendant, by virtue of his contract of purchase, had the right to examine the fruit, before accepting it. The real contest is as to whether the defendant in fact was refused permission to examine the fruit, within the contemplation of the parties, and whether he was justifiable in refusing to receive the fruit. It is proven that the car having the oranges arrived in Birmingham on the 7th of May, 1890. It is further proven that W. H. Jones, the agent of the shipper, was in Birmingham, and this was known to the defendant. It is not denied that, on the day of the arrival of the car, the defendant was notified by the agent of the railroad that the fruit had arrived, and that on the same day the defendant applied to the railroad agent for leave to examine the oranges, and that the railroad agent refused to permit the examination upon the ground that the bill of lading did not authorize it. The remaining testimony is somewhat conflicting. That of the plaintiff tends to show that, on the evening of the 7th, the day of arrival of the fruit, the defendant notified W. H. Jones, the agent of the shipper, of the arrival of the fruit, that he had applied to the railroad agent to examine the fruit and had been refused, and that he was anxious to get the fruit. The agent, Jones, then stated he would get permission, and the evidence shows that Jones telegraphed immediately to the shipper, and that on the next day, the 8th of May, he received permission, and offered to the defendant permission to examine the fruit, and offered to turn it over to him, and that defendant refused to inspect the fruit or to take it, because "he was not allowed to examine it when he wanted to do so." The defendant's testimony tended to show that the offer of the agent, Jones, to permit the examination, was made on the 10th of May, and that the defendant had made other arrangements

by that time. There was evidence tending to show that oranges at that season of the year would keep two or three weeks, and that offered by defendant tended to show that oranges at that season of the year were in danger of rotting unless sold and used quickly. The bill of lading was attached to a check drawn on the defendant for the purchase money through a bank at Birmingham. The evidence is sufficiently stated to test the correctness of the ruling of the court upon the charges given, and the refusal to charge as requested. The purchaser was not compelled to pay the purchase money, and thereby secure a delivery of the bill of lading and fruit before exercising his right, under his contract, to inspect the fruit. We are clearly of the opinion, however, that if he had pursued this course merely to get control of the car or goods, so as to make the inspection, the payment of the purchase money, under such circumstances and for this purpose, would not have been a waiver of the right to examine and reject the fruit if it failed to correspond with the quality purchased. When goods of a certain quality are to be shipped from a distance, and delivered at a designated place, subject to inspection by the buyer, and no time is fixed by the contract within which they are to be delivered, or the right of inspection to be exercised, it is understood the law says that a reasonable time is allowed for the delivery, and a reasonable time after their arrival is allowed to the buyer within which he must make the inspection. What is a reasonable time depends upon the facts and circumstances of the particular case, to be found by the jury. Benj. Sales, p. 519; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. Rep. 349; Diversy v. Kellogg, 92 Amer. Dec. 154, 44 Ill. 114. After the buyer refused to examine or accept the goods, the plaintiff was under no obligation to continue for an indefinite time to insist upon the acceptance of the fruit by the buyer. As we construe the charges given for the plaintiff when applied to the evidence, they assert the law correctly. The charge requested by the defendant asserts the proposition that if, upon the arrival of the fruit, the railroad company then denied the right of examination to defendant, such refusal on the part of the railroad gave him the right to reject the fruit. We do not understand, from the contract as stated in the evidence, that it was incumbent on the shipper to provide in the bill of lading permission to the buyer to inspect the fruit on its arrival, or that the common carrier, the agent of the shipper, had authority to grant or refuse the inspection. It was the duty of the shipper, after its arrival, within a reasonable time, to see that the buyer had the opportunity, as provided in the contract, to inspect the fruit, and it was also the duty of the buyer within such reasonable time to exercise the right. If the shipper himself, or his agent, Jones, had denied the right and refused the inspection, or had not provided for the inspection within a reasonable time, the buyer would have been under no duty to have repeated the demand to inspect the fruit. If such had been proven, the buyer would have been at liberty to regard the contract as rescinded. The charge refused asserts no such proposition. As a matter of law, it bases the right to reject the fruit and avoid the contract upon the bare refusal of the railroad company to permit the inspection. When referred to the evidence, the charge is also misleading, conceding that, as an abstract proposition, it was correct. It utterly ignores all the evidence which tends to show that, after the refusal by the railroad company, the defendant notified Jones, the agent of the shipper, that he was anxious to get the fruit, and desired to inspect it, and the statement of the agent in reply, that he would telegraph the shipper for the authority, to which the defendant made no objection. If the jury believed this phase of the evidence, it tends to show that the buyer waived any right to rescind the purchase which he might have claimed on account of the refusal of the railroad to permit the inspection.

We find no error in the record. Affirmed.

(69 Miss. 1)

ROTHENBERG *et al.* v. BRADLEY *et al.*

(*Supreme Court of Mississippi.* Dec. 14, 1891.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—CONSTRUCTIVE FRAUD.

1. Where, in a suit to set aside an assignment for the benefit of creditors, the deed appears valid upon its face, but evidence *aliunde* discloses facts which will operate to hinder and delay creditors, this is sufficient to avoid the deed *in toto*, without proof of an actual covinous intent.

2. Where an assignment for the benefit of the creditors of a partnership prefers a claim for taxes due on real estate owned by the individual partners, it will, at the instance of creditors, be set aside as a fraud upon their rights.

3. Upon the execution of an assignment for the benefit of firm creditors, one of the partners retained insurance money from the firm assets on the ground that the burned building which produced the fund was his individual property. The building had been occupied by the firm; the policies were in the name of, and the premiums had been paid by, the firm; and, in the proof of loss, it was stated that the firm owned the building, and a portion of the insurance money had been used, before the assignment, in paying firm debts. *Held*, that the retention of the balance of the insurance money was a sufficient cause for setting the assignment aside as a fraud upon creditors.

4. It is not a fraud upon creditors for a firm about to make a general assignment to pay the amount of an outstanding *bona fide* note to its accommodation maker, if the latter assumes payment, and induces its holder to release the firm.

Appeal from chancery court, Madison county; H. C. CONN, Chancellor.

Bill in equity by Marks Rothenberg & Co. and others against N. H. & R. L. Bradley to set aside an assignment for the benefit of creditors. Decree for defendants. Plaintiffs appeal. Reversed and remanded.

Nugent & McWillie, H. Peyton, E. E. Baldwin, and *Brame & Alexander*, for appellants. *Calhoon & Green*, for appellees.

COOPER, J. On the 25th day of February, 1891, N. H. & R. L. Bradley, a commercial firm, made an assignment of the partnership assets for the payment of partnership creditors, with preferences. The conveyance purports to convey all the partners'

property. The present bill was exhibited by certain creditors of the firm, attacking the assignment as fraudulent. These facts are relied upon to invalidate it: Some weeks prior to the assignment the firm was indebted to James, Lawson & Gordon in about the sum of $4,000. These creditors held as collateral security certain notes and accounts, but were pressing for other security. In this condition of affairs, it was agreed that Mrs. A. H. Bradley should execute her note to James, Lawson & Gordon, and secure the same by a mortgage of her farm, and that the firm of N. H. & R. L. Bradley should indorse the note. This was intended only as a temporary security, and Mrs. Bradley and her property were to be released as soon as other financial arrangements could be made by the firm. A few weeks after this the store of N. H. & R. L. Bradley, at Flora, with its contents, was destroyed by fire. The property was insured, and some $3,000 was collected from the insurance policies; and the firm, failing to make any satisfactory arrangements, determined to make an assignment. About the 20th of February, R. L. Bradley drew from the bank in which it had been deposited the insurance money, and sent by express to A. H. Bradley the sum of —— dollars. A. H. Bradley, acting for his wife, went to James, Lawon & Gordon with the money, and arranged with this firm for the discharge of the firm of N. H. & R. L. Bradley, by agreeing that his wife would assume the payment of the debt absolutely, and that her property, which had been mortgaged, should stand as security therefor. James, Lawson & Gordon thereupon surrendered to the firm of N. H. & R. L. Bradley the collaterals which they had held for the debt, erased the names of these parties from the note of Mrs. A. H. Bradley, and agreed to look solely to her for the payment of the debt. This transaction furnishes one of the grounds upon which the validity of the deed is assailed. Of the debts mentioned in the assignment, among the preferred claims, is one to R. J. Harding for about $294. The evidence discloses that the greater part of this claim arose in this way: The members of the firm of N. H. & R. L. Bradley owned certain lands and personal property, upon which taxes for the year 1890 were due and unpaid. Some weeks before the assignment was made, the firm wrote to Mr. Harding, who was the sheriff and tax collector of Hinds county, directing him to draw upon it for these taxes. In accordance with this request the sheriff drew upon the firm, and attached the tax receipts to the draft. The draft was presented and payment refused, and thereupon the draft and receipts were returned to Harding, who destroyed them, and advertised the property for sale. It does not appear that the assignors knew that the lands had been so advertised, or that there remained sufficient time for the sheriff to do so. The supposed debt to Harding, arising from these facts, was, as we have stated, among those preferred. Another attack arises from these facts: The store at Flora, in which the firm transacted business, was the individual property of N. H. Bradley. It was insured in the name of the firm, and the premiums paid by it. In making proofs of the loss, it was stated that the firm owned the store, but before the policy was paid the adjuster of the insurance company discovered the fact that the title was in N. H. Bradley. The company, however, waived defense on this ground, and paid the amount of the policy to the firm. A portion of the insurance money arising from the policy on the store was used in discharging the debt to James, Lawson & Gordon; but there remained of it about $290, which was in hand at the time of the execution of the assignment. Because of the ownership of the building by him, this fund was treated as the property of N. H. Bradley; and the money remaining on hand arising from the policy was handed to him by R. L. Bradley, and was by N. H. Bradley kept, and not delivered to the assignee. These are the principal facts upon which the assignment is sought to be annulled.

It is sufficient to say in reference to the transaction between the firm of James, Lawson & Gordon and Mrs. A. H. Bradley that nothing appears from which an inference of fraud is fairly to be drawn. The money was applied in the discharge of a debt due by the firm; and the fact that it was not actually paid over to James, Lawson & Gordon, and by them returned to Mrs. Bradley, is immaterial. The result is the same, and, since the thing done was lawful, no injury could accrue to any creditor by reason of the method pursued.

The effect of the preference given to R. J. Harding for the payment of the taxes upon the property of the members of the firm, and of the retention by N. H. Bradley of a part of the insurance money, may be considered together. They are of like character, being in the one case an appropriation of firm assets to the payment of the debts of the individual members, and in the other a retention by one of the assignors of a part of the firm assets.

It is argued by the appellees' counsel that no objection can be taken to the assignment on its face; that, so far as thereby appears, no fraud is shown, nor anything condemned by law; that the objectionable facts are shown by evidence *dehors* the instrument, and that under such circumstances the question is whether there was a fraudulent intent in fact on the part of the assignors, which is to be determined by a consideration of all the circumstances under which the assignment was made; and that an honest mistake of law or of fact, so shown, ought not to vitiate the deed. In other words, that where the court is not confined to a mere inspection and construction of the deed its validity is to be determined by the existence or nonexistence of a fraudulent purpose on the part of the grantors, and that a merely unlawful provision, disclosed by evidence *aliunde* the deed, should not affect it as a whole, but that it should be upheld save as to such provision. Two questions are presented by the inquiry: *First*, whether the intent which is the subject of investigation is the personal intent

of the assignor, or the technical intent of the statute against fraudulent conveyances; and, *second*, whether the intent, if found, as matter of fact, by evidence outside the deed, is in any respect different from the intent discovered by an inspection of the deed itself.

Mr. Bigelow, in his work on Frauds, (volume 2, p. 374,) in discussing the question whether it is necessary to show a personal fraudulent purpose of the debtors to invalidate a conveyance, the necessary effect of which is to hinder, delay, or defraud creditors, says: "The truth appears to be that to have taken the statute literally would in most cases have nullified the law; and accordingly, in all the great range and number of cases relating to the statutes against fraudulent conveyances, there is hardly to be found, apart from one or two well-defined situations, a single specific authority, which would be generally considered as of weight, for the proposition that the 'intent' of the statute is a personal intent. It is true, indeed, that proof of such intent will always make a case under the statute; and it is everyday practice for the courts to receive evidence for and against such intent. But in most cases the effect, whatever the purpose, of evidence of a personal intention to defraud, is only to strengthen a case that, if sustained, might have been made without such evidence." Mr. Burrill, on the other hand, contends that the true rule of construction is such that "in order to bring an assignment by a debtor within the statute of fraudulent conveyances, (at least in its original and unabridged form, and in reference to its professed title,) on the ground of an intent to hinder and delay, there must be an intent to delay and hinder actually entertained by the debtor, and not only an actual intent, but a covinous and fraudulent one. But there is a class of cases establishing a very different rule of construction to the statute in some states, and constituting there the law of the land." Burrill, Assignm. § 330. In this state, in a line of decisions beginning with Bank v. Douglass, 11 Smedes & M. 469, it has uniformly been held that where, upon the face of an instrument, an unlawful purpose appears, the law will impute to the grantor a fraudulent intent, and avoid the deed, upon the maxim that one must be held to have intended the consequences of an act done by him. It is admitted by counsel for appellees that if, upon the face of the instrument, it appeared that the assignors had devoted the partnership property to the payment of their individual debts, or that a part of the property purporting to have been conveyed by it was in fact reserved, the assignment would be annulled. But it is argued that this result would follow because the law would impute under such circumstances to the assignors, from the face of the instrument, a covinous and fraudulent intent. In other words, that the personal intent is that which in all cases must be discovered, and that it must be a fraudulent one to avoid the deed. We do not so understand the decisions. An act otherwise lawful may be invalidated because of the fraudulent personal intent of the party, but an act in and of itself unlawful cannot be made lawful because of the absence of actual fraudulent intent on the part of the actor. Where the intent is a fraudulent one, and the consequences of the act injurious, the fraudulent intent avoids it. Where the act is unlawful, though the actual fraudulent intent is absent, it is avoided because it is unlawful. Nightingale v. Harris, 6 R. I. 321, the case often referred to as supporting the proposition that the fraud which will vitiate an assignment must be the intentional fraud of the assignor, has been practically overruled in the more recent case of Gardner v. Bank, 13 R. I. 155.

It is evident that the nature and effect of an act cannot be changed or controlled by the character of the evidence by which it is proved. An unlawful act proved by the face of the deed is merely an unlawful act. An unlawful purpose proved by extraneous evidence is not the less unlawful. The question is not how the fact shall be proved, but it is, what effect does it have when proved? And so are the authorities. Southard v. Benner, 72 N. Y. 424; Gere v. Murray, 6 Minn. 305, (Gil. 213;) Sturdivant v. Davis, 9 Ired. 365; Ranlett v. Blodgett, 17 N. H. 298; Gardner v. McEwen, 19 N. Y. 123; Coolidge v. Melvin, 42 N. H. 510; Clow v. Woods, 5 Serg. & R. 275; Gibson v. Love, 4 Fla. 217; Putnam v. Osgood, 52 N. H. 148; Orton v. Orton, 7 Or. 478.

It might be sufficient for the disposition of this case to say that the reservation by N. H. Bradley of a part of the proceeds of the policy of insurance, which was the property of the firm, was sufficient to avoid the assignment, because it was an act done at the time, and as a part, of the assignment, the necessary consequence of which was to prevent the assignment from operating upon the property according to its professed purpose; but we are also of opinion that the preference to Harding for the taxes due upon the property of the individual members of the firm was a reservation of a benefit to them in the assigned property, and would alone have the same effect. In truth, the assignors owed Harding nothing, and, unless it be that this preference was a reservation of a benefit to the members of the firm, it was the preferring of a fictitious debt, and that would also avoid the deed. Bump, Fraud. Conv. p. 376, states the law to be "that an appropriation of the property to the payment of debts not owing by the assignor, nor contracted on his account, or for a larger sum than is due to the prejudice of his creditors, is evidence of fraud. This will not, however, make the assignment void unless the assignee participates in the fraud. No creditor is concluded by taking under the assignment from impeaching any of the debts attempted to be secured by it, and showing fraud and collusion in such of them as may stand in his way, and the payment of which would operate to his prejudice. The impeached claim is extinguished by the fraud, and the share that would otherwise have been appropriated to its payment sinks into the

residuum for the benefit of those who are entitled to the residuum by the terms of the deed." For this statement of the law he cites Mackintosh v. Corner, 33 Md. 598; Hempstead v. Johnston, 18 Ark. 123; Hardcastle v. Fisher, 24 Mo. 70; Harris v. Degraffenreid, 11 Ired. 89; Pinneo v. Hart, 30 Mo. 561; Nightingale v. Harris, 6 R. I. 321; Starr v. Dugan, 22 Md. 58; Woodward v. Marshall, 22 Pick. 468. Mr. Waite, in his work on Fraudulent Conveyances, (section 228,) makes a similar statement, relying upon some of these cases, as does also Burrill on Assignments, (section 355,) citing, in addition, the cases from Alabama. The Missouri court holds in accordance with the text of these writers. Maryland and Massachusetts have statutes on the subject by which their decisions seem to be controlled. We have been unable to find the statutes of these states. But in Woodward v. Marshall, 22 Pick. 468, it is held that "fraud on the part of an assignor, not participated in by the assignee, would not defeat the rights of the creditors to have the trust fund administered according to the statute; the court saying it is not one of the grounds mentioned in the statute for invalidating the discharge of the debtor." In Arkansas and Alabama it is also held that an assignment, though fraudulently made, is not void unless the assignee participated in the fraud. Hill v. Shrygley, 51 Ark. 56, 9 S. W. Rep. 845; Trussl v. Davidson, 90 Ala. 359, 7 South. Rep. 812; Harris v. Degraffenreid, 11 Ired. 89, was a controversy between a creditor and a *bona fide* purchaser from a trustee holding under a fraudulent deed, the fraud not appearing on the face of the instrument; and it was held that the purchaser got title. This case consists with our own decision of Covington v. Mayers, 62 Miss. 730. In Stone v. Marshall, 7 Jones, (N. C.) 300, it was held that the insertion of a fictitious debt avoided the assignment, upon the ground that the debts intended to be paid by the assignment formed the consideration for the conveyance, and that where a part of the consideration of a deed is against law the whole is void. Stone v. Marshall was overruled in Morris v. Pearson, 79 N. C. 253, upon the ground that the debts mentioned in an assignment for the payment of which it is made do not form the consideration of the conveyance, but that the nominal consideration recited in the instrument was its real consideration. On the other hand, it is held in Pennsylvania, New York, Kansas, Tennessee, and probably Kentucky, that the insertion of a simulated claim avoids the deed. Irwin v. Keen, 3 Whart. 347; Bank v. Wood, 45 Hun, 411; Jacobs v. Remsen, 36 N. Y. 668; Livermore v. Northrop, 44 N. Y. 107; Kayser v. Heavenrich, 5 Kan. 324; Lockhard v. Brodie, 1 Tenn. Ch. 384; Peacock v. Tompkins, Meigs, 317; Gibbs v. Thompson, 7 Humph. 179; Lehmer v. Herr, 1 Duv. 360.

The conflict in these authorities springs somewhat from the different points of view in which they are considered by the courts. If the assignee in the deed of assignment for the benefit of creditors is a purchaser for value, or, if because of the debts due to creditors, for the payment of which the assignment is made, their rights only are to be considered, it would seem that fraud of the grantor, not participated in or known by them, should not affect the validity of the conveyance; and if one or more of the claims to be paid are fraudulent the assignment should be upheld in favor of those whose debts are just. But with us the assignee is considered as a volunteer. He pays nothing for the conveyance, nor is the condition of any creditor changed by reason of its execution. If the conveyance is upheld, their claims are to be paid out of the property assigned; but, if it is avoided, they occupy no worse position than before. They lose nothing by reason of the attempt to prefer them. The whole effect of annulling an assignment is to disappoint the will of the assignor, which ought not to be effectuated if his purpose is an unlawful one. The conveyance is, in any event, valid so far as he is concerned, and cannot be assailed by him. But creditors who do not assent to it ought not to be precluded from pursuing their legal remedy, and subjecting the property assigned as the property of their debtor, unless some right superior to theirs has intervened. Assignments with preferences do not commend themselves to the courts, because of the inequality produced among a class of persons, each having an equal equity to a participation in the estate of the debtor. But since the law, by reason of the right of the debtor to control his own property, permits him to prefer one creditor to another, this inequality, alone, is not sufficient to condemn an assignment. Where, however, the power is exercised, it must be confined within legal limits, and no infringement upon the rights of creditors can be permitted. It is to be noted that the authorities cited by the text writers in support of the proposition that the insertion of a simulated claim does not avoid the deed are by courts in states in which, either by statute or by decision, it is held that the fraud of the assignor alone does not avoid the deed; North Carolina and Missouri only holding that the assignee is not a *bona fide* purchaser, and yet that the simulated claim is not ground of invalidating the assignment. We cannot assent to the correctness of these decisions. A creditor whose claim is not preferred should not be subjected to the additional claim of disproving the validity of preferred claims, recognized by the assignor, before he can reach the property or participate in its proceeds. The law gives and must preserve to a creditor the right of proceeding against his debtor to subject his property to the debt. He is not concerned about the claim of other creditors, and their existence interposes no obstacle to his subjecting the debtor's estate. The mere interposition by the debtor of a false claim, to which priority of right is by his act given over real creditors, operates necessarily to hinder and delay them, and probably to defraud them. They must, in any event, turn aside from the pursuit of their debtor or his estate, and litigate with the fictitious creditor, and are thereby hindered and delayed, or must submit to the unlawful ap-

propriation by the debtor of a part of his estate to such simulated debt, by which they would be defrauded. An insolvent debtor, for the reason that he is the owner of his property notwithstanding his indebtedness, may appropriate his estate to the payment of any just debts due by him; and, since each creditor is justly entitled to the whole sum due him, no legal wrong is done to any creditor by the payment in full of the demands of others, to the exclusion of his own, if the debtor's estate is insufficient to pay all he owes. It is upon this principle that the right of an insolvent to make a preferential assignment rests, but the debtor may not pass beyond the limit fixed by law, and apply his estate to the benefit of himself or of others, whom he does not owe, to the injury of creditors; for this is, in and of itself, a fraud upon them, regardless of the secret purpose of the debtor.

Much of the apparent inconsistency in judicial utterances arises from the fact that the word "fraud" is sometimes used as though applicable only to an act done with a corrupt or covinous intent, whereas, in legal terminology, it has a much broader meaning and application. Voluntary conveyances have been in very many cases held to be fraudulent as against creditors, where there was an absence of any other evidence of a fraudulent intent on the part of the grantor, other than the fact and character of the conveyance and the insolvency of the grantor. No case can be found in which the absence of a personal fraudulent purpose has given validity to a voluntary conveyance by an insolvent debtor of his whole estate; and it would be manifestly immaterial whether the character of the conveyance appeared on its face, or should be proved to be voluntary by evidence *debors* the instrument. It is unnecessary to express any opinion as to what would be the effect where, by honest mistake of fact, reasonably occurring, the debtor has unintentionally included as a recognized claim against him one having no existence. It will be time enough to consider that when presented. In any event, the courts could not relieve against such mistake save under such circumstances as would warrant reformation of the instrument according to the practice in chancery. Authority, however, is not wanting for the proposition that where a mistake is made in such an assignment, which under other circumstances would be corrected by a court of equity, the court will not interfere to correct it because of the strong equity of the general creditors, but will leave it to stand or fall as executed by the party. Hunt v. Rousmanier, 1 Pet. 1; Anderson v. Tydings, 8 Md. 427.

Reversed and remanded.

(44 La. Ann. 561)

BRADY v. BRADY. (No. 10,929.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

Appeal from civil district court, parish of Orleans; ALBERT VOORHIES, Judge.

Action by Mrs. T. J. Brady for a separation from her husband's bed and board, and to enjoin him from alienating the community property. From a judgment for plaintiff, allowing her alimony, defendant appeals. Appeal dismissed.

Buck, Dinkelspiel & Hart, for appellant. *Henry P. Dart*, for appellee.

BREAUX, J. The plaintiff sued the defendant for a separation of bed and board; also for an injunction restraining the defendant from alienating the property of the community. The defendant filed the plea of general denial. A short time after, the plaintiff by rule prayed to be allowed alimony, as she was without means of support. After legal hearing, she recovered alimony, to be paid monthly by her husband. From this interlocutory judgment allowing her alimony the defendant has appealed. On appeal the attorney representing the plaintiff filed a motion to dismiss the appeal, on the ground that it is premature, and from an interlocutory judgment, and that the court is without jurisdiction *ratione materia*. The appellant also files a motion to dismiss, and annexed to it a copy of the judgment dismissing plaintiff's suit in the district court. Both the appellant and the appellee move to dismiss the appeal. It is therefore ordered that the appeal be dismissed, at appellant's costs.

(44 La. Ann. 569)

STATE v. TOWNSEND. (No. 11,024.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

CRIMINAL DOCKET—SETTING CASES FOR TRIAL.

In the absence of any special rule of court fixing cases for trial when reached on the docket, the defendant in a criminal case cannot be ruled to trial without a previous setting of his case, or other proper notice giving him time to subpœna his witnesses.

(*Syllabus by the Court.*)

Appeal from district court, parish of Richland; R. P. WILLIAMS, Judge.

Conviction of Tom Townsend. Defendant appeals. Reversed.

Todd & Todd and *Fergus Kernan*, for appellant. *Walter H. Rogers*, Atty. Gen., for the State.

FENNER, J. The bill of exceptions recites, in substance, that prior to proceeding with the trial, counsel for defendant represented to the court that a material witness, residing in the parish, and without whom he could not go to trial, was absent, and that, although he had issued a subpœna for him, there had not been time to serve it; that the case had just been called, and that there had been no previous setting of the case for trial; that he was entitled to time to have his witness served; and that the granting of a short time would be sufficient. The judge overruled the application, and proceeded with the trial. The judge, in his statement appended to the bill, does not contradict or traverse any statement therein contained, but simply based his action on defendant's lack of diligence. Both the judge *a qua* and the attorney general seem to treat this as a mere ordinary application for a continuance on the ground of absence of a witness. If it were such, it would not be

entitled to a moment's consideration, not being supported by any affidavit of the evidence or other necessary facts. We regard it in a much more serious light,—as an objection to going to trial on the ground that the case was called without having been previously set for trial, and without the allowance of any time whatever to the defendant for the summoning of his witnesses. It is true that this court has held that, "where the court had adopted a special rule authorizing such a mode of procedure, a case may be called on being reached on the regular docket before it has been fixed for trial." State v. Lartigue, 29 La. Ann. 642. The judge does not advise us that any such rule has been adopted in his court, and we cannot presume it. The statements of the bill, approved by the judge's signature, strongly suggest the contrary. The adoption of such a rule would have operated all needful notice to defendant, and would have put him under the necessity of diligence to be ready with his witnesses when the case was reached upon the docket. But certainly defendant is entitled to some kind of notice as to when the trial of his case will be taken up. Under the showing made by this bill, we think the objection was well taken, and the judge erred in overruling it. It is therefore ordered that the verdict and judgment be annulled and set aside, and that the case be remanded for further proceedings according to law.

(44 La. Ann. 562)

STATE *ex rel.* CITY OF NEW ORLEANS v. ST. CHARLES ST. R. CO. (No. 10,921.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

STREET RAILROADS — STREET REPAIRS — MODIFICATION OF CONTRACT.

1. The St. Charles Street Railroad Company, under its contract with the city of New Orleans, was to plank Baronne street from specified points.

2. The city of New Orleans having caused the contract to pave this street between the said specified points to be adjudicated to the Rosetta Gravel Paving & Improvement Company, and the defendant company having submitted propositions which have been acted upon to pay part of the cost of graveling the street, in lieu of the performance of its paving contract, the city must rescind its action in the matter of the said adjudication and of cost, if there be cause, before suit can be maintained, to enforce the original contract.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Suit by the city of New Orleans against the St. Charles Street Railroad Company to compel it to plank a certain street along which defendant's tracks are laid. From a judgment for defendant, plaintiff appeals. Affirmed.

Samuel L. Gilmore, Asst. City Atty., for appellant. *Harry H. Hall*, for appellee.

BREAUX, J. The relator sues to compel the defendant to plank Baronne street, alleging that the defendant bound itself by contract to plank all mud streets through which its tracks shall pass, with the exception of Dryades street. The defendant, answering, says that it is ready to comply with its contract by planking Baronne street from Howard avenue to a point about equidistant between Sixth and Seventh streets, being that part of Baronne street occupied alone by its tracks; but that the property holders objected, and presented a petition to the common council for permission to have Baronne street paved with Rosetta gravel; that the city comptroller advertised for sealed proposals to pave the said street with said gravel; that the mayor was authorized to contract with the Rosetta Gravel Paving & Improvement Company to pave the said street, and that the city has by its several acts made it impossible for the defendant company to comply with the alleged contract. Judgment was rendered dismissing plaintiff's suit as in case of nonsuit, from which the relator prosecutes this appeal.

The petition of the property holders on Baronne street states that the defendant company has consented to pay the amount that would be required for laying a plank road on the said street. It is also shown that a committee reported to the common council that the defendant company has generally complied with its contracts, except in so far as relates to the planking of Baronne street, and this "default the company are hardly responsible for, as the property owners objected to the planking, and failed to agree upon a substitute. The question is now practically settled, however; the property owners having petitioned for a general gravel pavement, the railroad contributing to the expense of same what it would cost to plank the street." Subsequent to the contract entered into between the plaintiff and the defendant company the right to gravel this street was adjudicated to the Rosetta Paving & Improvement Company. The defendant company having acquiesced in this adjudication, and promised to pay the cost of planking the street, instead of actually planking it under the original contract, a difference has arisen about the cost to be paid by the defendant. The following is an extract from a letter of the president of the defendant company, addressed to the city surveyor: "That the St. Charles Street Railroad Company is willing to pay in full discharge and satisfaction of its obligation to plank Baronne street, as aforesaid, a sum equal to 50 cts. per superficial square yard for each such yard of gravel laid on Baronne street between its track and gutter. That it will expend five cents for each superficial square yard in repairing said street," etc. Several witnesses testify that this is less than should be paid. The question remains undetermined. Were this cost agreed upon or fixed, no reason is stated why the street should not be graveled in compliance with the ordinance on the subject. All parties concerned favor the change proposed from plank to gravel, and have in due form expressed a preference for the latter. The question to be settled (it seems to be the only cause of disagreement) is as to the cost which should be paid by the defendant, to be applied towards graveling the street. Al-

though evidence was admitted on the subject, that issue is not before us for decision. Unless the action of the council be rescinded for cause, or issue be presented to the court and evidence adduced showing an unwillingness of the defendant company to comply with its obligation, necessity for judicial action does not arise. We agree with the district judge that the action is premature, and that, until the question of the gravel contract be settled, and the right under the contract adjudicated to the gravel company determined, the suit is premature.

Judgment affirmed, at appellant's costs.

(44 La. Ann. 492)

OLDSTEIN v. FIREMEN'S BLDG. ASS'N *et al.*
(No. 10,899.)

(*Supreme Court of Louisiana.* April 4, 1892. 44 La. Ann.)

ADJACENT LAND OWNERS—PARTY WALLS—AIR AND LIGHT—ORDINANCE.

1. Merely building a wall by one of two adjacent owners, and placing the same in equal proportions on each lot, does not make it a party wall in absence of agreement to that effect.

2. The owner of the lot adjacent has no right to have the windows in the wall closed before he makes it a wall in common.

3. Servitude of light and of air through windows in a wall cannot be acquired by prescription against the owner of the lot adjacent, unless he is able to assert the right to have them closed.

4. The owner of the adjacent lot, that on which servitude is claimed, has the right to use, to enjoy, and to dispose of his property.

5. He who builds either above or below his soil, adjacent to his neighbor's property, must build it in a perpendicular line.

6. He may build as high as he pleases, although it may occasion inconvenience, provided the building does not cause damage.

7. Damage must be proven to enable a private individual to invoke the benefit of a city ordinance as to the moving of wooden buildings within certain limits. Inconvenience, although great, will not suffice.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit by Abraham Oldstein against the Firemen's Building Association and others to recover damages for obstructing his light. From a judgment for plaintiff, defendants appeal. Modified.

Moise & Titche and *W. B. Lancaster*, for appellants. *Moise & Cahn*, for appellee.

BREAUX, J. Plaintiff is the owner of an improved lot in this city, which he purchased from Mrs. Emma Beers. The building improvement is a two-story dwelling house constructed years ago. Witnesses residing in the neighborhood, advanced in years, did not know when it was built. They saw it in their youth, where it now is. One half of the wall was constructed on the lot which now belongs to the defendant. It is not proven that any of defendant's authors contributed in any manner to the building of this wall. There are eight windows in this wall,—four in the first story, and the others in the second. Four of these windows have blinds opening and closing on their hinges. The defendant bought the adjacent lot, on which the said wall partly rests, from the Firemen's Building Association. The structures on defendant's property were, at the time of his purchase, two small houses,—one an old frame cottage, fronting on the street, with one of its side walls extending from the banquet to the front corner of plaintiff's house, on or near the boundary line of the two premises; the other was in the rear of his lot. The shutters of defendant's cottage opened on plaintiff's flower garden, in front of his house. The defendant had 18 inches cut off the western side of the building, (the side adjacent to plaintiff's lot,) and reduced its width by that number of inches. His shutters no longer open on plaintiff's lot. The space between the two corners of plaintiff's building and defendant's cottages, separated by 18 inches cut off, as just mentioned, was closed by a wall about 7 feet high. Another building—the one in the rear of the lot—was moved by defendant against the wall of plaintiff, leaving a space along the wall between this moved building and defendant's cottage in front. This space was afterwards taken up with a new structure against plaintiff's wall and connecting defendant's cottage with the said moved building. There is no window in that wall opposite this part of the building. The uprights of the building touch the wall of the plaintiff. These uprights average three to four inches in thickness. Laths were nailed thereon, and afterwards the inside wall was plastered. This part of the building has no wall on the outside, other than plaintiff's. The frame of each of the defendant's buildings is self-supporting. Four of the windows are almost entirely closed by the wall of defendant's building. That part not closed by the wall was closed by the defendant with boards. Defendant's buildings are covered with slate. Where the roof touches the wall there is a coat of plaster serving as a valley or conduit to the rain falling on the roof. A shed was constructed in the rear of the last building, one of the walls of which completely obstructed two windows. The two remaining windows were closed at first with boards; afterwards screens were erected. Plaintiff's vendor states as a witness that the closing of the windows darkened the apartments of the house and caused dampness. It was her reason for selling, she says. A skylight was opened. It did not give sufficient light, another witness testifies, and it is necessary at times to light the gas in the kitchen. They also testify that the value of the property was depreciated; the danger from fire was increased.

Pleadings: Plaintiff alleges that the wall is a party wall, and that the defendant has no right to close his windows, which, during more than 30 years, had given access to light and air; that his possession and that of his antecedent owners entitles him to these windows; that the defendant has annoyed and harassed him by depriving him of light and air. For damage to his property, deprivation of light and air, and the value of the half of the wall, he claims $4,600. The defendant excepted to plaintiff's petition on the

ground that his allegations were contradictory, and his demands inconsistent, and that he should be made to elect one or the other. In compliance with the court's ruling, plaintiff, after having reserved a bill of exception to the ruling, elected to abandon the demand for the value of the wall, and vested his case on its being a wall in common. The defendant filed a general denial, and, in addition, alleged that his acts on his premises were in pursuance of his legal rights as owner. The plaintiff also filed a special plea of immemorial possession, and pleaded the prescription of 10, 20, and 30 years. He also filed a plea in estoppel, based on defendant's allegation in his answer that, in acting as he had, he pursued his legal right as owner. The judge of the district court maintained the pleas of prescription and estoppel, and ordered that the hindrances be removed, and recognized a servitude of light and air as described in the petition.

The owner of a lot in a city who first builds in a place not surrounded by walls may rest one half of his wall on the land of his neighbor. Civil Code, art. 675. There is conflict between the article just referred to and article 505, Civil Code. Under the latter, the ownership of the soil carries with it the improvement. Under the former, he has the right to erect a construction on the owner's property, and to remain the owner until his neighbor may choose to make it a wall in common. Built at his expense, he is the owner. Jeannin v. De Blanc, 11 La. Ann. 465; Lavergne v. Lacoste, 26 La. Ann. 507. In each of the cases just referred to, the wall which was the subject of litigation was built at the individual expense of one of the neighbors, and rested upon the line of division of the properties adjacent one to the other. In each it was held that the wall was owned by the proprietor at whose expense it was built. The case principally relied upon by the plaintiff is not similar. The two buildings were separated by a wall in common. It was presumed common for the reason that each building on the respective lots rested on the whole wall. It was decided that the flues in this wall also were in common, as well as the wall used by both proprietors. Weill v. Baker, 39 La. Ann. 1102, 3 South. Rep. 361. In the pending case, prior to moving the buildings, as before stated, there was no structure against or near the wall. The fact that this wall separated defendant's lot from plaintiff's houses does not make it a wall in common. Every wall which separates a yard and garden in a city shall be presumed to be common. Rev. Civil Code, art. 677. This article corresponds to article 653, Code Nap. Baudry de Lacantinerie, commenting upon the latter, says: "The wall which separates a house from a garden or lot is not presumed a wall in common, (*mitoyen.*) The law reads 'between buildings,' and between inclosure and garden, and not between a building and inclosure and garden." Volume 1, p. 884. "The owner of the inclosure or of the garden has not the same interest in constructing the wall as the proprietor of the house." Id. He cannot be forced to surrender part of his land, and made to pay the cost and value of the wall, although of no service to him in building. The ownership remains in the one who has had it constructed, until the owner of the adjacent lot makes it a wall in common. "The defendant contends that until the wall is made common it is her exclusive property. * * * It appears to me that view of the case is correct." 11 La. Ann. 465. It was decided in said case that plaintiff did not have a right of action to have the window closed in a wall which he did not choose to make a party wall. It is obvious that, in order that prescription may be acquired, the owner must be able to assert his right. "The wall belonged to plaintiff in full ownership until the owner of the contiguous lot should pay for half of it; and this right would exist so long as that wall stood." 26 La. Ann. 507. It is in some respects different under the French Code.

In a case in which the facts were somewhat similar to those in the case at bar the plea of immemorial possession was maintained. The grounds were that the owners of the adjacent estate, before the wall had been made one in common, had the right to have the windows closed before making it a party wall. "They (the said parties) permitted a servitude to be established which they might have prevented." "Legislation and jurisprudence have established that servitude can be acquired by prescription." Montagnac v. Montagu, Cassation, 1869, p. 387. In Jeannin v. De Blanc the reverse is decided: "The wall belongs exclusively to the party who built the wall." His right of action "remains in suspense until he may see proper to make it a wall in common." This decision is not the only authority. Under the Code of 1808 the proprietor of a wall, not in common, adjoining the estate of another, had the right to make windows, under certain restrictions. The articles conferring the right were not included in the Code of 1825. The reasons given for the suppression of those articles shows that it was not the intention to prohibit the openings in walls thus situated. "Nous avons cru devoir supprimer ces deux articles qui prescrirent au proprietaire d'un mur non-mitoyen, joignant immediatement l'heritage d'autrui, de n'y faire des ouvertures ou fenetres qu'a une certaine hauteur et avec des barreaux et a verre dormant. Nous avons pense que chacun doit etre le maitre de faire dans son bien, ce qui lui plait, et par consequent d'ouvrir dans son mur, telles fenetres que bon lui semble." Travaux Preparatoires, p. 73; Civil Code La. 1825. The question had been previously considered in this and other states, and the doctrine has since been followed in numerous well-considered cases. "The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and use of lands, is, that no right of the said character can be acquired, that is, the prescriptive right to light and air, without express grant of an interest in or covenant relating to the lands over which the right is claimed." Wait, Act. & Def. pp. 297, 295, and *alia*. The French text writers are equally as clear as to the

right of the owner of the lot adjacent to build on his property. "The owner who has possessed during 30 years windows at a prohibited distance has acquired the right to conserve them. But has he, in addition, acquired the right to prevent the neighbor from constructing on his land buildings near enough to render the lights useless?" The answer of the commentator is in the negative. 1 Mourlon, p. 861. Equally as clear is 8 Laurent, p. 54: "Si, dans un mur joignant immediatement l'heritage d'autrui, il pratique des vues au lieu de jours, s'il les possede pendant trente ans, il aura recouvre la liberte de son heritage, la servitude legale de l'article 676 sera eteinte. Mais il n'aura acquis aucun droit sur l'heritage du voisin; celui-ci conserve, de son cote, la liberte de son heritage, il peut construire meme contre les fenetres de son voisin, sans etre tenu de respecter un pretendu droit de vue qui n'existe pas." The wall is not a party wall. The owner of the adjacent lot has not paid its cost, nor its value. His buildings were not erected against the wall to support any weight. The testimony gives rise to the immediate impression that defendant's buildings were constructed against the wall to close the windows, so as to prevent servants and children from prying upon the privacy of his dwelling and premises.

The plaintiff contends that it is a partition wall, in order, evidently, to establish a servitude of light. If we were to maintain plaintiff's contention that the wall is one in common, prescription would at most commence to run from the time the buildings were moved against the wall. This would not be of any service to his cause. The acquisition of the right would not have a retroactive effect. There was no estoppel on the part of the defendant. The allegation in his answer that he acted in pursuit of his right as owner, is not such an admission as makes it conclusive that the wall was common. The wall not being a party wall, the neighbor had no right to its use, and, without authority, to close the windows as was done. The plaintiff having alleged a party wall, and the defendant having denied, each manifestly against his interest, we treat the question as an original question, and base our conclusions on the testimony which establishes that it was not in common. "Generally a party is not estopped by assuming a petition forced upon him by the opposite party." 7 Amer. & Eng. Enc. Law, p. 22; 1 Greenl. Ev. p. 34.

Plaintiff urges that a city ordinance has been violated, relating to the moving and remodeling of wooden buildings. Private individuals have no right of action unless they have personally suffered damages. The allegations with reference to damages were not proved, and plaintiff is therefore left without cause of complaint on account of the said violation. The additional danger from fire was not shown, nor any increase in the rate of insurance. No depreciation in the value of property was proved. The vendor to plaintiff says that, after the structures had been moved against the walls, she accepted $1,000 less than the price at which she had previously offered the property. This statement, uncorroborated by other testimony, does not establish the difference in the value of the property, which should be shown by direct reference to the value of the house before the moving and after, and not by what a vendor asked one day and determined to accept the next. "Ownership gives the right to use, to enjoy, one's property in the most unlimited manner not prohibited by law." Rev. Civil Code, art. 491; Id. art. 450. Plaintiff lastly argues that the city ordinance was not only violated, but that the defendant, in violating it, had concealed his breach of the law, and fixed matters so as to prevent an injunction. Our conclusion makes it unnecessary to consider this proposition at length. The defendant had no right to close windows as he did, and to build against and use his neighbor's wall as he did. Plaintiff had no right under said city ordinance, (actual damages to him not having been proven,) to prevent him from moving his buildings. The defendant has the right to make the wall one in common by paying half its value, or he can build as near to plaintiff's wall as he chooses, provided his structures do not touch his wall. The judgment appealed from is affirmed in so far as it orders that the boards nailed on the windows, and any of defendant's structures touching plaintiff's wall, be moved, and made not to touch it; also in so far as it orders the plaster serving as a valley or conduit for water to be taken off plaintiff's wall. It is amended by rejecting plaintiff's demand to have them moved away further than to prevent their touching plaintiff's wall. Judgment amended, and, as amended, affirmed, at appellee's costs.

(44 La. Ann. 454)

CALDER *et al.* v. HIS CREDITORS. (No. 11,025.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

INSOLVENCY — PRACTICE — APPOINTMENT OF PROVISIONAL SYNDIC — SALE OF PROPERTY.

1. The general rule of our insolvent laws requires that the property surrendered shall be held intact during the pendency of proceedings for the election of a definitive syndic; and provisional syndics, when appointed, are not generally authorized to sell property, but are required to hold all the assets, and deliver them to the syndic.

2. But this general rule suffers exceptions in cases where, owing to the nature and situation of particular property, a sale is necessary to prevent its deterioration, and preserve its value for the benefit of all concerned; in which cases the sale may be sustained as a conservatory act, which the law expressly authorizes provisional syndics to perform.

3. It certainly requires a strong case to justify the sale of immovable property as a conservatory act; but in the case of a sugar plantation in course of cultivation, where it is admitted that the insolvent is without means to run it, that the abandonment of its cultivation would operate a great deterioration of value, and that its prompt sale is necessary for the interest of all concerned, and particularly when the first mortgage creditors to the probable value of the plantation and the provisional syndics concur in the facts and in the opinion of the advisability of the sale, the judge is vested with a legal discretion

to order the sale as a conservatory act, and this court approves its exercise.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

The Whitney National Bank, as a creditor of D. R. Calder, seized his plantation, and advertised the same for sale. Pending the notice, he made a cession of his property under the insolvent law, and provisional syndics were appointed. The bank intervened, and took a rule on the syndics to show cause why the court should not order the plantation to be sold. From a judgment making the rule absolute and granting the order, the syndics appeal. Affirmed.

Horace E. Upton and *Henry L. Lazarus*, for appellants. *White, Parlange & Saunders*, for appellee Whitney Nat. Bank. *Carroll & Carroll*, for appellee Bank of Commerce, party in interest. *Henry C. Miller*, for appellee Canal Bank, party in interest.

FENNER, J. The Whitney National Bank is a creditor of D. R. Calder for $20,000, secured by first mortgage on the Orange Grove plantation. After fruitless efforts by the insolvent and the bank to effect a private sale of the plantation, the bank sued out executory process in the civil district court of this parish, under which the plantation was duly seized and advertised for sale to take place on March 19, 1892. On the 15th of February, 1892, Calder made, in the proceeding now before us, a cession of his property under the state insolvent law. Provisional syndics were duly appointed and qualified. Thereupon the bank intervened in the insolvent proceedings, and, representing the necessities and circumstances of the case as indicated in the agreed statement of facts which we reproduce further on, they took a rule upon the provisional syndics to show cause why the court should not make its order allowing the sale of the plantation to proceed under the order of seizure and sale as advertised, under the condition that the proceeds should be paid over to the syndics, and held by them as funds of the insolvency, subject to the same mortgages resting on the plantation, and to be distributed by them according to law. The syndics appeared, and showed cause against the rule on two grounds, viz.: (1) That, under the law, the court is without authority or power to grant the relief demanded. (2) That no legal order for the sale of the property referred to in said rule can be granted until a definitive syndic is elected herein, and the cession made by the insolvents accepted by their creditors. The case was submitted to the court under the following agreed statement of facts: "(1) The Whitney National Bank of New Orleans held and owned, and still holds and owns, the note of D. R. Calder, one of the above-named insolvents, for $20,000, dated March 30, 1889, payable one year from date, and payment extended to January 1, 1891. (2) The said above described note was secured by first mortgage on the Orange Grove plantation, in Lafourche parish, La., owned by said D. R. Calder, before H. N. Coulon, notary public in said parish of Lafourche, and duly recorded. Said mortgage contains the pact *de non alienando*. (3) On December 26, 1891, the said Whitney National Bank sued out executory process on the above-mentioned note and act of mortgage, in the suit entitled 'Whitney National Bank v. D. R. Calder,' No. 34,586 of the docket of the civil district court for the parish of Orleans, in which said parish said D. R. Calder was resident and domiciled at the time. (4) In said proceedings, after due notices and delays, the writ of seizure and sale issued and was placed in the hands of the sheriff of Lafourche parish for execution, and thereunder, after due notices and delays, the said sheriff seized, and then advertised for sale, according to law, the said Orange Grove plantation. (5) After the issuance of said writ and the seizure of said plantation, as above recited, the said John Calder & Co., and the said D. R. Calder, filed their petition making a cession of their property to their creditors, under the insolvent laws of Louisiana, in the proceedings hereinabove entitled. (6) The insolvents surrendered, as part of their assets, seven sugar plantations under cultivation, one of which was the said Orange Grove plantation. (7) The only funds surrendered by the insolvents, or since received by the provisional syndics, are seven thousand dollars, part of the proceeds of the crop of 1891, made on said sugar plantations, or on some of them, and now applicable to the privilege or ordinary creditors of the insolvents. (8) It will cost about $1,500 a month to cultivate and keep up the Orange Grove plantation from now until July, 1892. (9) If said Orange Grove plantation is not so cultivated and kept up, it will rapidly and largely deteriorate in value; the drainage will become obstructed with vegetation and earth; the labor will leave the place; the crop will be lost; and a heavy expenditure of money will be necessitated to restore the plantation to its present earning capacity and value, and in consequence of such deterioration the plantation will sell for much less than could be obtained for it now. (10) The opinion of persons who own or deal with sugar plantations is that they will not sell as advantageously later in the season as they would now; that, while the plantation might sell for a little more later on, it would not, in all probability, sell for as much more as would have been expended in cultivating and keeping it up; and if, in consequence of an unfavorable season, too much rain or too little, a *crevasse*, or visitation of worms, the crop did not look well, the plantation would probably sell for much less than it would bring now. (11) The syndics have not sufficient funds in the insolvency to cultivate and keep up all the plantations surrendered, even if they are permitted to use all the funds in the insolvency for that purpose. If they undertake to cultivate the places, they will be compelled to borrow money for that purpose; and, if the plantations should not find a purchaser when offered for sale, then the syndics

will be compelled to borrow largely in order to complete the crop and get back the sums so borrowed. (12) The said Orange Grove plantation was offered for sale nearly six weeks preceding the cession of property herein, and the highest price offered in that time did not equal the amount of the mortgage resting on said plantation. (13) The meeting of creditors for the election of a syndic will open in this case on March 21, 1892. (14) If the Whitney National Bank is permitted to sell under its writ, as demanded in its rule, it is willing to advance the funds necessary to run the plantation until the date of the sale; and the provisional syndics are of the opinion that, if such sale can be legally allowed by the court, it will be greatly to the interest of all concerned. [Signed] HORACE E. UPTON and H. L. LAZARUS, Attorneys for Provisional Syndics. WHITE, PARLANGE & SAUNDERS, Attorneys for Whitney National Bank." After hearing, judgment was rendered making the rule absolute, and granting the order prayed for, from which the provisional syndics prosecute the present appeal.

The case really presents no issue except the issues of law raised in the pleadings, viz., to wit, (1) whether, in any case, the court has power to order the sale of property surrendered before the election of a definitive syndic; and (2) whether it had authority to make the particular order here granted.

If the court had the authority to order the sale, the statement of facts exhibits conclusively a proper case for its exercise. We deal with the substance, not the form, of things. It is not of the slightest consequence whether the order is applied for by the bank or by the provisional syndics. Both were before the court; both submitted the question to the court; both agreed upon the facts which rendered the sale necessary; and the syndics expressly told the court that they were "of the opinion that, if such sale can be legally allowed by the court, it will be greatly to the interest of all concerned." Their counsel now say in their brief: "The provisional syndics are not before the court urging that the sale of the mortgaged plantation was a conservatory act necessary for its preservation and safekeeping." We can give no heed to such a statement. They were before the court upon an agreed statement of facts showing that the sale of the property was a conservatory act, necessary to preserve the property from great deterioration in value, and advising the court that, if it could be legally done, the sale should be ordered in the interest of all concerned. We cannot permit them, in this court, to impugn the judgment of the court below on any other question than the one submitted, of judicial authority *vel non*. It is equally insubstantial to say that this sale was made in a proceeding conducted against the debtor, and under an order granted in a proceeding different from the cession, and which had been stayed by the latter. The sale was really made under and by authority here complained of, issued by the court in the insolvent proceedings. The bank asserted no pretension of right to proceed with the sale under the original order. It acknowledged the paramount authority of the insolvent court, and applied for its order as the warrant under which the sale should be made, and according to which the funds realized were to be held, controlled, and distributed by that tribunal. The case differs in no respect from what it would have been had the court rendered an independent order of sale without reference to the pending foreclosure proceeding. It prejudiced no right, and was a wise exercise of discretion, in the interest of economy, to allow the sale to proceed under the pending advertisement, if it was legal to make the sale at all. It was, moreover, a substantial compliance with the provisions of the law, under which suits against the insolvent do not abate, but are only stayed by the cession, and which require further proceedings therein to be conducted before, and under the authority of, the insolvent court. Code Pr. art. 165, No. 3; Rev. St. § 1816; State v. Ellis, 41 La. Ann. 41, 6 South. Rep. 55.

These formal objections being thus eliminated, the sole question remaining is whether or not the law vests the insolvent court with authority, in any case, to order the sale of assets surrendered, prior to the meeting of creditors and the choice of a definitive syndic. It cannot be denied that the general rule prescribed by our insolvent laws requires that the property surrendered shall be held intact during the pendency of the proceedings for the election of a syndic, and that provisional syndics, when appointed, exercise, ordinarily, only powers of administration, and must hold and deliver to the definitive syndic, when elected, all the assets which have been received by them. Such are the provisions of the law enforced by uniform jurisprudence. Rev. St. pars. 1793, 1794, 1812; Pitcher v. Creditors, 40 La. Ann. 784, 6 South. Rep. 98; Spears v. Creditors, 40 La. Ann. 650, 4 South. Rep. 567; Barkley v. Creditors, 11 Rob. La. 30.

But the lawmaker could not close his eyes to the fact that during the considerable delays that might intervene before the appointment of a definitive syndic, sometimes extending over many months, an inflexible adherence to this rule might impair, and even utterly destroy, the value of some of the surrendered assets. Hence he wisely invested provisional syndics with the power of "performing all the conservatory acts which may be necessary as well for the interest of the insolvent debtor as for that of the mass of creditors." Rev. St. 1793. It is, to our minds, self-evident that these powers embrace the power of sale, when that is necessary for the conservation of the property or its value. Even in cases of attachment the law wisely provides that property attached, if "of a perishable nature and subject to be lost or deteriorated during the pendency of the suit," may be sold *pendente lite*. The judge before whom the cession is pending is vested with a discretion to determine what are such conservatory acts as are necessary to preserve the property or its value for the interest of all concerned. It certainly requires a clear case of necessity to justify

the sale of immovable property as a conservatory act. But no one can read the statement of agreed facts without perceiving that it presents the strongest possible case. The syndics themselves, who are the only appellants, unreservedly concede the necessity of the sale in order to prevent serious deterioration in value, and that it would be greatly to the interest of all concerned. What was the judge to do? Was he to sit idly, and permit the plantations to go to waste and ruin, sacrificing the whole benefit of the planted crops? Or was he to embark the provisional syndics in the hazardous enterprise of borrowing large sums of money to run seven sugar plantations? If not, there was no other alternative but to order the sale to proceed, and, in so doing, we think he wisely exercised a legal discretion.

Judgment affirmed.

(44 La. Ann. 579)

NEWMAN v. CANNON, Sheriff, *et al.* (No. 11,041.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

VENDOR'S PRIVILEGE—SALE IN BLOCK.

When goods, on which a vendor's privilege is claimed, have been sold in block, and for a lumping price, and when the proof sustains the privilege on a part and fails to sustain it on the rest of the goods, the impossibility of separating the price is fatal to the allowance of the privilege.

(*Syllabus by the Court.*)

Appeal from district court, parish of Avoyelles; ADOLPHE V. COCO, Judge.

Action by H. & C. Newman against Clifton Cannon, sheriff, and others. From a judgment for plaintiffs, A. Lehman & Co. appeal. Affirmed.

Irion & Lafargue, for appellants. *Thorp & Peterman*, for appellees.

FENNER, J. When this case was before us last year (9 South. Rep. 439) we remanded it, in order to allow A. Lehman & Co. and other parties, claiming the vendor's privilege upon certain goods, the opportunity, by further evidence, "to improve the certainty of their identification, and to separate the price of the goods properly identified from that of those which cannot be identified." A. Lehman & Co. undertook to do this by further evidence, but failed to satisfy the judge *a qua*, who rendered judgment rejecting their privilege, from which they bring the present appeal. The only additional evidence offered is that of the same witness whose evidence was their main reliance on the former trial. He amplifies and strengthens his former evidence in some respects, but he does not overcome our conviction that a considerable portion of the goods claimed were not susceptible of identification, and that some of them had not even been sold by A. Lehman & Co. All the goods claimed and set aside by A. Lehman & Co. were sold in block, and adjudicated to them at a lumping price. It is impossible to separate the price of the goods on which their privilege is established from that of those on which they have proved none. This is fatal to their claim, and sustains the judge's ruling. Judgment affirmed.

(44 La. Ann. 580)

DUCOTE v. RACHAL. (No. 11,045.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

REGISTRY OF HOMESTEAD.

1. A registry of a homestead exemption of a farm, including "the necessary quantity of corn and fodder for the current year," is sufficient without specifying the particular quantity of corn and fodder.

2. The constitution requires no more, and courts cannot enlarge its requirements.

(*Syllabus by the Court.*)

Appeal from third magistrate's court, parish of Avoyelles; P. A. DURAND, Judge.

Action by C. J. Ducote against Henry Rachal. From a judgment for plaintiff, defendant appeals. Modified.

Irion & Lafargue and *H. C. Edwards*, for appellant.

FENNER, J. The plaintiff, claiming a privilege for a debt of $15, caused to be sequestered a quantity of corn on defendant's farm, which the defendant claims to be exempt, as attached to his homestead, under article 219 of the constitution, which exempts "on a farm the necessary quantity of corn and fodder for the current year." It fully appears that defendant had duly registered his homestead exemption, including his farm, and "the necessary corn and fodder for the current year;" that all the conditions entitling him to the exemption continued to exist; and that he did not have more corn, including that sequestered, than was necessary for the year. The magistrate nevertheless rejected the exemption, and maintained the sequestration. The magistrate gives no reasons for his judgment, and plaintiff has made no appearance in this court. It is suggested by appellee's counsel that the magistrate refused the exemption, because the registered homestead claim did not specify the number of barrels of corn to be exempted. The constitution requires no such specifications, and courts cannot enlarge the requirements of the constitution. There was a reconventional demand for damages, but the record exhibits no proof whatever in its support. The claim should not have been rejected, but only nonsuited. It is therefore adjudged and decreed that the judgment appealed from be amended by denying the privilege and dissolving the sequestration, and, further, that the judgment rejecting the reconventional demand be changed to one of nonsuit, and, as thus amended, the same be now affirmed, appellee to pay costs of appeal.

(44 La. Ann. 600)

WHELAGE v. LOTZ. (No. 10,791.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

SALE OF LAND—POWER OF ATTORNEY—EVIDENCE.

1. It is only parol evidence that is inadmissible, under the provisions of the Code, to prove agency to sell real estate. It permits a power of attorney to be conceived in any kind of private writing, even by letter.

2. Notwithstanding the admissibility of such documents, they must make clear and sufficient proof of the authorization to sell, without resort to any parol evidence to supply an ellipsis.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit by H. B. Whelage against Christine Lotz to compel her to execute title to certain land. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank Zengel and *Henry P. Dart*, for appellant. *James C. Walker*, for appellee.

WATKINS, J. This suit has for object to compel the defendant to execute title to real estate, and it is therefore petitory in character,—the demand of the petition being that the defendant be condemned to a specific compliance with her agreement, and to execute conveyance to the plaintiff of two lots of ground, with the buildings and improvements thereon, situated in the first district of the city of New Orleans, in the square bounded by Hunter, Tchoupitoulas, New Levee, and Benjamin streets, designated by the letters A and B, and measuring as follows, to wit: Lot A, 69 feet front on Hunter street, by 48 feet in depth, and front on Tchoupitoulas street; lot B, 26 feet front on Hunter street, by 48 feet in depth between parallel lines; "Lot A, forming the corner of Tchoupitoulas and Hunter streets, as will appear from the agreement to buy, hereto annexed as part of this petition." The following is plaintiff's proposition, viz.: "New Orleans, October 23rd, 1890. Baumgarden and Friedericks—Gentlemen: I have a client who will give $3,400 cash for the property corner of Tchoupitoulas and Hunter streets. See title for dimensions. Please submit this proposition to your clients, and let me have an early offer. Yours truly, FRANK ZENGEL, Attorney." Messrs. Baumgarden & Friedericks presented this communication to their client, the defendant, who wrote thereupon this indorsement, viz.: "I accept the above proposition. [Signed] Mrs. J. C. LOTZ." This proposition and its acceptance are the foundation of this suit.

The position of the defendant's counsel is that the offer was only to sell the "property corner of Tchoupitoulas and Hunter streets," and that it is described in plaintiff's petition as "Lot A;" and the averment of her answer is that her acceptance of plaintiff's offer did not include lot B, which she never contemplated selling, but which she expected always to reserve as her homestead, and which is subject to a special mortgage in favor of her minor children, to secure their interest in the succession of their father, and of which she has no power to divest them. The main controversy in the lower court was in relation to the admissibility of testimony, the greater part of which was admitted over defendant's objection; the judge *a qua* ruling that the objections urged went to the effect of the evidence after it had been received. Some of the testimony consisted of (1) a letter written by Baumgarden & Friedericks to Frank Zengel, having date October 24, 1890, in reference to his proposition of the day previous, and connecting it with "the measurements and conditions of sale, as advertised in the New Orleans Picayune" at a certain time; (2) a printed form, filled up, authorizing Baumgarden & Friedericks to sell property corner of Tchoupitoulas and Market streets; (3) a receipt of Baumgarden & Friedericks for $340, it being an advance of 10 per cent. on the price of contemplated purchase; and (4) the plan of the property as it was exhibited for sale by Baumgarden & Friedericks. The principal ground of objection that was urged to this character of proof was that it was insufficient and inadmissible for the purpose of disclosing in Baumgarden & Friedericks authority to sell real estate for the defendant; and insufficient for, and inadmissible to prove, either a promise to sell or a sale of real estate. We agree with our learned brother of the lower court, both as to his opinion in reference to the admissibility of the testimony and his appreciation of it. It is only parol evidence that is inadmissible, under the provisions of the Code, to prove agency to sell real estate. Rev. Civil Code, art. 2992; Hackenburg v. Gartskamp, 30 La. Ann. 898; Perrault v. Perrault, 32 La. Ann. 635. That article specially sanctions the right of a party to conceive a power of attorney in any kind of private writing, "even by letter;" hence the admissibility of the writings that were offered in evidence. But they do not, of themselves, prove defendant's authorization to Baumgarden & Friedericks. It may well be that they were authorized to sell for the defendant "the property [at the] corner of Tchoupitoulas and Hunter streets. It may well be that those gentlemen, acting in perfect good faith under such an authorization, advertised in the Picayune the property as one single property. It may well be that the plaintiff, making the offer he did, acted upon the information contained in that newspaper advertisement. But, if all that be taken for granted, there remains an ellipsis to be supplied by parol proof, and that is the defendant's authorization to them to make sale of two lots. Not only is this the case, but such evidence tends to enlarge plaintiff's proposition, as well as to alter his averments. On the whole, we are of opinion that the proof fails to disclose that *consentio mentium* necessary to constitute a contract binding between the parties in respect to the object of sale.

Judgment affirmed.

(44 La. Ann. 462)

SCHLIEDER v. DIELMAN *et al.* (No. 10,851.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

OPTIONS — CORPORATIONS — LIABILITIES — OBLIGATION OF CONTRACTS — BREACH — DAMAGES — FUTURE PROFITS.

1. An option is not an existing and complete agreement, which contains a condition, but it is the supplement of an agreement, to the performance of which the assent of another is of the essence.

2. It is a mere pollicitation, not yet ripened into a perfect, commutative contract. It belongs to that class of conditional covenants which obliges the party in whose favor such a stipulation is made to give notice to the one granting it of his intention to exercise it before it becomes obligatory on the other.

3. A private corporation is a person in law, quite as responsible for its contracts as natural

persons are. Notwithstanding such corporations possess the inherent power of dissolution at will, that right does not carry with it the authority of impairing the obligation of their contracts; but this liquidation, while it deprives the creditor of the power to compel specific performance, leaves his equitable remedy for the recovery of damages unimpaired.

4. As a general rule the future profits of a contract cannot be included in the injury suffered by its breach, mainly for the reason that they depend upon so many and various contingencies that it is impossible for a court or a jury to arrive at any definite determination of the actual loss by any trustworthy method. They are open to the objection of remoteness as well as of uncertainty.

5. When the breach of a contract consists in preventing its performance, without the fault of the other party, who is willing to perform it, the damages which the latter can recover will consist of (1) what he has already expended towards performance; (2) the profits which he would have realized by performance.

6. Profits cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and definite proof which the law requires. When not fully proven, or they are too remote, the true measure is the loss of outlay and expense.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Action by E. G. Schlieder against P. W. Dielman and others to recover damages for a breach of contract. From a judgment for plaintiff, defendants appeal. Reversed.

Buck, Dinkelspiel & Hart, for appellants. *White, Parlange & Saunders* and *E. Howard McCaleb*, for appellee.

WATKINS, J. This is an action for the recovery of purely prospective damages, alleged to have resulted from the loss of anticipated profits occasioned by the defendants' nonfulfillment of their contract, whereby its full term was abbreviated by the period of six years and more. Judgment is claimed against defendants, as liquidators of the Louisiana Brewing Company, for the sum of $97,209.18 on that score, alleging its dissolution and liquidation, and claiming the right to have the same paid from the assets in their hands. The plaintiff prayed for and obtained an injunction restraining the defendants and the New Orleans Brewing Association—a new corporation, into which the Louisiana Brewing Company and other brewing companies had been consolidated—from disposing of said assets, and from surrendering them to the stockholders of the dissolved corporation, especially the stock and bonds which said liquidators had received from the Louisiana Brewing Association. Stated in more general terms, the claim of plaintiff is that he had a contract with the Louisiana Brewing Company whereby the latter agreed to furnish him all the beer he required for bottling purposes, and to furnish bottling beer to no one else, for and during a term of five years,—consenting that he should have the option to continue the contract in force for an additional period of five years; that prior to the expiration of the term of five years the corporation was, by a vote of the stockholders, voluntarily dissolved, and its affairs placed in the hands of the defendants as liquidators, leaving said contract in force. There is no fraud, tort, or wrong alleged in the act of dissolution, or any attempt to thereby avoid or evade the force and effect of their engagement; but the plaintiff's averment is that the obligation of the contract remained unbroken notwithstanding the dissolution of the corporation. The judge *a qua* perpetuated plaintiff's injunction, and gave him judgment for the sum of $43,482.38, allowing as the value of the bottling plant $10,378.16, and as the amount of future profits $33,104.22. It is from that judgment that the defendants have appealed.

Originally the Louisiana Brewing Company was engaged in the manufacture and sale of beer in the city of New Orleans, and in connection therewith it operated a bottling department for bottling beer, likewise for sale; the two plants being conducted co-operatively. As bottled beer was principally marketed in localities distantly removed from the place of its manufacture, its introduction into new business communities necessitated the employment of traveling salesmen, at heavy outlay and expense, to maintain its established trade relations. On this account, mainly, the brewing company disposed of its bottling plant, and leased the buildings wherein it was located and was in full operation as "a going concern." By this means the beer manufactory and the bottling department became separated, and each one passed under a separate administration. Contemporaneously with the sale of the bottling plant to Daniels & Schlieder—the predecessors of the plaintiff, whose rights he acquired—on the 1st of July, 1886, the contract sought to be enforced was executed. The principal stipulations of their agreement may be thus summarized, viz.: (1) The Louisiana Brewing Company contracted to sell Daniels & Schlieder the beer of its manufacture, and to no other person or bottling establishment, for bottling purposes, and to continue to thus furnish them beer for a period of five years. (2) Daniels & Schlieder agreed to purchase all the beer they required from said brewing company, and to take and use no other beer than that of its manufacture, and to continue their purchase for a period of five years.

The present controversy involves an interpretation of the contract of the brewing company to sell plaintiff beer, and the solitary issue tendered is the quantum of damages plaintiff is entitled to recover, upon the score of his loss of the anticipated profits of his bottling establishment, because of the brewing company's failure to carry its contract to its ultimate completion. At the date the suit was instituted there remained a little more than one year of the first period of five years unexpired; and there was likewise more than one year to elapse between the date of suit and the commencement of the further period of five years, during which plaintiff had the option to keep the contract in force. This action is for the recovery of damages *ex contractu*, resulting from the brewing company's simple inexecution of its contract to supply the plaintiff with

bottling beer, which was occasioned by the purely lawful act of liquidating the corporation. The plaintiff's counsel treat the contract as though the two five-year periods were installments thereof, employing this expression, viz.: "His existing contract had more than one year to run, and he had the privilege of running for a period of five years more. This privilege was an integral part of his contract, and the company was as much bound by it, and bound to respect it, as it was bound by any other provision in the contract." On this theory counsel have formulated their demands, and the judge *a qua* accepted their theory, and acted upon it, in rendering judgment, taking as the initial point of his computation the sum of $5,517.37, as the annual net profits of the bottling business, and multiplying that sum by 6, thus giving to plaintiff an allowance of $33,104.22, on this score. In our opinion the learned judge of the district court misapprehended the true import of the plaintiff's option, and, so doing, incorrectly held it to be an integral part of the absolute contract; his judgment resting upon the incorrect hypothesis that the plaintiff had "exercised his privilege," and continued the contract in force for an additional period of five years, whereas he had not, in point of fact, so elected to continue the contract in force, by giving due notice to the brewing company before its liquidation. An option is not an actual, existing contract, but merely a right reserved in a subsisting agreement to the obligee to continue it in force for an additional term; but its preservation depends upon the obligee's exercise of the faculty of renewal, and seasonable notice given to the obligor of his intention to exercise the option. Mossy v. Mead, 2 La. 157; Lieuteaud v. Jeanneaud, 20 La. Ann. 327. In a certain sense an option is a mere pollicitation,—a promise without mutuality, not yet ripened into a perfect agreement, containing mutual stipulations, which either may enforce, and from which neither is at liberty to recede. It is an open proposition by one party to a contract, which must be accepted in precise terms by the other in order that it may be binding upon both parties. Without attempting any collation of authorities on this question, we make a single extract from a standard text writer on the subject, aptly expressing our views upon the subject, viz.: "It may be," says the author, in treating of the conditions on which a sale of goods depends, "the happening of some event; and then the question arises as to the duty of the obligee to give notice that the event has happened. As a general rule a man who binds himself to do anything upon the happening of a particular event is bound to take notice, at his own peril, and to comply with his promise when the event happens. But there are cases in which, from the very nature of the transaction, the party bound on a contract of this sort is entitled to notice from the other of the happening of the event on which the liability depends." The author then furnishes this illustration, to wit: "But no notice is required when the particular person whose action is made a condition of the bargain is named, * * * and no option to be exercised by the vendor. And it seems that this is the true test, viz.: That, if the obligee has reserved any option to himself by which he can control the event on which the duty of the obligor depends, then he must give notice of his own act before he can call upon the obligor to comply with his engagement." Benj. Sales, pp. 561, 562, § 577. See, also, Watson v. Walker, 23 N. H. 471; De Mill v. Insurance Co., 4 Allen, (N. B.) 341; Lent v. Padelford, 10 Mass. 230; Tasker v. Bartlett, 5 Cush. 359. In Ice Co. v. Heinze, 14 S. W. Rep. 756, the Missouri court said: "The option given by the company was never exercised. Hence that clause of the proposition never became applicable." Accepting this interpretation of an option in a contract, and applying thereto the evidence supplied by the record, and we have no hesitancy in reaching the conclusion that plaintiff never exercised his right, or gave any notice of his intention to exercise it. While it is true that the plaintiff, in all of his relations of contractor with the brewing company, occupied the position of a third person, yet the fact is quite undeniable that he was both a director and stockholder of the corporation at the same time; and while negotiations were in progress, looking to a liquidation, the plaintiff actively participated therein, and gave them countenance and support; and they resulted in its virtual assignment to the New Orleans Brewing Association. These negotiations occasioned several meetings of the stockholders, many of which were attended by the plaintiff, though it is contended by counsel that he did not participate therein, and they state in their brief, to wit: "Schlieder favored all the negotiations to sell to the English syndicate, but when the question of consolidation came up, although he was one of the largest stockholders in the Louisiana Brewing Company, and attended the meeting at which the proposition to dissolve was voted upon, he refrained from voting because he was apprehensive that the dissolution might affect his contract rights." He was present at "the meeting at which the dissolution was determined upon, * * * and did not vote. * * * Some one remarked that the voting was about to close, and asked Schlieder if he did not wish to vote. There is some discrepancy in the evidence as to the reply that Schlieder made. Schlieder says positively that, in declining to vote for the liquidation, he gave as his reason that by doing so he might imperil his right as a contractor."

As a witness, plaintiff states that he had been advised by counsel not to vote in the stockholders' meeting, and that he was present at that meeting, and publicly stated the reasons why he could not consent to vote for the liquidation, nor sign any document to that effect. It is in proof that the plaintiff made similar statements, just before and just after the meeting, to several of the stockholders. But, considering all the evidence on this question, it is quite apparent that plaintiff acted and voted in such manner as to tacitly permit,

so far as he was concerned, the liquidation to take place, and thus realize a share of the large profits of the adventure, and at the same time to protect his contract rights from impairment. This is evident from his general course of conduct, and having taken the advice of a lawyer as to the nature and extent of his rights, and the best manner of protecting them. Openly and publicly, plaintiff made no protest. He assigned to his associate stockholders no ground for his refusal to act. But, just as soon as the dissolution of the corporation became an accomplished fact, he promptly instituted this suit against the liquidators appointed to adjust its affairs, and by injunction arrested in their hands the entire avails of its liquidation, and from which he claims the right to receive a little less than $100,000 as damages resulting to his bottling business because of the dissolution, in the mean while making no disavowal of his intention to accept his share of the immense profits realized by the liquidation. Without commenting upon plaintiff's course of dealing with his associates, or making any application of it to the actual contract, in respect to its unexpired term, we may, with becoming propriety, state, and emphasize the statement, that there is not one *scintilla* of testimony which even tends to show that he ever asserted any intention to exercise his option, nor that he did any act or uttered any word that would by any fair and reasonable interpretation indicate such purpose on his part. And we are well satisfied that, if he entertained such an idea, it was only a thought he harbored in his own mind, but never communicated to the stockholders or directors of the corporation, and who, in the absence of any such notification, had a perfect right to assume that he had abandoned it, and act accordingly. Inasmuch as the exercise of the option was exclusively under the plaintiff's control, and as he was not only aware of the proposed liquidation, but was present and participated in all the proceedings that led up to the liquidation, though he declined to sign the final act, a clear and indisputable obligation was imposed on him to have given notice to the stockholders' meeting of his intention to exercise his option; and, failing to do so, he must be conclusively presumed to have abandoned such right. This being our conclusion, the option of the plaintiff to continue the contract in force for a new and additional term is eliminated from the controversy.

In respect to the immediate effects of the liquidation of the corporation on the plaintiff's contract rights, there can be but little difficulty, as it cannot be doubted that the liquidation of a corporation has the immediate effect of terminating all of its purely personal obligations, and of relegating the beneficiaries thereunder to an action in damages in keeping with its covenants. A corporation is quite as much bound as a natural person is to the performance of its contracts. The law, in authorizing the creation of corporations, provides at the same time for their forced as well as for their voluntary dissolution. The law authorizes the stockholders of a business corporation such as the Louisiana Brewing Company was to dissolve at will, upon a vote of three fourths of its stockholders. Rev. St. § 687. The privilege is incorporated in the company's charter, and no act of the board of directors could deprive the stockholders of such right, and the contract the corporation had made with the plaintiff could have no such effect. It has been repeatedly decided that "the laws of a state, in this regard, enter directly into the contract, and as corporations have the power to dissolve themselves, or consent to a forfeiture of corporate franchise, all persons must be regarded as having contracted upon the hypothesis of the existence and possible exercise of this power." State v. Gas-Light Co., 2 Rob. 529; Hunter v. Insurance Co., 26 La. Ann. 13; Louisiana State Bank v. Orleans Nav. Co., 8 La. Ann. 294; Palfrey v. Paulding, 7 La. Ann. 363; Trisconi v. Winship, 43 La. Ann. 49, 9 South. Rep. 29; Mumma v. Potomac Co., 8 Pet. 281; Railroad Co. v. State, 29 Ala. 586; Taft v. Pittsford, 28 Vt. 286; Green's Ultra Vires, §§ 138, 435. But it is equally true that such dissolution does not destroy the obligation of the company's contracts; the equitable rights of creditors surviving the act of dissolution, and attaching to the assets and property of the corporation in the hands of its liquidators. Mor. Corp. § 1035; Curran v. Arkansas, 15 How. 304.

Whether, however, obligations *in futuro* of a corporation, such as plaintiff seeks to enforce, survive a dissolution, is a question of serious difficulty. The right of dissolution being expressly granted by law, and the law being read into such a contract, it is not easily perceived how it could be enforced specifically, or damages for nonperformance granted; nonperformance being the necessary result of dissolution. *Lex neminem cogit ad impossibilia.*

But preliminary to this discussion a question arises in reference to the plea of estoppel that is urged against the plaintiff, based on the ground that he was a stockholder and director in the corporation, and participated in the proceedings which culminated in its dissolution, and is by such action concluded from claiming damages. *Quoad* this transaction, plaintiff was an utter stranger, to be dealt with as such, and to have his contract interpreted just as though he had no relations of trust with the corporation, for the principal and sufficient reason that his action was not controlling, and any resistance on his part to dissolution could not have prevented it, and equity does not require resort to a vain effort to accomplish an impossibility. We are therefore of opinion that the estoppel urged is not good.

Whatever may be the correct view to be taken of the allowance and measure of damages, it is obvious that the rights of all parties became fixed and irrevocable at the date of dissolution, and that which in the contract was potestative or conditional became absolute at the time of liquidation. In a recent and well-considered case the Florida court said: "It has been held in England, as well as in this country, that when one party, before the time

of performance of the contract has arrived, renounces it to the other party, the latter may act upon the renunciation, treat the contract as broken, and sue before the time for performance." Sullivan v. McMillan, 8 South. Rep. 450. The purport of that opinion is that where there is an executory contract for the manufacture and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, the vendor being able and desirous to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for a breach of contract. To the same effect are numerous other authorities, to wit: Howard v. Daly, 61 N. Y. 362; Dugan v. Anderson, 36 Md. 567; Fish v. Folley, 6 Hill, 54; Tinney v. Ashley, 15 Pick. 547; Mullaly v. Austin, 97 Mass. 30; Smith v. Lewis, 24 Conn. 624; Fales v. Hemenway, 64 Me. 373; Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224;) Town v. Turnpike Co., 14 Vt. 311; Railroad Co. v. Van Dusen, 29 Mich. 431; George v. Railroad Co., 8 Ala. 234; Friedlander v. Pugh, 43 Miss. 111; Railroad Co. v. Howard, 13 How. 307.

Considering plaintiff's claim for damages, we find it to be predicated on the principles of the Code; and he makes claim to reimbursement, exclusively upon the ground that the inexecution of the company's agreement to continue to supply him with beer of its manufacture, for bottling purposes, rendered his bottling plant absolutely useless to him, and caused the destruction of his business, and hence the measure of his damages is the loss of the profits anticipated to result from that enterprise for the residue of the unexpired term. The controlling article of the Code on the subject "of damages resulting from the inexecution of obligations" declares that "the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived;" or, in the further words of the article, "when the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract." Rev. Civil Code, art. 1934. In this connection the question to be determined is whether the unearned profits of a transaction properly enter into a calculation of the loss which the creditor has sustained, and the profit of which he has been deprived, in the sense of that article. The decisions based on that article have invariably placed a strict interpretation on its provisions; the court generally awarding only such damages as will fully indemnify the creditor, and disallowing speculative profits, confining them to the immediate and direct consequences of the breach of contract. Such is the purport of the following cases, viz.: Ryder v. Thayer, 3 La. Ann. 150; Arrowsmith v. Gordon, Id. 105; Porter v. Barrow, Id. 140; Reading v. Donovan, 6 La. Ann. 491; Smith v. Thielen, 17 La. Ann. 239; Berje v. Railroad Co., 37 La. Ann. 468; Vidalat v. City of New Orleans, 43 La. Ann. 1121, 10 South. Rep. 175. In Harrison v. Railroad Co., 28 La. Ann. 777, quite a similar question arose to the one under consideration, and the court said: "The question is, what damages had the plaintiff sustained up to the time the suit was instituted, and how are those damages to be ascertained?" An examination has satisfied us that our jurisprudence is in accord with the opinions of text writers, and the jurisprudence of other courts of the country, in this regard. One author announces the general rule to be that an allowance of damages should be restricted to "the natural and proximate consequences of the breach." Suth. Dam. pp. 17, 74. Another says: "The future profits of a business which has been interrupted are open to the objection of remoteness as well as of uncertainty." 3 Pars. Cont. p. 181. Another says: "It is a rule that a catching bargain shall not be taken advantage of, so as to enable the plaintiff to put into his pocket a greater sum of money than from a fair and reasonable compensation for the injury he has sustained by the breach of a contract." 2 Add. Cont. p. 1110. The summary of opinions of the courts of the country, in respect to the allowance of future profits as an element of damages, seems to incline in its favor, with certain modifications; and they appear rather to turn upon the question of the remote and speculative character of the damages claimed than upon their allowance *vel non* on the score of being future profits. In U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. Rep. 81, the supreme court said: "When the breach of a contract consists in preventing its performance, without the fault of the other party, who is willing to perform it, the damages which the latter can recover will consist—*First*, of what he has already expended towards performance; and, *second*, the profits which he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires,"—stating in conclusion that the "*prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby." This rule in the assessment of damages *ex contractu* has been followed by the state courts in varying forms of expression, and in many cases. *Vide* Walrath v. Whittekind, 26 Kan. 482; Cates v. Sparkman, (Tex. Sup.) 11 S. W. Rep. 846; Bingham v. City of Walla Walla, (Wash.) 13 Pac. Rep. 408; Griffin v. Colver, 16 N. Y. 489; Snell v. Cottingham, 72 Ill. 161; Ruff v. Rinaldo, 55 N. Y. 664, mem; Hexter v. Knox, 63 N. Y. 561; Hinckley v. Beckwith, 13 Wis. 34; Shepard v. Gaslight Co., 15 Wis. 349; 1 Sedg. Dam. 77; Fuld. Dam. 10; Kenny v. Collier, (Ga.) 8 S. E. Rep. 59; Hamilton v. Schumacher, (Tex. App.) 15 S. W. Rep. 715; Railroad Co. v. Hutchins, (Neb.) 48 N. W. Rep. 398; McHose v. Fulmer, 73 Pa. St. 365; Masterton v. Mayor, 7 Hill, 61.

Without entering into a more critical analysis of authority in reference to the

allowance of damages for future profits, we think it quite clear that the plaintiff has not stated a proper case for the allowance of such profits; for it appears from the evidence that the plaintiff was a large stockholder in the Louisiana Brewing Company, and also a director, and as such he participated in all the proceedings which led up to, and resulted in, the liquidation of that corporation. The evidence leaves no doubt that he favored and approved it, and desired its consummation. The liquidation produced large pecuniary advantages to the stockholders, to a participation in which plaintiff is entitled. It is true that he declined to vote for or to sign the final act of liquidation, assigning as his reason that it might prejudice his contract, yet even at that time, and with the idea of protecting his contract uppermost in his mind, he failed to oppose or vote against it, but on the contrary signified his approval of the action that was taken by his associates. It is difficult to appreciate how his mere refraining from voting on the question of dissolution alters or improves his position in any respect. The only importance attaching to the question of dissolution *vel non* arises from the fact that it placed on the corporation the impossibility of performing its personal obligations under its contract with plaintiff. But the final result was just as effectually brought about by the various measures to which he expressly gave his assent and approval, and which operated the sale of the plant of the corporation and the abandonment of the enterprise. If evidence was needed to further substantiate plaintiff's full knowledge of, and acquiescence in, the liquidation of the corporation, it is readily supplied by the letter his lawyer addressed to the New Orleans Brewing Association soon afterwards, in which the desire is expressed "that some arrangement be made with him by [the] association at an early day," etc. Replying thereto, the brewing association promised and agreed to carry out the contract of the Louisiana Brewing Company in all respects, but the only answer he made to this proposition was the institution of this suit. The resolution of the brewing association tendered exact and specific performance of every obligation of the contract. Plaintiff, it is true, suggests certain possible disadvantages to which he would be subjected by the change of proprietorship, but they are more seeming than real. It is true that in effecting the consolidation of the breweries the brewing association acquired the ownership of other bottling establishments attached to other breweries; but these existed prior to the liquidation of the Louisiana Brewing Company, and were in active operation and competition with the plaintiff. The evidence further shows that there were on hand at date of liquidation over 5,000 barrels of the Louisinaa beer, which had been actually brewed by that company, and which were subject to plaintiff's order, and were tendered to him by the brewing association, and which would have supplied him under his contract for more than one year; and he refused to accept it. On the contrary, plaintiff chose to abandon his business and bring this suit for damages. Under the facts and circumstances related, we are of opinion that the plaintiff's case must fail, under the maxim *volenti non fit injuria*.

With regard to that part of the judgment awarding the plaintiff $10,378.16 as the value of his bottling plant, our conclusion is that it is likewise erroneous, and must be reversed, because the terms of the act of sale of the bottling plant to Daniels & Schlieder are that in case of the discontinuance of the bottling business the Louisiana Brewing Company was reserved the right to purchase the plant at a price to be fixed by arbitrators. The liquidators invoke that stipulation, and they have an absolute contract right to have it enforced. It is therefore ordered and decreed that the judgment appealed from be reversed, and that there be judgment rejecting the plaintiff's demands, at his cost in both courts; the rights of all parties being fully reserved in reference to the bottling plant under the contract.

(44 La. Ann. 617)

MATHER v. LEHMAN. (No. 10,926.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

PARTITION—ABSENT HEIRS—FAILURE TO APPOINT CURATOR.

Notwithstanding the Civil Code directs that an attorney or curator must be appointed by the judge to represent absent heirs in the conduct of succession and partition proceedings, the failure of the judge to make such appointment, or the existence of an irregularity in the appointment, does not constitute such an absolute nullity as will work the revocation or annulment of a sale of property made thereunder. *Omnia rite acta.*

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; THOMAS C. W. ELLIS, Judge.

Suit by George Mather against Gustave Lehman, Sr., to compel compliance with a certain contract. From a judgment for plaintiff, defendant appeals. Affirmed.

Buck, Dinkelspiel & Hart, for appellant. *H. G. Morgan*, for appellee.

WATKINS, J. Plaintiff institutes this suit to compel the defendant's compliance with the terms of his contract to buy of him a certain piece of improved real estate, situated in the sixth municipal district of the city of New Orleans, in the square bounded by Antoine, Foucher, and Prytania streets and St. Charles avenue, having a frontage on the latter of 175 feet, for the consideration of $13,000. The defendant admits the contract, but denies the validity of the title tendered him, averring that on the 30th of November, 1868, one James O'Dowd purchased the property from Raymond Pochleu, and subsequently died; that his succession was administered, and therein certain alleged partition proceedings were had, by which the surviving widow of the deceased appeared to have acquired same, but which the defendant avers to have been null and void for want of proper parties thereto. And he further avers that the subsequent proceedings had in said succession could not have the effect of validating the title

of Widow O'Dowd, she having in the mean time conveyed title to another, and the same not having been conducted according to law. From the record it appears that in the partition proceedings designated the property was allotted to Mrs. O'Dowd; that on the 29th of October, 1877, she sold it to Mrs. Eva Jonas Lyons, and that she conveyed it to the present plaintiff. From the record it appears that James O'Dowd left at his demise the property in controversy, and certain other parcels of city real estate, thereto adjoining, all of which belonged to the community theretofore existing between himself and his surviving widow, Mrs. E. A. O'Dowd, one undivided one-half interest in the whole of which vested in her, and the remaining one-half interest in the legal heirs of the deceased. Mrs. O'Dowd presented a petition to the then second district court for the parish of Orleans, in which the succession of her deceased husband was being administered, praying for a partition of the common property, she being unwilling longer to continue joint ownership with the heirs of her late husband. On her petition an attorney was appointed to represent the absent heirs, who accepted the appointment, and acted accordingly. The matter was by the judge of that court referred to a notary for further proceedings according to law; and, upon the report of experts duly appointed that the several properties were susceptible of division in kind, the partition was made, the widow O'Dowd having allotted to her the property in controversy as the fair equivalent of that which was allotted to the heirs of the deceased. All the foregoing proceedings were conducted contradictorily with the said attorney for absent heirs. The notary prepared a *proces verbal* of the partition, which was duly filed and homologated on the 26th of October, 1877, and thereunder Mrs. O'Dowd went into possession as owner.

On this state of the case the sole question raised is of the capacity of the attorney for absent heirs to personate them in the partition proceedings. The Code directs that, upon the opening of a vacant succession, or one of which the heirs, or a part of them, are absent from, and not represented in, the state, it is the duty of the judge ordering an inventory of the succession effects to be made to "appoint a counsel to the absent heirs," etc. Rev. Civil Code, art. 1210. It also provides that, when an order for the sale of succession property is applied for, "the petition of the curator must be notified to the counsel for the absent heirs," etc. Id. art. 1166. It further declares that in case of the absence of coheirs, "the *curators* who have been appointed for them * * * can sue or be sued for a *partition* as representing *in every respect* the absent heirs." Id. art. 1315. (Our italics.) These articles relate evidently to an appointment of counsel or curators under varying circumstances, either in successions or in partition suits outside of successions. In this case we have under consideration the appointment of an attorney for absent heirs, made in a partition of succession property, and we cannot conceive of any reason why it should not be accepted and regarded as efficacious in view of the foregoing provisions of the Code. Some verbal criticism has been made of the style or title given to the person thus appointed, but it is not discoverable what the distinction consists in, for practically there is none. *Vide* Hooke v. Hooke, 6 La. 473; Bienvenu v. Insurance Co., 33 La. Ann. 209. Even if there were any doubt of the regularity of the appointment of the attorney for absent heirs, it could not avail the defendant, after the lapse of so great a length of time, because it was held in Gibson v. Foster, 2 La. Ann. 503, that, the record of the sale disclosing no order of appointment of such an attorney, the presumption *omnia rite acta* was strictly applicable. It was also held in Succession of Wadsworth, 2 La. Ann. 966, that "an order for the sale of the property of a succession, made at the suit of an administratrix, without citing the attorney of absent heirs, is not a nullity. * * * The omission to cite the attorney for absent heirs was an informality anterior to judgment, which could not be inquired into collaterally," etc. In Herriman v. Janney, 31 La. Ann. 276, it was held that the failure to appoint an attorney for absent heirs with whom to conduct contradictorily an application for the administration of a succession will not affect the validity of the appointment of the administrator. As against the theory of plaintiff's title, predicated upon the foregoing statement of facts, defendant's further contention is that Mrs. O'Dowd petitioned the court to be recognized and put in possession of the property of the succession of her deceased husband as heir; but it is quite evident that those proceedings are not germane to the question of title under examination, as they exclusively relate to that portion of the community property which was set off to the absent heirs in the aforesaid partition proceedings. The tendency of such proof is rather to confirm than disaffirm the plaintiff's title by partition. Counsel for plaintiff has collated many decisions of this court on the question of prescription *acquirendi causa*, but as, in our opinion, the questions at issue are clearly determinable upon other grounds, we find no occasion to give them an examination.

Judgment affirmed.

(44 La. Ann. 526)

STATE *ex rel.* CITY OF NEW ORLEANS v. CANAL & C. ST. R. CO. (No. 10,945.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

MANDAMUS—ENFORCEMENT OF CONTRACT—CONSTRUCTION—PAROL EVIDENCE.

1. Under Act 133 of 1888, *mandamus* is provided as a special statutory remedy, applicable to the enforcement of such obligations as those involved in this case, in a contract between the city and a street railway corporation.

2. The case involves a construction of the provisions of the contract, and the judge below properly interpreted the meaning of the language used.

3. The intent of the parties being plainly expressed, no foundation existed for resort to evidence of prior conversations to vary or explain.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Mandamus proceedings by the city of New Orleans against the Canal & Claiborne Streets Railroad Company to compel the performance of a certain contract. From a judgment for the relator the respondent appeals. Affirmed.

James R. Beckwith, for appellant. *Carleton Hunt*, City Atty., and *Henry Renshaw*, Asst. City Atty., for appellee.

FENNER, J. This is a proceeding by *mandamus* to compel the performance of obligations of a certain contract entered into between the city and defendant with reference to the maintenance of certain street bridges along the route of a street railway. It is taken in conformity with legislative Act No. 133 of 1888, which authorizes the writ of *mandamus* as a special statutory remedy in such cases, and there is no tenable objection to its invocation in this case.

The following are the provisions of the contract, enforcement of which is demanded: "The street bridges, where crossed by the company's tracks, throughout their routes, shall be placed in first-class order, and be kept so during the term of franchise. * * * That said Canal & Claiborne Streets Railroad Company, or its successor or assigns, as a part consideration for said franchise," etc., "shall, at its own cost, charges, and expense for all material and labor, and without indemnity or right of reclamation, construct and maintain all street bridges where crossed by said company's tracks, and at all times to keep such crossings, bridges, culverts, where crossed, in first-class order, and shall also keep and maintain two feet of the street on the outer side of each rail of their tracks in good order and condition." The city contends that these provisions impose the obligation to keep the bridges crossed by the railway in order. The defendant claims that it is only required to keep that portion of the bridges in order immediately under or between the tracks, or "where crossed." The judge below maintained the city's construction, and gave reasons therefor to which we can add nothing. Notwithstanding the insistence of defendant's counsel, we are unable to discover any ambiguity in the contract, which raises in our minds any doubt as to its true meaning. The things to be constructed and maintained are the bridges, not the crossings of the company's tracks over the bridges. It is true the word "where" indicates and limits locality; but the locality indicated here is that of the bridges, not of the particular part of the bridges crossed by the track. The meaning of the words "where crossed" jumps to the eye. It means that bridges situated where they are crossed by the track are to be maintained and kept in order. Other bridges, situated where they are not crossed, are not included. This is rendered more clear by reference to the preceding contract between the parties, which required the purchaser "to keep in good repair and condition, during the continuance of this privilege, the paved and unpaved streets through which said tracks pass, as well as all the bridges on said streets." The new contract modifies the old in favor of the company, by restricting the obligation to a particular part of the streets, and to the particular bridges crossed. Had the intention been to confine the obligation to a particular part of the bridges, this would have been defined with the same distinctness as that employed as to the parts of the streets. Moreover, as the judge *a qua* weightily says, "there was no reason for the city to obligate by written contract the defendant to keep in repair the bridges only at the points were crossed by the tracks, for the reason that the defendant was and is compelled to do so in order to maintain its tracks and run its cars."

Finding that the intention of the parties is plainly expressed in the contract, no foundation existed for resorting to prior conversations and negotiations between representatives of the contracting corporations to vary or explain it, and such evidence was rightly excluded.

Judgment affirmed.

(44 La. Ann. 548)

HANSELL *et al.* v. HANSELL. (No. 10,946.)

(*Supreme Court of Louisiana.* April 18, 1892. 44 La. Ann.)

FOREIGN LUNATIC—HOW PROCEEDED AGAINST—CURATOR AD HOC—JUDGMENT—IRREGULARITIES—WHO MAY TAKE ADVANTAGE OF—ESTOPPEL.

1. A person alleged to be insane, whose domicile is in a foreign jurisdiction, cannot be represented in this state by a special curator.

2. The courts of this state must deal with an absent insane person, domiciled elsewhere, as a sane person until the courts of his domicile have interdicted him.

3. Where an absent insane person has property in this state, held in common with another, for the purpose of partition, he must be considered and proceeded against as an absentee.

4. If no curator has been appointed to represent him and to take charge of his property, and he has no known representative in the state, the court before whom the suit is pending must appoint a curator *ad hoc* to represent the absent person. He is not required to take an oath.

5. Parties to a suit only can avail themselves of irregularities when prosecuted to a judgment. Other parties cannot urge such irregularities for annulling the judgment.

6. When property is owned in indivision, and is the only property so owned with the coproprietor, it is unnecessary to have an inventory of the property made.

7. When the property is ordered to be sold at public auction in conformity to articles 1339, 1340, Rev. Civil Code, it is to be presumed that satisfactory evidence was adduced before the judge that the property was indivisible in kind, or that it could not be conveniently divided.

8. Where a minor who has arrived at majority appears in court, and disclaims any title to or interest in property which it is alleged was transferred without divesting his interest when a minor, he will afterwards be estopped from setting up title to said property.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; FREDERICK D. KING, Judge.

Suit for partition by Emma W. Hansell and others against Henry H. Hansell. There was judgment ordering the premises sold, which was done, and the prop-

erties adjudged, one to R. Maitre and the other to R. F. W. Bachman, who refused to take title. Plaintiffs took a rule to compel them to comply with the adjudication. From a judgment for defendants in the rule plaintiffs appeal. Reversed, with directions to make the rule absolute.

Hayne & Denegre, for appellants. *Browne & Choate*, for appellees.

McENERY, J. Plaintiffs, Emma W. Hansell *et al.*, being the owners of an undivided twenty-nine thirtieths of certain improved real estate in the First ward of the city of New Orleans, on Magazine and Common streets, bring this suit for a partition against Henry H. Hansell, the owner of the remaining undivided one-thirtieth interest. The petition alleges the ownership, and that Henry H. Hansell is a notoriously insane person, who has never been interdicted, and to whom no curator has ever been appointed; that he is confined in an asylum in the city of Philadelphia, Pa., and it is necessary that a special curator and curator *ad hoc* be appointed to represent him, and defend the suit; that F. F. Hansell, of the full age of majority, is the brother of H. H. Hansell, and is the person who, under the law, would be appointed curator to said H. H. Hansell in case he were to be interdicted. The prayer is that said F. F. Hansell be appointed special curator and curator *ad hoc* to represent said H. H. Hansell; that he be notified of his appointment, and duly cited to answer the petition; and that there be judgment ordering the property sold at public auction, as provided by law. In accordance with the prayer of the petition, F. F. Hansell was appointed special curator and curator *ad hoc* of Henry H. Hansell, and was duly notified and served with citation to answer in due course. The judgment was regularly rendered, in accordance with the prayer of the petition, ordering a sale of the property at public auction. The sale was made, and the properties were adjudicated, one to R. Maitre and the other to R. F. W. Bachman, who refused to take title for various reasons stated in their answer to the rule taken by plaintiffs on them to compel them to comply with the adjudication. The principal objection made by the adjudicatees, and the one upon which they insist most strongly, is that, until H. H. Hansell has been interdicted, and a curator appointed for him, as provided by law, he cannot be properly brought into court, and a binding judgment rendered against him; (2) they object on the ground that F. F. Hansell has never taken oath as special curator, and therefore H. H. Hansell was not properly represented, and the judgment rendered against him not a valid and binding one.

It is alleged in the petition that H. H. Hansell is notoriously insane, and this averment is proved by the testimony. He has been in this condition for three years, and during that time has been confined in an insane asylum in the city of Philadelphia. His domicile is in that city. The courts in this state have no jurisdiction of his person, and can render no decree affecting his personal *status*, and interdict him. The courts of his domicile alone have jurisdiction to ascertain his mental condition, and to render the necessary decree relieving him of the control both of his person and estate. No facts alleged and no evidence received by the courts here can place a person domiciled in a foreign jurisdiction among the class of persons incapable of managing their persons and estates. A person alleged to be insane, whose legal domicile is in a foreign jurisdiction, cannot, therefore, be represented in this state by the appointment of a special curator. Interdiction of Dumas, 32 La. Ann. 679. The courts of this state must treat him as a sane person until the courts of his domicile have decreed otherwise by interdicting him. That part of the petition which alleges the insanity of H. H. Hansell, and the order of the court appointing a special curator, may be disregarded.

The petition does allege that he is an absentee and owns property in this state. A curator *ad hoc* was appointed to represent him as an absentee, and the proceedings for a partition were conducted regularly and contradictorily with him. He is not represented in this state. In the matter of the interdiction of Dumas, above referred to, Dumas' actual domicile was in France. He had, when sane, given a power of attorney to an agent residing here. This court said in the opinion announcing the decree: "The lamentable disability with which it is alleged that Dumas was afflicted at the bringing of this suit, and which continued to dement him long afterwards, was a mental malady, which could, no more than any other infirmity, produce the effect of revoking the procuration which he had given to his agent. It could be recalled, in a circumstance like this only by actual, valid judgment of interdiction. Rev. Civil Code, art. 3027. The institution of the interdiction suit did not revoke the power so intrusted. Gernon v. Dubois, 23 La. Ann. 27." "Even could such mental derangement put an end to the mandate, the consequence would only have been that Dumas would have to be treated as an absentee, and his property taken care of and administered upon as provided by law in such cases. Rev. Civil Code, art. 50 et seq." H. H. Hansell cannot be considered as an insane person, as his incapacity has not been declared by the courts of his actual domicile, where he can be personally cited. He has property in this state. He is an absentee, and has no known agent in the state to manage this property. It must therefore be preserved and cared for as provided by the Code, art. 47 et seq. Article 56 of the Revised Civil Code provides that, "if a suit be instituted against an absentee, who has no known agent in the state, or for the administration of whose property no curator has been appointed, the judge before whom the suit is pending shall appoint a curator *ad hoc* to defend the absentee in the suit." No curator had been appointed when the suit was brought to take charge of the property of the absentee. Article 116 of the Code of Practice also provides that a curator *ad hoc* must be appointed to represent

the person intended to be sued, if he be absent, and not represented in the state. Neither of the above articles of the Revised Civil Code and Code of Practice requires that the curator *ad hoc* shall take any oath. The absentee, H. H. Hansell, owned property in common with a resident of this state. No one can be compelled to hold property in indivision with another. Rev. Civil Code, art. 1289. The rules established in the Revised Civil Code, art. 1298 et seq., are applicable to partitions between coproprietors of the same thing when among the coproprietors any are absent, minors, or interdicted. The only way of having the absentee brought into court was through the appointment of a curator *ad hoc*. The coproprietor of the absentee, Hansell, had the right to demand a partition, and his only remedy was by proceeding against the absentee in the manner provided for by articles 56, Revised Civil Code, and 116, Code Practice.

The defendants in rule have urged other objections to accepting title to the property. The objections that the signatures to the petition in Succession of S. F. Hansell, in suit No. 32,246, civil district court, consenting to the recognition of their mother as universal legatee of the deceased, have not been proved, concerns only the parties to that suit. The judgment rendered in that suit is conclusive as to the genuineness of the signatures. It is presumed to have been rendered on sufficient evidence. We make the same remark with reference to the objections to the signatures to the agreement, annexed to the petition in Succession of Barnett Hansell, No. 32,247, civil district court. The interest of the minor Morris E. Hansell, it is alleged, was not disposed of legally in the property adjudicated to defendants in rule. The agreement among the heirs and the surviving partners in the Hansell partnership seem to have been more for the just recognition of what belonged to the partnership, and the individual members of the same, rather than for the alienation of property. The property was taken in the name of individual partners, and by consent restored to its proper ownership. But whether this view is correct or not is immaterial, so far as this controversy is involved, as Morris E. Hansell, now 26 years of age, renounced all right, title, and interest to said property in open court, and put the declaration on record in the note of evidence, and is therefore estopped from asserting title or any claim whatever to said property.

There is a technical objection to the petition filed in Succession of Standish F. Hansell, No. 32,246, civil district court, that the signatures of the attorneys were not at the foot of the petition. One of the attorneys signed on the back of the petition inadvertently. The suit was prosecuted to a judgment, and the parties directly interested interposed no objections. The defendants in rule have no interest in opposing the want of the signatures to the petition. The judgment was not absolutely null and void, and could not be attacked collaterally. We do not intimate even that it was relatively null, as the want of the signature to the petition was cured by the judgment. The immediate parties to the suit only could urge the objection now opposed by defendants in rule. It is also urged that there was no inventory of the property to be partitioned, and no experts appointed, to show that it was indivisible in kind. Rev. Civil Code, art. 1339, provides that when the property is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order, at the instance of one of the heirs, on proof of either of these facts, that it be sold at public auction, etc. Rev. Civil Code, art. 1340, says: "It is said that a thing cannot be conveniently divided when a diminution of its value, or loss and inconvenience of one of the owners, would be the consequence of dividing it." It appears from the record the party who held the property in common with the absentee was not an heir, and that it was the only property he owned in indivision with him. An inventory was therefore unnecessary. It is to be presumed that before the order to sell the property at public auction was rendered the judge had sufficient evidence before him to satisfy him that the property could not be conveniently divided in kind. The averments in the petition as to the small amount of interest owned by the absentee in the property would indicate that the judge who gave the order was satisfied on this point. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered that the relief prayed for be granted, and the rule herein be made absolute; appellees to pay costs.

END OF VOLUME 10.